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As Director of Legal Research at Torkin Manes, Marco provides legal opinions and analyses on a range of topics in the civil litigation and corporate/commercial context. He has drafted legal memoranda, facta and materials for all levels of court, with a particular emphasis on appellate cases.

Supreme Court of Canada Limits Ability to Appeal Arbitral Interpretations of a Contract

THE SUPREME COURT OF CANADA HAS LIMITED THE ABILITY OF COMMERCIAL PARTIES TO APPEAL AN ARBITRATOR'S AWARD, PARTICULARLY WITH RESPECT TO THE ARBITRATOR'S INTERPRETATION OF A COMMERCIAL CONTRACT. THE DECISION ARGUABLY ALSO HAS IMPLICATIONS FOR APPEALING A JUDICIAL INTERPRETATION OF A COMMERCIAL CONTRACT.

In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, per Rothstein J., at issue was the obligation of Creston Moly Corporation ("Creston") to pay a finder's fee to Sattva Capital Corporation ("Sattva") as a result of Sattva introducing Creston to the opportunity to acquire a mining project in Mexico. The parties agreed that under their finder's fee agreement (the "Agreement"), Sattva was entitled to a finder's fee of US $1.5 million and was entitled to be paid this fee in shares of Creston. The parties disagreed on which date should be used to price the Creston shares and therefore the number of shares to which Sattva was entitled.

As a result of the dispute, the parties entered into a commercial arbitration under the British Columbia *Arbitration Act*. The arbitrator found in favour of Sattva, based on his interpretation of the Agreement. Creston sought leave to appeal the decision of the arbitrator to the British Columbia Supreme Court. Following multiple leave applications and appeals, the British Columbia Court of Appeal ultimately found in favour of Creston. Sattva appealed both the decision by the Court of Appeal granting leave to appeal and the Court of Appeal's decision on the merits of the appeal.

The Supreme Court of Canada held that the Court of Appeal erred in granting leave to appeal. In any event, on the merits, the Supreme Court held that the arbitrator's

decision was reasonable.

Among the many issues before the Supreme Court of Canada were: whether leave ought to have been granted to appeal the arbitrator's award under the BC *Arbitration Act*; what was the appropriate standard of appellate review to be applied to commercial arbitration decisions; and whether the arbitrator reasonably construed the Agreement as a whole.

Justice Rothstein of the Supreme Court held as follows:

1. The arbitrator's interpretation of the contract was not a "question of law". In order for leave to be granted from a commercial arbitral award, a threshold requirement must be met: leave must be sought on a question of law. The Court held that in this case, the arbitrator's contractual interpretation was not a question of law and did not satisfy this test. In particular, in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties; the Court held that this was a fact-specific goal, through the application of legal principles of interpretation. Accordingly, contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contract interpretation are applied to the words of the written contract, considered in light of the factual matrix.

The Court held that the circumstances in which a question of law can be extricated from the interpretation process "are rare". Legal errors made in the course of contractual interpretation include the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor. They may also include the requirements for the formation of the contract, the capacity of the parties, and the requirement that certain contracts be evidenced in writing. In the absence of a legal error of the type just identified, no appeal lies from an arbitrator's interpretation of a contract.

2. Courts should defer to an arbitrator's award on a standard of reasonableness. Once a question of law has been identified, the Court must be satisfied on a leave to appeal application that the determination of that point of law on appeal "may prevent a miscarriage of justice". In order to rise to the level of a miscarriage of justice, the legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case. A determination of a point of law may prevent a miscarriage of justice only where the appeal has some possibility of succeeding. The appropriate threshold for assessing the legal question is whether it has "arguable merit".

Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. The Court held that the standards of review established by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, are not entirely applicable to appeals from arbitral awards.

The Court held that reasonableness will "almost always" apply to commercial arbitration, except in "rare circumstances" where the question is one that would attract a correctness standard of review, such as a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise. In this case, the Court held that even if the British Columbia Court of Appeal properly identified a question of law, leave to appeal should have been denied. The requirement that there be arguable merit that the arbitrator's decision was unreasonable was not met and the miscarriage of justice threshold was not satisfied.

Moreover, when the Court actually assessed the merits of the appeal, it held that in determining that Sattva was entitled to be paid a finder's fee in shares priced at $0.15 per share, the arbitrator reasonably construed the Agreement as a whole.

3. Courts still have residual discretion to deny leave to appeal. The Court also has a residual discretion to deny leave to appeal the arbitrator's decision, even where the requirements for leave have been met under the *Arbitration Act*. A non-exhaustive

list of discretionary factors to be considered in a leave application include the conduct of the parties, the existence of alternative remedies, undue delay, and the urgent need for a final answer.

4. The appellate Court is not bound by the analysis of the leave Court. Finally, the Supreme Court held that if leave to appeal is granted, the appellate Court is not in any way bound by the assessment of the merits of the appeal initially made by the judge hearing the leave application. A court considering the leave application is not adjudicating the merits of the case. Accordingly, in this case, the BC Court of Appeal erred in treating the leave court's reasons on the merits as binding.

Sattva has important implications for the future of appeals from arbitral awards and for appeals of the interpretations of contracts generally. In short, it will only be in rare circumstances now that a Court will not defer to a commercial arbitrator's interpretation of a contract. Leave to appeal the arbitrator's decision to a Canadian Court has become more difficult to obtain and an element of finality has now been enshrined in commercial arbitration.