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RECENT DEVELOPMENTS & TRENDS IN CASE LAW

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Why Do Appeal Courts Defer to the Decisions of Commercial Arbitrators?

When parties to a contract agree to have their disputes resolved by a commercial arbitrator, they choose to limit the Courts' powers of review. Placing their faith in the arbitrator, the parties select a private forum in which to decide issues of contractual interpretation.

This is why Ontario Courts are so reluctant to get involved in appeals from the decisions of commercial arbitrators. The Courts show considerable deference to the arbitrator's ruling, even where the Court would have reached a different result. The Courts' deference lies not in their belief in the arbitrator's superior expertise, but in the fact that the parties to the contract made a deliberate choice to have their dispute resolved by arbitration.

A recent decision of the Ontario Court of Appeal, *Ottawa (City) v. Coliseum Inc.*, 2016 ONCA 363, per MacPherson J.A., illustrates these themes. Echoing the Courts' deference to commercial arbitrators as established in the Supreme Court of Canada decision, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Court of Appeal in *Coliseum* establishes that Courts will defer to the contractual interpretation of an arbitrator, even where the Court would have ruled differently.

The Facts

Coliseum involved a dispute between two parties to a commercial lease. Coliseum and the City of Ottawa entered into a lease agreement in which Coliseum was allowed to use a football stadium in Ottawa. The parties began to dispute Coliseum's right of possession to the stadium. The parties resolved this dispute in Minutes of Settlement (the "Settlement").

Under the Settlement, the City had the right to terminate the lease if it had *bona fide* intentions to redevelop the stadium. In such a case, Coliseum would be given the option of leasing a park nearby, known as Ben Franklin Park, or, alternatively, a similar City-owned property.

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The City delivered a notice of termination of the lease for the stadium to Coliseum under the Settlement. As Ben Franklin Park was no longer available, the City also delivered a notice of option to lease to Coliseum in which it offered Ledbury Park as the alternative venue.

When the City's notice of termination became effective in 2012, Coliseum objected to the City's offer of Ledbury Park. When the parties could not decide on a proper venue, Coliseum commenced an arbitration against the City, alleging that the City was in breach of the Settlement.

After eleven days of hearing, the Arbitrator ruled in favour of Coliseum. The arbitrator awarded Coliseum damages of approximately $2.2 million.

The arbitrator held that the City had breached the Settlement. In offering Ledbury Park as an alternative site to Ben Franklin Park, the City failed to take meaningful steps to determine that Ledbury Park was "appropriate to the operations of [Coliseum]", as required by the express language of the Settlement. Under the Settlement, the parties would then negotiate the terms of the lease. The arbitrator held that this interpretation of the Settlement was in accordance with the intention of the parties.

On appeal to the Ontario Superior Court, the application judge reversed the arbitrator's ruling. The application judge held that under the Settlement, the City and Coliseum were first required to negotiate in good faith to find an alternative venue for Coliseum if the currently-occupied stadium was unavailable. If those negotiations failed, the City was required to identify a single alternative site and the parties could then try to negotiate a new lease acceptable to them both.

Coliseum appealed the application judge's ruling to the Ontario Court of Appeal under the *Arbitration Act, 1991*, S.O. 1991, c.17.

Deference to the Arbitrator's Contractual Interpretation on Appeal

The Court of Appeal overruled the application judge's interpretation of the Settlement. In the Court's view, while the application judge's interpretation was a reasonable one, so was the arbitrator's. Accordingly, the application judge erred when she substituted her own interpretation of the Settlement for that of the arbitrator.

Where two reasonable interpretations of a contract are posited by an arbitrator and the Court, the arbitrator's interpretation should be preferred.

Why So Much Deference to an Arbitrator's Ruling?

The Court of Appeal began its analysis by citing *Sattva* for the proposition that the standard of review on appeal from an arbitrator's ruling is reasonableness.

In cases where the appeal is on a question of law, the Courts will defer to the arbitrator's ruling, so long as that ruling was reasonable. Questions of law that are "of central importance to the legal system" or involve constitutional issues, however, still attract a standard of review of correctness, i.e. the Courts will show less deference to the arbitrator's ruling in such cases.

The rationale for deference to the arbitrator's ruling has little or nothing to do with the arbitrator's superior expertise in contractual interpretation. Rather, parties who agree to participate in commercial arbitration do so "by mutual choice, not by way of a statutory process". Moreover, the parties to an arbitration also select the number and identity of the arbitrators.

Citing a passage from its previous decision in *Popack v. Lipszyc,* 2016 ONCA 135, the Court of Appeal emphasized the parties' choice of commercial arbitration as the basis for showing deference to the arbitrator's ruling:

> 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 application judge's decision not to set aside the award is consistent with the well-established preference in favour of maintaining arbitral awards rendered in consensual private arbitrations.

In *Coliseum*, the Court concluded that there were no circumstances justifying a less deferential standard of review to the arbitrator's interpretation of the Settlement.

The dispute between Coliseum and the City did not raise questions of law "of central importance to the legal system", nor were constitutional questions at issue. In the circumstances, the application judge was bound to defer to the contractual interpretation of the arbitrator, which the Court deemed reasonable. Even if the application judge had proposed an alternatively reasonable construction of the Settlement, the application judge could not replace the arbitrator's interpretation with her own.

Conclusion

The decision in *Coliseum* emphasizes the degree to which appellate Courts will defer to a commercial arbitrator's interpretation of a contract.

This deference does not arise out of the arbitrator's expertise *per se*, but from the intention of the parties to subject their dispute to private, commercial arbitration.

In this way, the Courts respect the spirit of the Ontario *Arbitration Act, 1991*, which is to provide commercial parties with an alternative forum for the resolution of disputes where they agree to do so.