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The Arbitrator's Right to be Unreasonable or Incorrect

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By John Buhlman

It was for the arbitrator, not the court, to interpret and apply the substantive provisions of the [agreement], and it is of no moment whether the arbitrator did so reasonably or unreasonably, correctly or incorrectly.[1]

The Ontario Court of Appeal has once again confirmed that section 46(1) of the *Arbitration Act, 1991*[2] (the "Act") is not an alternate appeal route and must not be treated as such. In *Alectra Utilities Corporation v. Solar Power Network Inc.*,[3] the Court of Appeal reversed the decision of a judge who did just that by finding that the arbitrator's interpretation of the agreement in issue was unreasonable and that, therefore, the arbitrator's award was made in excess of his jurisdiction under the agreement. In other words, the application judge determined that an unreasonable interpretation or incorrect interpretation of an agreement was a jurisdictional error that permitted the court to set aside the award under paragraph 46(1)3 of the Act.

Section 46(1) of the Act authorizes the court to set aside an arbitration award on the limited and specific grounds enumerated in that section. The grounds are not concerned with the substance of the parties' dispute. Paragraph 3 of that section permits a court to set aside an arbitration award where:

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 agreement that was the subject of the arbitration contained two provisions relating to the arbitration. The terms of the agreement giving the arbitrator jurisdiction were very broad and general in nature, and made clear that the arbitrator had the authority to resolve any and all differences arising out of or in any way connected with the agreement, including performance, breach and any damages resulting therefrom.[4] It would be difficult to find a dispute that was not covered by the arbitration provision.

The second provision relating to arbitration provided that there was to be no appeal from the determination of the arbitrator to any court. As the Court of Appeal noted, "[t]here is no ambiguity here: there is no appeal to the court, period. The arbitrator's determination is final and binding."[5]

Notwithstanding these two provisions, the application judge described the issues raised on the application under section 46(1)3 of the Act as jurisdictional in nature, and stated that interpretation of the agreement was necessary in order to resolve them. The application judge then found that the arbitrator's interpretation of the agreement was unreasonable in two respects and, therefore, the arbitrator lacked jurisdiction. In other words, the arbitrator, having interpreted the agreement in a manner that the judge considered unreasonable, made a decision on a matter that was beyond the scope of the agreement for the purposes of section 46(1)3 of the Act.

In arriving at its decision to allow the appeal, the Court of Appeal acknowledged that the distinction between an error that is jurisdictional in nature and an error made within jurisdiction is so fine as to be manipulable. The characterization often depends on

whether a party seeks to have the court intervene or not.[6]

The problem with the application judge's approach is that any unreasonable or incorrect interpretation of an agreement by an arbitrator would result in a loss of jurisdiction. There would be, in effect, an appeal under section 46(1)3 of the Act even when the parties have agreed that there is to be no appeal.

In the end, the Court of Appeal reinstated the arbitrator's award, reconfirming the principle that the interpretation of a contract that is the subject of an arbitration is for the arbitrator, not the Court under section 46(1) of the Act. That section does not authorize a review of the substance of an arbitrator's award.

An arbitrator is entitled to interpret a contract in a way that a judge may see as unreasonable or incorrect.

The question is, are there any limits? Can an interpretation be beyond unreasonable? It will be interesting to see whether, in future cases, courts will try to find a way to set aside arbitration awards that are alleged to be based on an interpretation considered to be more than "just" unreasonable.

[1] *Alectra Utilities Corporation v. Solar Power Network Inc.,* 2019 ONCA 254 at para. 41 ("***Alectra***").

[2] S.O. 1991, c. 17.

[3] *Alectra*, *supra* note 1.

[4] *Ibid.* at para. 37.

[5] *Ibid.* at para. 22.

[6] *Ibid.* at para. 30.

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