Focus ALTERNATIVE DISPUTE RESOLUTION

Appeal decision supports Sattva

William Horton

In its recent decision in *Ottawa (City) v. Coliseum Inc.* 2016 ONCA 363, the Ontario Court of Appeal has made a major contribution to the increased efficiency and viability of commercial arbitration. At the same time, the court has quietly but firmly embraced broader transformative changes which were introduced by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53.

At a time when progress in both areas is being resisted by some in the profession and by other provincial courts of appeal (see *Teal Cedar Products Ltd. et al v. Her Majesty the Queen in Right of the Province of British Columbia, et al* 2013 BCCA 326), the *Coliseum* case deserves wide attention.

In the *Coliseum* decision the Court of Appeal accepted and applied, without reservation, the principle enunciated in *Sattva* that the standard of review on an appeal from a commercial arbitration will generally be reasonableness *even where appeals are restricted to questions of law.* The only exception arises where the question is one which would attract the correctness standard, such as constitutional questions or questions of law that are of central importance to the legal system as a whole and outside the adjudicator's expertise.

This principle as applied to the review of arbitration decisions is a major departure from the way appeals of questions of law are viewed by Canadian courts in other contexts. This point was not lost on the Ontario Court of Appeal. During the oral argument of the appeal, Justice James MacPherson, who wrote the unanimous decision of the court, drew particular attention to the novelty of the principle.

In its decision, the Ontario Court of Appeal could have questioned, qualified or evaded the principle as has been done by other courts, and as was done by the judge of first instance in the *Coliseum* case. It did none of those things.

The application judge had found that the arbitrator committed several errors on questions of law, which she dubbed "extricable questions of law." Rather than questioning the characterization of the issues by the application judge as "issues of law" (which it could easily have done), applying the principles in *Sattva*, the Ontario Court of Appeal simply noted that there was "nothing in this appeal taking it outside the general rule."

GAJUS / ISTOCKPHOTO.COM

> [I]t is highly desirable that arbitration be allowed to develop, and succeed or fail, as a truly independent alternative to court litigation, without having its determinations enmeshed in years of court proceedings relating to the merits.
>
> **William Horton**
> Commercial arbitrator

The appeal court explicitly found the application judge's interpretation of the contract to be reasonable—but, because it also found the arbitrator's interpretation to be reasonable, it allowed the appeal and reinstated the arbitrator's award.

In reaching this result, Justice MacPherson endorsed and adopted the decision and reasons in the earlier case of *Popack v. Lipszyc* 2016 ONCA 135, in which it was said by Justice David Doherty: "The parties' selection of their forum implies both a preference for the outcome arrived at in that forum and a limited role for judicial oversight of the award made in the arbitral forum."

The *Coliseum* case makes it clear that this principle applies regardless of the characterization of issues as questions of fact or law, unless one of the exceptions in *Sattva* is engaged.

It is predicable that the *Coliseum* decision will be met with naysayers among both arbitration and litigation practitioners. Some of the former will maintain that this approach is "bad for business" because it may dissuade parties from using arbitration. Some of the latter will express concern that the notion of correctness will also now be "watered down" in non-arbitration cases involving questions of contract interpretation.

On the contrary, it is highly desirable that arbitration be allowed to develop, and succeed or fail, as a truly independent alternative to court litigation, without having its determinations enmeshed in years of court proceedings relating to the merits. The Supreme Court and the Ontario Court of Appeal strengthen the role of arbitration, and at the same time protect the values and resources of the court system, by holding parties to their choice of non-court adjudication.

Another benefit of this approach is that, in promoting a culture of deference with respect to arbitration, the courts are also potentially promoting a culture of deference in other types of cases.

The "correctness standard," when it is applied, gives judges or panels of judges permission to substitute their own opinions for that of the arbitrator or trial judge. Yet, everyone recognizes that opinions may differ, even on questions of law.

When principles of deference are engaged, the reasonableness standard should cause the judge or panel of judges to consider that other judges or panels may have taken a different view. When applying the reasonableness standard a reviewing judge should not ask only "Do I agree with this interpretation of the law or the facts?" but "Are there other judges on my court who might have agreed with this interpretation of the law or the facts had they been assigned to this case?"

In other words, in deferring to arbitrators, judges are also deferring to the possible views of other members of their own court.

William Horton is an arbitrator of Canadian and international business disputes.