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Thomas Heintzman specializes in alternative dispute resolution. He has acted in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia, Nova Scotia and New Brunswick and has made numerous appearances before the Supreme Court of Canada.

Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, insurance, broadcasting and telecommunications, construction and environmental law. He was an elected bencher of the Law Society of Canada for 8 years and is an elected Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers.

Thomas Heintzman is the author of *Heintzman & Goldsmith on Canadian Building Contracts,* 5th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Grounds For Reviewing Arbitration Decisions Are Narrow: B.C Court Of Appeal

A recent decision of the British Columbia Court of Appeal warned that the grounds for reviewing an arbitral award are narrow. In ***Boxer Capital Corp. v. JEL Investments Ltd.,*** the court noted that arbitral dispute had gone through two separate arbitrations and nine (yes, nine) judicial proceedings already. The Court of Appeal said: "Surely that procedural history is inconsistent with the objectives of commercial arbitration." The court held that the motion judge had no basis to over-turn the last arbitral award and re-instated that award.

Background

The issue in the appeal was whether the second arbitrator was bound by principles of ***res judicata*** arising from the award of the first arbitrator or the decision of the judge who heard an appeal from that first award. The second arbitrator held that he was not bound by those decisions by reason of ***res judicata***. The judge hearing an appeal from that decision held that the second arbitrator was so bound. I wrote about that decision in my article of February 17, 2014.

From that latter decision an appeal was taken to the British Columbia Court of Appeal.

The B.C. Court of Appeal's decision

The B.C. Court of Appeal agreed with the arbitrator. The issue turned upon whether the issue before the second arbitrator was the same as the issue before the first arbitrator or the court which heard the appeal from the first award. The Court of Appeal held that it was not:

> "Respectfully, Mr. Justice Abrioux erred in characterizing the issues so broadly, and in finding that they had been the same throughout. When the issues are properly framed, it becomes apparent that they are quite different. The issue before [the firs] Arbitrator….., as defined by the parties who chose to submit their dispute to him, was whether the shotgun purchase price under the [Co-Owner's Agreement, or COA] was $1.425 million or $2.19 million. The issue before[the court on appeal from the second arbitral award], as defined by this Court's decision granting leave to appeal, was whether [the second] Arbitrator "erred in failing to have regard to established principles of law in deciding that a term should be implied". Finally, the issue before [the second] Arbitrator, again as defined by the parties, was whether the Boxer Parties had a continuing interest in the venture. These are different issues."
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> The B.C. Court of Appeal then concluded:
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> "It was open to [the second] Arbitrator to construe the COA afresh on the continuing interest issue. It is not for this Court to review the merits of his decision in this regard. His decision is the last word on the interpretation of the COA."

In the course of making its decision the court made a number of comments about the decision of the Supreme Court of Canada in ***Creston Moly Corp. v. Sattva Capital Corp.***, 2014 SCC 53.

First, it distinguished the role of a court in an appeal from an arbitral award from its role in an appeal from another judicial decision; the former role is much more limited than the latter. It said:

> Like the present appeal, *Sattva* dealt with an issue of contractual interpretation. Mr. Justice Rothstein explained that in most cases, issues of contractual interpretation will be important only to the parties themselves, and will not have a broader impact….. However, the role of appellate courts (including the B.C. Supreme Court, when sitting on appeal from an arbitral award) is generally not to

> provide "a new forum for parties to continue their private litigation" but rather to ensure "the consistency of the law" and decide legal issues of public importance (*ibid*.). Accordingly, "our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application"…. In sum, "the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings ... weigh in favour of deference to [arbitrators] on points of contractual interpretation".”

Second, it said that if the principles in Sattva had been applied in the present case, there might have been no appeal from the first arbitral award and the matter might have ended there:

> *“Sattva* held that questions of contractual interpretation should almost always be regarded as questions of mixed fact and law…. (Historically they were seen as questions of law.) This means that, after *Sattva*, leave will rarely be granted to appeal an arbitral award on a question of contractual interpretation. (If *Sattva* had been decided earlier, leave arguably would not have been granted to appeal the parties' initial arbitral award and this lengthy saga would have been avoided.)”

Discussion

As in most debates, defining the question largely defines the answer. The Court of Appeal said this about the exercise involved in defining the question in an appeal from an arbitral award:

> “This appeal serves as a reminder of the importance of judicial restraint in the review of arbitral awards, at least in the commercial context. When sitting on appeal from an arbitral award, a court's jurisdiction is narrow. The inquiry differs fundamentally from a trial, and even from a judicial review of an administrative decision.”

As a result of the new test in *Sattva* for reviewing arbitration decisions, and the narrow definition of the question involved in the appeal from the second arbitral award, the Court of Appeal held that that question was not the same as the questions in the first arbitration or the appeal from the first arbitral award.

This decision does not mean that the doctrine of ***res judicata*** should be applied narrowly by arbitral tribunals. It means that, in reviewing a decision by an arbitrator about that doctrine, the court has a very narrow jurisdiction. If the arbitrator has the jurisdiction to determine whether the doctrine applies or not – and that was not doubted in the present case – then the conclusions of the arbitrator must be accepted, unless the arbitrator’s errors about those matters result in a complete loss of jurisdiction or an error on a pure question of law.

In any event, this decision can go down as Exhibit A about how arbitration can lead to expense and delay if the procedures get out of hand. As I said in my February 12, 2014 article about the lower court decision in this case, “proponents of arbitration may wonder if there are better

ways to find speedy justice. The parties selected arbitration presumably to avoid the costs and delays of the court system. That objective was not achieved in the present case."

See *Heintzman and Goldsmith on Canadian Building Contracts*, 5th ed., chapter 11, part 3.

***Boxer Capital Corp. v. JEL Investments Ltd.,* 2015 CarswellBC 96, 379 D.L.R. (4th) 712**

Arbitration – Appeal – Res Judicata – Standard of Review - Shot-gun agreements

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