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Ontario Court of Appeal confirms high bar for reversing arbitral awards under the UNCITRAL Model Law

DECEMBER 13, 2017 4 MIN READ

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The Ontario Court of Appeal recently confirmed the very high bar in Ontario to overturning international arbitral awards under the United Nations Commission on International Trade Law (UNCITRAL) Model Law (the Model Law).

Decision background

Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A. was an appeal from an unsuccessful challenge to an international commercial arbitration award. The appellant, Consolidated Contractors Group (CCG), challenged the Superior Court of Justice's decision to uphold the arbitral award, arguing that portions of the award were made without jurisdiction, were made in breach of procedural fairness and violated public policy.

The arbitration concerned a slurry pipeline construction project related to a nickel mine in Madagascar. A panel of three arbitrators (the Tribunal) awarded the respondent, Ambatovy Minerals (Ambatovy), $25 million in respect of counterclaims made for liquidated damages for delay and additional costs. In turn, the Tribunal awarded CCG $7 million in respect of Ambatovy's claims for breaches of contract.

Grounds for judicial review of arbitral decisions

The Ontario Court of Appeal rejected CCG's argument that the arbitral award should be set aside and affirmed that only the most serious errors and injustices will merit judicial intervention.

The Court of Appeal held the following on each ground of challenge to the arbitral award:

- **Jurisdiction**: CCG claimed that the Tribunal had exceeded its jurisdiction by hearing the respondent's counterclaims prematurely, before those claims had gone through the initial steps for dispute resolution specified in the contractual dispute resolution provisions. The Court of Appeal reiterated that jurisdictional challenges are to be strictly limited to a "true question of jurisdiction."[1] The Court of Appeal held that courts should limit any intervention to a "dispute not contemplated by or not falling within the terms of the submission to arbitration, or [which] contains decisions on matters beyond the scope of the submission to arbitration."[2] In this case, the Court of Appeal found that "the respondent's counterclaims were clearly the proper subject of arbitration under the

contract" and "the only question…was when they would be arbitrated."[3]

- **Procedural fairness:** The Model Law (which has been given force in Ontario under the *International Commercial Arbitration Act, 2017* and predecessor legislation) specifies that a challenge to an arbitral award based on the grounds of procedural unfairness requires that a party not receive proper notice of the proceedings or otherwise be unable to present its case. The Court of Appeal referred to one of the few decisions in Canada that addresses this standard of review, *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.* (which was subsequently affirmed by the Ontario Court of Appeal). This case interpreted a court's review of an arbitral award to include both substantive and procedural injustice. However, the Court held that to justify setting aside an award for reasons of fairness or natural justice, the conduct of the Tribunal "must be sufficiently serious to offend our most basic notions of morality and justice."[4] Further, "judicial intervention for alleged violations of the due process requirements of the Model Law will be warranted only when the Tribunal's conduct is so serious that it cannot be condoned under the law of the enforcing State."[5]
  CCG brought a number of claims under this ground. However, in all cases the Ontario Court of Appeal found that CCG had failed to demonstrate the key element of a procedural fairness claim: that CCG had been denied the opportunity to present its case to the Tribunal.
- **Public policy:** CCG claimed, among other things, that a portion of the damages award amounted to "double recovery," which it claimed was offensive to Canadian public policy. The Court of Appeal referred to the leading statement of the law in respect of public policy challenges to foreign awards in *Schreter v. Gasmac Inc.*, which was subsequently adopted by the Court of Appeal:
  The concept of imposing our public policy on foreign awards is to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts.[6]
  The Court of Appeal found that the arbitral award in this case did "not come close" to meeting this test.[7]

Future implications

This case affirms the Canadian public policy objective of limiting judicial intervention when parties have contractually agreed to resolve disputes by arbitration. The Court of Appeal affirmed the very limited bases on which a court can set aside an arbitral award on either procedural or substantive grounds. In short, only the most egregious and patently unfair circumstances will meet the high bar that would warrant judicial intervention.

[1] Para. 52.

[2] Para. 46.

[3] Para. 52.

[4] Para. 65.

[5] Para. 65.

[6] Para. 99.

[7] Para. 101.