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SETTING ASIDE: EXCESS OF JURISDICTION OR ERROR OF LAW? — A SECOND KICK AT THE CAN

J. Brian Casey[*]

Over the last 10 years, Canada has witnessed an amazing growth in the use of arbitration to resolve commercial disputes. As it has moved into the mainstream of commercial dispute resolution, arbitration has attracted the trappings of—and some would say, the baggage attendant with—judicial dispute resolution. In particular, the benefit of finality has bumped into the legal profession's usual expectation of challenging decisions that do not meet their clients' expectations. Commercial clients are content to articulate the arbitration tropes of efficiency and finality, until they lose, at which time finality no longer looks as attractive as it did when the arbitration agreement was entered into.

Recourse against an award that a party does not like is limited. The legislation in Canada is based on the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), which proceeds from the premise that arbitration is a private dispute resolution mechanism and, as mentioned on a number of occasions by the Supreme Court of Canada, is not part of any province's judicial system.[1] As a result, one must look solely to the applicable arbitration legislation to see to what extent there can be court review of an arbitral decision.

Under Canadian legislation, there are two distinct and separate concepts for challenging an arbitral award in court. The first, known to all litigators, is an appeal in which the arbitral decision is reviewed to determine if the decision can be sustained under the law chosen by the parties. The second concept is setting aside, where the court determines if the award must be set aside due to procedural irregularities or, as it is sometimes misleadingly called,

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[1] *Éditions Chouette (1987) inc v. Desputeaux*, 2003 SCC 17.

"arbitral error".[2] These are two totally separate and distinct concepts that unfortunately have become blurred as a result of a number of decisions discussed in this article. Also, as discussed below, there has been a blurring between set aside applications under legislation and the common law remedy of judicial review.

APPEALS

If the arbitration is international—that is, it falls under a province's international commercial arbitration statute—there is no right of appeal, nor are the parties free to craft rights of appeal to the courts.[3]

For domestic arbitrations, we have, in keeping with our Canadian tradition, a patchwork of appeal rights. Quebec and the Federal government follow the Model Law for both international and domestic arbitrations.[4] There is no right of appeal. Under the Ontario or Saskatchewan domestic Acts, if the arbitration agreement prohibits appeals, then there is no right of appeal.[5] If the arbitration agreement is silent, a statutory right of appeal applies and there may be an appeal on a question of law with leave of the court. In Nova Scotia, there is no right of appeal at all unless the parties agree.[6] In Alberta, New Brunswick and Manitoba, parties cannot contract out of the statutory right of appeal, with leave, on a question of law.[7] The British Columbia domestic Act allows for an appeal on a question of law either with leave or without leave but with the consent of all the parties to the arbitration.[8] In that province, the court's jurisdiction to hear appeals can only be ousted if, after the arbitration hearing has commenced, the parties agree

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[2] See, for example, the B.C. domestic *Arbitration Act*, RSBC 1996, c 55, s 30.

[3] Model Law at art 4; *McHenry Software Inc. v. ARAS 360 Incorporated*, 2018 BCSC 586.

[4] See *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp); Arts 2638-43 Quebec CCQ; Arts 2892 and 2895 CCQ; Arts 3121 and 3133 CCQ; Art 3165 CCQ; Arts 620-655 Quebec CCP.

[5] See *Arbitration Act*, SO 1991, c 17, s 45; *Arbitration Act*, SS 1992, c A-24.1, s 45(1).

[6] See *Commercial Arbitration Act*, RSNS 1999, c 5, s 48(1).

[7] See *Arbitration Act*, RSA 2000, c A-43, s 44(2); *Arbitration Act*, RSNB 2014, c 100, s 45(2); *Arbitration Act*, CCSM 1997, c A120, s 44(1).

[8] See *Arbitration Act*, RSBC 1996, c 55, s 31.

in writing to exclude the jurisdiction of the courts. An agreement to oust the court's jurisdiction on questions of law entered into prior to the commencement of the arbitration hearing is of no effect.[9]

Under most of the common law provinces' domestic Acts, unless the arbitration agreement so provides, there is no appeal on a question of fact, or on a question of mixed fact and law. Also, most jurisdictions provide that absent an agreement, appeals are restricted to questions of law, and only with leave of the court. Further, many provincial Acts set out that leave will not be granted unless (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and (b) the determination of the question of law at issue will significantly affect the rights of the parties.[10]

The right of appeal in domestic arbitrations has been further narrowed by the Supreme Court of Canada decision in *Sattva Capital Corp. v. Creston Moly Corp.*[11] In *Sattva*, Justice Rothstein, speaking for the Court, held that any appeal on a question of law must confine itself to an extricable legal issue and, as commercial contract interpretation involves mixed questions of fact and law, such decisions cannot be appealed. The court in *Sattva* also determined that on the appeal itself, the standard of review in most cases will be reasonableness, not correctness. This is fully in keeping with the modern view of arbitration: that it is a private contractual process, with no precedential value, where the arbitrator's primary duty is to resolve a commercial dispute, not to advance or settle the law.

In the recent case of *Lobanova v. Grynyshyn*, Mr Justice Myers put it this way:

> In this dispute, the parties agreed to have their court proceedings resolved by arbitration. That was their right. They were heard by the arbitrator very quickly as they wished. One corollary of the parties' decision to proceed by alternative dispute resolution is that the parties have very limited access to the courts

[9] *Ibid* at s 35.

[10] See for example the domestic Ontario *Arbitration Act*, SO 1991, c 17, s 45.

[11] 2014 SCC 53.

> when things do not go as they hope… . An arbitration is not a test run in which evidence and positions can be tried on for size and then discarded in subsequent court proceedings. The parties opted-out of their court proceedings. Resort to the court after an arbitration is not a do-over. The arbitration is the main event. The court can intervene only on the prescribed grounds set out the Arbitration Act, 1991 none of which is raised on arguments made on this motion.[12]

With limited appeal rights in most Canadian arbitrations, the focus turns to how far parties that lose in arbitration can stretch the setting aside remedy to review the arbitrator's decision for "correctness".

SETTING ASIDE

With appeal rights either non-existent or highly circumscribed, disappointed parties can only look to the other statutory remedy available, which is generally referred to as setting aside, and sometimes as annulment. This remedy is available under all of the international and domestic Acts. All of the Canadian arbitration legislation is similar and provides a number of grounds under which a court may set aside an arbitral award.[13] For example, Section 46(1) of the Ontario domestic Act provides that an award may be set aside if:

1. A party entered into the arbitration agreement while under a legal incapacity;
2. The arbitration agreement is invalid or has ceased to exist;
3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement;
4. The composition of the tribunal was not in accordance with the arbitration agreement, or if the agreement did not deal with that matter, was not in accordance with the Act;

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[12] 2019 ONSC 3064 at para 51.

[13] Under the B.C. domestic Act, the concept of "arbitral error" covers many of the same grounds.

5. The subject-matter of the dispute is not capable of being the subject of arbitration under provincial law;
6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator;
7. The procedures followed in the arbitration did not comply with the Act;[14]
8. An arbitrator has committed a corrupt or fraudulent act, or there is a reasonable apprehension or bias; and
9. The award was obtained by fraud.

As can be seen from these sections, a setting aside application goes to procedural or structural matters of the arbitration, not to the decision itself.

RECOGNITION OF THE DIFFERENCE BETWEEN APPEALS AND SETTING ASIDE

There are any number of Canadian cases making it clear that there is a significant difference between an appeal on a question of law and an application to set an award aside for procedural irregularity. Rather than attacking the tribunal's judgment, an application to set aside an award is a challenge to the validity of the arbitral process itself, the result of which, if successful, takes away the fundamental underpinning of the award.

The Ontario Court of Appeal in *United Mexican States v. Cargill*,[15] which dealt with an application to set aside a NAFTA award under Article 34 of the Model Law, made the point that a court faced with an application to set aside an award must ensure that it does

[14] Note that some domestic Acts, such as Alberta's, have the additional words "or the arbitration agreement." Arguably the omission of these words in the Ontario domestic Act does not remove this additional ground as, under the provisions of section 33, the arbitral tribunal "shall decide the dispute in accordance with the arbitration agreement...." The failure of the arbitral tribunal to decide the matter in accordance with any procedural requirements set out in the arbitration agreement is therefore a failure of the tribunal to comply with the Act.

[15] 2010 ONSC 4656.

not, advertently or inadvertently, stray into the merits of the question that was decided by the tribunal:

> The central issue on this application is not whether the tribunal erred in law in finding that both the upstream and downstream losses to Cargill were "by reason of or arose out of" Mexico's measures in breach of Chapter Eleven and thus compensable. Rather, the issue is whether the tribunal was empowered to inquire whether the upstream losses were a compensable area of loss.[16]

In *Mungo v. Saverino*, Campbell J put it this way:

> The great merit of arbitrations is that they should be, compared to courts, comparatively quick, cheap, and final. There is a trade-off between perfection on the one hand and speed, economy, and finality on the other hand. If you go to arbitration, you can get quick and final justice and you can get on with your life. If you go to court, you can get exquisitely slow and expensive justice and you can spend the rest of your life enduring it and paying for it.
>
> For a disappointed arbitral litigant, jurisdiction and natural justice are good pickings. Jurisdiction and natural justice invoke the primordial instinct of courts to second guess other tribunals and thus defeat the greatest benefit of arbitration, its finality.
>
> It is therefore important for the court to resist its natural tendency, faced with a clear and attractive argument on jurisdiction and natural justice, to plunge into the details of the arbitration and second-guess the arbitrator not only on the result but also on the punctilio of the process. If an arbitration is basically fair, courts should resist the temptation to plunge into detailed complaints about flaws in the arbitration process.[17]

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[16] *Ibid* at para 44.

[17] 1995 CarswellOnt 3298 at paras 71-73, [1995] OJ No 3021 (Ont Gen Div Ct).

Other Model Law jurisdictions have also been clear on the distinction between appeals and setting aside. For example, in *American International Group and AIG Capital Corporation v. X Company*, Madam Justice Chen of the Hong Kong Court of First Instance observed:

> The setting aside remedy under Article 34 of the Model Law is not an appeal on the law. The Court is concerned only with the structural integrity of the arbitration process.
>
> It is trite that the Court does not review the merits of the dispute or the correctness of an award on an application to enforce, or set aside, an arbitral award. Even if the findings made by the Majority are clearly wrong in law, that is not a ground for the Award to be set aside, or for recognition of the Award to be refused (*Grand Pacific Holdings Ltd v. Pacific China Holdings Ltd (in liq) (No 1)*[2012] 4 HKLRD 1). The setting aside remedy under Article 34 of the Model Law is not an appeal. The Court is only concerned with the structural integrity of the arbitration process.[18]

If only it were so.

THE CONFUSION OF REALITY

There are two areas where a setting aside application runs into the danger of becoming a review of the merits of the decision. The first is where it is alleged that the award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement. The second situation is where the court imports concepts of common law judicial review into its analysis of the setting aside application.

EXCESS OF JURISDICTION

The recent case of *Alectra Utilities Corporation v. Solar Power Network* ("SPN")[19] illustrates the difficulties that can arise in a

[18] [2016] HKEC 1996 at para 15.

[19] 2018 ONSC 4926 [*Alectra*].

setting aside application in distinguishing between an allegation that an arbitrator lacked jurisdiction and an allegation that the arbitrator simply made a wrong decision.

In October 2015, Alectra and SPN entered into a contract (the "Agreement") to take advantage of opportunities for projects under the Ontario governments Feed-In Tariff Program. Sometime later, Alectra delivered a "Defunct Project Notice" (the "Notice"), which purported to cancel the Agreement. The Agreement permitted the delivery of such a Notice in Alectra's sole discretion.

SPN then brought an arbitration seeking damages for breach of contract, claiming Alectra had issued the Notice in bad faith, as a pressure tactic, whilst in the middle of negotiations to purchase SPN's interest in the Agreement.

The Agreement contained an arbitration clause that provided:

> […] Any and all differences, disputes, claims or controversies between (the parties) arising out of or in any way connected with this Agreement … may be referred by any party to arbitration under the Arbitration Act, 1991 (Ontario).

The arbitration clause went on to provide that there could be no appeal from the determination of an arbitrator to any court.

The Agreement also contained indemnity provisions under which each party was to indemnify the other for any "damages" for any breach of any covenant contained in the Agreement. Damages was defined, and excluded "any special, consequential, punitive or aggravated damages or damages for loss of profit or lost opportunity…".

The arbitrator found that the Notice had been issued in bad faith and that Alectra had improperly terminated the Agreement. He went on to find that the claim for damages for the improper delivery of the Notice did not fall within the indemnity provisions of the Agreement; consequently, the damages definition, excluding lost profits, was not applicable. The arbitrator awarded damages for breach of contract which included an amount for future lost profits.

SPN brought an application to enforce the award in the Ontario Superior Court of Justice. Alectra moved to have the award set aside on the grounds the arbitrator lacked jurisdiction to make a damage award that included loss of profits under the jurisdiction provision of section 46(1)3 of the Ontario domestic Act. The Court held that the award should be set aside on that ground. The judge found that while the dispute was arbitrable under the arbitration agreement, he disagreed with the arbitrator's interpretation of the Agreement that the indemnity provisions, with their limitation on damages, did not apply. He held that the indemnity provisions should be read as limiting the arbitrator's jurisdiction under the arbitration agreement:

> Based on the foregoing, I conclude that the arbitrator's conclusion that he had the jurisdiction under the [Agreement] to hear the arbitration was reasonable but his conclusion that the monetary limitation in section 5.3(3) did not limit his authority to award damages for loss of profits in the case of a dispute described in section 5.2 was unreasonable.
>
> Given the foregoing, the critical issue is whether SPN's claim is based on a breach of a covenant of PowerStream that falls within section 5.2(b) of the [Agreement]. The arbitrator held that it did not. I do not think this determination is reasonable for the reasons set out below.[20]

In other words, the judge found that the arbitrator had broad jurisdiction to determine the dispute between the parties, but then found that the arbitrator's interpretation of the Agreement and the extent of damages that could be awarded, based on bad faith, was in excess of his jurisdiction.

The Court of Appeal for Ontario disagreed. Huscroft JA, writing for the Court, made it clear that once the application judge concluded that the arbitrator acted within the authority conferred by the arbitration agreement, his task was at an end. It was for the arbitrator, not the court, to interpret and apply the substantive terms of the Agreement and "…it was of no moment whether the

[20] *Ibid* at paras 55-56.

arbitrator did so reasonably or unreasonably, correctly or incorrectly. The decision was the arbitrator's to make…".[21]

The Court found that to go beyond the arbitration agreement to determine the arbitrator's jurisdiction would have the effect of turning all setting aside applications based on jurisdictional claims into appeals:

> [33] The problem with the respondent's argument is plain: given that an arbitrator's authority stems from the agreement pursuant to which he or she is appointed, any unreasonable or mistaken interpretation of that agreement could be characterized as resulting in an excess or loss of jurisdiction. On this approach, arbitration awards that are not subject to appeal would, nevertheless, be vulnerable to being set aside for jurisdictional error. In effect, arbitrators would have only the jurisdiction to make awards that are reasonable or correct.
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> [34] This is not the law in Ontario...[22]

Alectra has sought leave to appeal this decision to the Supreme Court of Canada on two grounds:

a. whether an arbitrator's jurisdiction, which is conferred by an arbitration clause within the parties' commercial contract, can be limited by other provisions of the contract; and
b. the standard of review applicable to the question of an arbitrator's jurisdiction, which by necessity requires interpretation of the contract that conferred jurisdiction.[23]

Regardless of whether leave is granted or not, this decision highlights the difficulty that can arise where a complaint about an arbitrator's interpretation of a contract is couched as a jurisdictional issue. There is a large difference between an allegation that an arbitrator had no jurisdiction to make an award and a complaint

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[21] See *Alectra Utilities Corporation v. Solar Power Network Inc*, 2019 ONCA 254 at para 41.

[22] *Ibid* at paras 33-34.

[23] See Memorandum of Argument of the Applicant at para 3.

that the arbitrator awarded damages based on an incorrect legal interpretation of a contract. If an arbitrator gets the law wrong, or interprets a term of a contract incorrectly, that should not be taken as having exceeded his or her jurisdiction.[24] To be clear, an error of law is not a jurisdictional error. It cannot be argued that the parties only gave the arbitrators jurisdiction to decide in accordance with the correct law, and thus attempt to turn an error of law, which is not appealable, into an error of jurisdiction.[25]

One unanswered question in Canada is whether the US doctrine of "manifest disregard" of the law has any place in an application to set aside an arbitral award. While an arbitrator has the right to be wrong in his or her interpretation of the law, if the arbitrator completely disregards the agreed law of the arbitration and substitutes some other law, then in that narrow sense one might be able to make a jurisdictional argument. If the agreement to arbitrate specifies a particular law to be applied, the arbitrator would exceed his or her jurisdiction if a different law was chosen.

The area gets still more confusing if the arbitrator says he or she is applying the parties' chosen law, but then clearly disregards that law's effects in coming to his or her conclusions. Is this sufficient to raise a jurisdictional challenge, or is it within the scope of the arbitrator's jurisdiction to get the law wrong? In *Dewan v. Walia,* the US Court of Appeals for the Fourth Circuit held that a manifest disregard of the law is established only where the arbitrator understands and correctly states the law, but then proceeds to disregard it.[26] In the Hong Kong case *American International Group*, the court made it clear that in order to succeed the applicant must show that the circumstances of the case give rise to a clear inference that the tribunal made its erroneous findings of law, in conscious disregard of the law chosen by the parties, and "intentionally reached a result contrary to [the chosen law] that comported with their own notions of justice and equity, and disguised this equitable decision

[24] See *Canada (Attorney General) v. S.D. Myers Inc*, 2004 FC 38 at paras 55-56.

[25] See *K/S A/S Bill Biakh v. Hyundai Corporation*, [1988] 1 Lloyd's Rep 187; *Bank Mellat v. GAA Development and Construction Co*, [1988] 2 Lloyd's Rep 44.

[26] *Dewan v. Walia*, 2013 U.S. App LEXIS 21970 (4th Cir Ct, 2013) (unpublished).

making as a purported application of the law."[27] Rarely will we see this level of impropriety.

THE VESTIGES OF JUDICIAL REVIEW

The Canadian courts have been clear that there is no "judicial review" of an arbitral tribunal's decision.[28] The old common law prerogative remedies do not apply to consensual arbitration.[29]

The limits on judicial review under the Model Law were discussed by Kelen J in *Canada (Attorney General) v. S.D. Myers Inc.*[30]

> It is noteworthy, that article 34 of the Code does not allow for judicial review if the decision is based on an error of law or an erroneous finding of fact if the decision is within the jurisdiction of the Tribunal. The principle of non-judicial intervention in an arbitral award within the jurisdiction of the Tribunal has been often repeated.
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> ...
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> An arbitral award is not invalid because, in the opinion of the Court hearing the application, the Arbitral Tribunal wrongly decided a point of fact or law.[31]

An application for judicial review is a public law remedy, dealing with statutory tribunals and public officials. It is not available to challenge the award of a private consensual arbitrator.[32] It should be clear that court intervention in an arbitration is to be restricted to those areas set out in the applicable arbitration legislation.

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[27] *Supra* note 18 at para 16.

[28] See *Alaimo v. Di Miao,* 2008 CarswellOnt 3729, 171 ACWS (3d) 784 (ONSC) [*Alaimo*]; *Bansal v. Stringam*, 2009 ABCA 87; *Superior Propane Inc v. Valley Propane (Ottawa) Ltd,* 1993 CarswellOnt 5730, 38 ACWS (3d) 855 (Gen Div).

[29] *Ellsworth v. Ness Homes*, 1999 ABQB 287.

[30] *Supra* note 24.

[31] *Ibid* at para 42.

[32] See *Universal Settlements International Inc v. Duscio* 2011 ONSC 41; *Sharecare Homes Inc v. Cormier*, 2010 NSSC 252 at para 51; *Alaimo*, *supra* note 28 at paras 53, 58; *Blustein v. Blustein*, 2010 ONSC 6897.

The difficulty is that a setting aside application looks a lot like a judicial review, and counsel and the courts unfortunately have turned to the judicial review jurisprudence when faced with a setting aside application.

To date, the leading case on judicial review is *Dunsmuir v. New Brunswick*.[33] Boiled down to its essence, the case makes two points. First it holds that the court can always review a statutory tribunal's decision to determine if it had jurisdiction to make it. The test is one of correctness:

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction.[34]

The second takeaway from *Dunsmuir* is that the decision itself can be reviewed to determine whether it was reasonable:

> While we are required to give deference to the determination of the adjudicator, considering the decision in the preliminary ruling as a whole, we are unable to accept that it reaches the standard of reasonableness. The reasoning process of the adjudicator was deeply flawed. It relied on and led

[33] 2008 SCC 9. In a trilogy of cases presently before the Supreme Court, the *Dunsmuir* principle may be subject to review and restatement.

[34] *Ibid* at para 59.

> to a construction of the statute that fell outside the range of admissible statutory interpretations.[35]

While it would appear clear that *Dunsmuir* deals exclusively with judicial review of administrative tribunals, it keeps being quoted and relied on in setting aside applications, particularly in Ontario, for the proposition that an arbitrator exceeds his or her jurisdiction if the award is unreasonable. For example, as discussed below, we find setting aside cases where the court entertains applications to set an award aside on the ground that the arbitrator made unreasonable errors of law, or where the final award was said to be unreasonable and therefore ought to be set aside.

HOW WE GOT HERE

We begin with a commercial landlord and tenant case, *VAV Holdings Ltd. v. 720153 Ontario Ltd*.[36] In this case, the applicant moved to set aside an award under section 46(1)3 of the Ontario domestic Act. The application judge set aside the award on the basis that the arbitrator had applied the wrong legal standard, resulting in a rental rate that was "patently unreasonable". The Court of Appeal, in a brief endorsement, reversed the application judge because it could not say that the legal standard chosen by the arbitrator was wrong or that the result was patently unreasonable. The Court of Appeal did no analysis of how the "patently unreasonable" test fell within the set aside provisions of section 46(1)3 of the Act.

The issue was revisited in the Ontario Court of Appeal case of *Smyth v. Perth & Smiths Falls District Hospital*.[37] The question was whether the application judge had erred in determining that the arbitrator rendered a decision on a matter "beyond the scope of the arbitration agreement between the parties". The judge had applied a correctness standard to determine whether the arbitrator had acted outside his jurisdiction. The Court of Appeal, relying on *Dunsmuir*, agreed with the correctness standard but disagreed with the result and found that the arbitrator was within his jurisdiction.

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[35] *Ibid* at para 72.

[36] 1996 CarswellOnt 5554, 62 ACWS (3d) 13, (Gen Div), rev'd 1996 CarswellOnt 4233, 66 ACWS (3d) 1018 (ONCA).

[37] 2008 ONCA 794.

This was all that was really before the court, and had the court stopped there, there would be no issue. However, having referred to the *Dunsmuir* decision, the court went on to say:

> 21. Once the jurisdictional issue is disposed of in favour of the arbitrator's interpretation of his mandate, the only remaining question is whether his award was reasonable.
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> 22. In *Dunsmuir*, Bastarache and LeBel JJ discussed the contents and implications of the reasonableness standard of review in this fashion, at para. 47:
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> > Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[38]

Nowhere is there an analysis of how this last part of the *Dunsmuir* test for judicial review fits within the setting aside provisions of section 46 the Ontario domestic Act. The court simply reverts to the judicial review analysis for administrative tribunals and applies it to an arbitral award, thus opening a

[38] *Ibid* at para 21-22.

backdoor for reviewing the reasonableness of arbitrators' decision in setting aside proceedings.[39]

Similarly, without analysis, the Ontario Court of Appeal in the *United Mexican States v. Cargill* case considered Mexico's alternative argument that the reasonableness test in *Dunsmuir* had not been followed. The case was a treaty case, under NAFTA, and the application was a setting aside application under the Model Law that had been argued primarily on the basis that the Tribunal had exceeded its jurisdiction.

Having decided that the Tribunal had not exceeded its jurisdiction, the court went on to state:

> An alternative argument was advanced by Mexico that the result is an unreasonable one and reliance is placed on *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 (CanLII). It is said that the result does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. It is argued that the tribunal's reasoning was not consistent with the aims of Chapter Eleven which is to protect investments only. It is argued that Cargill, having chosen to establish a distribution facility in Mexico but not a production facility, should not be put in better position in damages than investors such as those in the *ALMEX* case which established a joint venture production facility in Mexico.[40]

Again, rather than saying the judicial review test of reasonableness had no place in a setting aside application, the Court found the tribunal's decision "not irrational".[41]

Both the *Smyth* and *VAV Holdings* cases were put to Mr. Justice Mew in *Advanced Explorations Inc v. Storm Capital Corp*.[42] There,

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[39] In a trilogy of cases argued in December 2018, the Supreme Court of Canada is reviewing the decision in *Dunsmuir*. As of this writing the decisions have not been released.

[40] *Supra* note 15 at para 69.

[41] *Ibid* at para 73.

the applicant had brought an application to set aside the arbitral award under the Ontario domestic Act on the grounds that the arbitrator had made "three unreasonable errors of law and thus decided a matter beyond the scope of the arbitration agreement such that the award may be set aside pursuant to s. 46(1)3."[43]

Presumably because he was faced with decisions from his own Court of Appeal, Justice Mew, who knows something about arbitration, held that *Smyth* is "at best ambiguous" authority for the proposition that that an arbitrator's award can be reviewed for reasonableness under section 46(1)3 of the Act.[44] He went on to find, however, that he did not need to decide the point as the arbitrator's decision was reasonable.

SATTVA: TWO STEPS FORWARD, ONE STEP BACK?

The *Sattva* decision, referred to above, was not a setting aside decision. The Court was dealing with the statutory right of appeal of an arbitrator's award and the test for leave to appeal. While the Court clarified the test for leave to appeal and the standard for the appeals themselves—a welcome development—it did so by referring to *Dunsmuir*:

> [104] Appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal. For example, for the most part, parties engage in arbitration by mutual choice, not by way of a statutory process. Additionally, unlike statutory tribunals, the parties to the arbitration select the number and identity of the arbitrators. These differences mean that the judicial review framework developed in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, and the cases that followed it, is not entirely applicable to the commercial arbitration context. For example, the AA forbids

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[42] 2014 ONSC 3918.

[43] *Ibid* at para 28.

[44] *Ibid* at para 38.

> review of an arbitrator's factual findings. In the context of commercial arbitration, such a provision is absolute. Under the *Dunsmuir* judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference (*Dunsmuir*, at para. 31).
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> [105] Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. Both involve a court reviewing the decision of a non-judicial decision-maker. Additionally, as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties. For these reasons, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.
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> …
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> [119] For these reasons, the arbitrator did not ignore the "maximum amount" proviso. The arbitrator's reasoning, as explained by Justice Armstrong, meets the reasonableness threshold of justifiability, transparency and intelligibility (*Dunsmuir*, at para. 47).

Unfortunately, while deciding on the standard for arbitral appeals, the court used the language of judicial review and invoked the reasonableness test from *Dunsmuir*. This has continued to cause confusion in the courts now hearing set aside applications, where counsel cite both *Dunsmuir* and *Sattva* for the proposition that in a setting aside application, the arbitrator's ultimate decision must be reasonable.

POST-SATTVA DECISIONS

In *FCA Canada Inc. v. Reid-Lamontagne*,[45] the applicant moved to have an award set aside under section 46 of the Ontario domestic

[45] 2019 ONSC 364.

Act on a number of grounds, one of which was that "the Final Award's finding that there was a Current Defect was unreasonable and ought it to be set aside".[46]

Madam Justice Spies stated:

> [59] Even if the Final Award can be reviewed for reasonableness under s. 46(1)3 of the Act, I find that the Final Award was reasonable and ought not to be set aside. A decision is reasonable if the decision falls within a range of possible outcomes which are defensible in respect of the facts and the law; see *PQ Licensing S.A. v. LPQ Central Canada Inc.*, 2018 ONCA 331 (CanLII) at para 35, referencing *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII) at para 47.

Justice Spies then reviewed the arbitral award and concluded:

> [72] For these reasons I find that the Final Award is reasonable in that it is justifiable, transparent and intelligible; see *Dunsmuir* at para 47; *Sattva* at para 119.

In *Elchuk v. Gulansky*,[47] we have an even more troublesome analysis. While it is not completely clear from the decision, it would appear that the court accepted that the applicant could not establish any of the grounds for setting aside under the Saskatchewan domestic Act, which mirror the setting aside provisions of the other provincial Acts. Nevertheless, the court went on to review the arbitrator's decision as a judicial review. After quoting both *Dunsmuir* and *Sattva*, the court concluded:

> [46] Whether I would have come to the same decision as the Arbitrator is neither here nor there. His Decision lies entirely in the realm of reasonable and is insulated from Elchuk's challenge.

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[46] *Ibid* at para 59.

[47] 2019 SKQB 23.

While we only have an endorsement from the judge and no reference to any cases, the Ontario decision in *Saskatchewan v. Cricket* baldly states:

> If the arbitrator's findings were unreasonable, it might be argued that a review could be considered under s 46(1)(6) of the Act. In this case, however, the applicant has not identified any dubious factual finding made by the arbitrator. The reasons of the arbitrator comprehensively address the relevant evidence and there is no basis to find that the arbitrator's factual determinations were anything other than reasonable and entirely within his province.[48]

In the *Alectra* appeal decision, the Ontario Court of Appeal dealt directly, but in a cursory manner, with the question of whether the judicial review test of reasonableness applies to a setting aside application under the Ontario domestic arbitration Act. At the end of its decision, the Court stated:

> [44] For greater certainty I would add this: once the jurisdictional question is answered, in the absence of a right of appeal pursuant to s 45 the court has no authority to go on to review the arbitrator's award for reasonableness. *Smyth* is not to be read as authority to the contrary. The basis for the court's decision is not set out and its comments must be regarded as *obiter*.

While in the author's view this is a correct conclusion, it is problematic in two respects. First, it would have been nice if the Court had clarified that the reasonableness test mentioned in *Sattva* only deals with appeals from an arbitrator's decision and does not purport to import a reasonableness test into setting aside applications. *Sattva* is not mentioned by the *Alectra* court.

The second problem, and with all due respect to the *Alectra* court, is that the requirement of a reasonableness standard as articulated by the Court of Appeal in the *Smyth* case was not *obiter*.

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[48] 2019 ONSC 18.

In *Smyth*, the Court of Appeal stated that once the jurisdictional issue had been disposed of, the only remaining question regarding the setting aside was whether the award was reasonable. The Court then reviewed the reasonableness test in *Dunsmuir* and held: "... the arbitrator's decision was clearly reasonable within these parameters."[49] This is not *obiter,* but rather a second part of the setting aside test, as understood by the *Smyth* court. The court in *Alectra* disagreed, finding that there was only one part to the test and there was no reasonableness requirement. But this does not make the decision on reasonableness as articulated in *Smyth obiter*.

Regardless of these problems with the *Alectra* decision, we should be happy with the result.[50]

CORRECT OR REASONABLE?

The *Alectra* and *Smyth* decisions both find that in a setting aside application on the grounds of lack of jurisdiction, the test is one of correctness. The same result obtained in the *Cargill* decision. In *Cargill*, like in *Alectra*, the Applicant argued that while the tribunal had general jurisdiction to hear the dispute, it did not have jurisdiction to award all of the damages that it did. The *Cargill* court held:

> [42] I conclude that the standard of review of the award the court is to apply is correctness, in the sense that the tribunal had to be correct in its determination that it had the ability to make the decision it made.

One might argue that if the Supreme Court of Canada determined in *Sattva* that the standard of review on an appeal of an arbitrator's decision on a question of law is one of reasonableness, the same standard should apply in reviewing an arbitrator's decision on jurisdiction, but we will have to wait and see. This issue is one of those for which leave to appeal in *Alectra* has been sought.

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[49] *Supra* note 24 at para 23.

[50] As mentioned above, leave to appeal the *Alectra* decision has been filed with the Supreme Court of Canada, but this issue as to whether the overall decision needs to be reasonable does not appear to have been appealed.

CONCLUSIONS

It would appear that notwithstanding repeated admonitions from the courts that an application for setting side should not be turned into a review of the merits of the decision, this is easier said than done.

First, we have those cases where the court disagrees with the arbitrator's decision and counsel convinces the court that the error goes to the arbitrator's jurisdiction. Second, we have the courts, on a number of occasions, using *Dunsmuir* and *Sattva* to question the reasonableness of the arbitrator's decision in applications to set aside an arbitral award.

This may be seen in part as a cultural issue. While arbitration has existed for millennia, it is only recently that it has been allowed to deal with substantive legal issues. The view that commercial arbitration is a private dispute resolution mechanism, in which the state has little or no interest, is a relatively recent liberal democratic concept. Historically, "[a] private jurisdiction is repugnant to the spirit of monarchy."[51] An arbitrator's view of how to apply the law to resolve a commercial dispute bumps up against the more traditional legal order in which the court considers itself the final word on what "the Law" is and the concept of finality bumps up against a lawyer's immediate inclination to recommend appeal to the courts if their client does not like a result.

Where the parties to a commercial arbitration have determined that there will be no appeals, they have accepted that the arbitrator will take his or her best shot at applying the law as he or she sees it, regardless of whether the courts might hold a different view of that law. The courts should not be trying to oversee the result by the application of a doctrine that permits a judge to determine if the ultimate result is "unreasonable". A decision of what is unreasonable, in essence, turns on whether the appellate judge agrees with it. As William G. Horton has noted, "In *Groia v. The Law Society of Upper Canada* 2018 SCC 27 […] the decision of a presumptively expert administrative tribunal was found by 5 judges in the Supreme Court to be unreasonable even though three other judges of the

[51] Edward Gibbon, *The History of the Decline and Fall of the Roman Empire* (1845 ed) at 44600 (Kindle Edition).

same Court and 13 other judges and tribunal members in previous proceedings found the result to be either correct or reasonable."[52] In a private, consensual commercial arbitration, there should be no room for setting the decision aside based on the personal view of an appellate judge as to whether it was reasonable.

The Ontario Court of Appeal got it right in *Alectra*. Once it is determined that the arbitrator had jurisdiction to decide an issue, it is immaterial whether the arbitrator's decision was reasonable or unreasonable, correct or incorrect.

A MODEST WISH LIST

As this area of the law is still evolving**,** we might wish for courts and counsel to consider the following suggestions:

1. Resist using the words "judicial review" in a set aside application;
2. Recognize that *Sattva* deals with the test for appeals, not set asides;
3. Accept that the set aside provisions of the domestic Acts and the Model Law are a complete code setting out an exhaustive list of grounds for setting aside an award;
4. Apply the reasonableness test in a set aside application solely to determine whether the arbitrator properly interpreted his or her jurisdiction to decide the dispute; and
5. Hope that other courts follow the Ontario Court of Appeal in the *Alectra* case and confirm that the added ground of reasonableness of the arbitrator's overall decision has no place in determining whether or not it should be set it aside.

[52] William G. Horton, "Message from the Editor" (2018) 27:2 Can Arb & Med J 7.