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Commercial arbitration awards: Why courts won’t interfere

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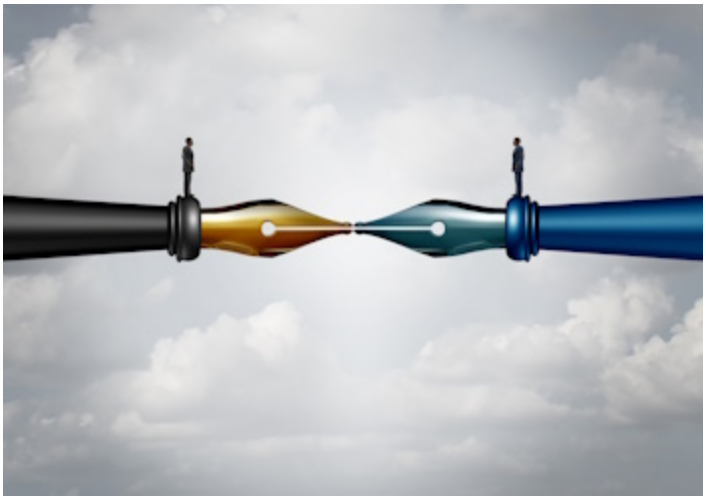
Law360 Canada (May 28, 2024, 1:02 PM EDT) -- Under Ontario’s *Arbitration Act, 1991*, S.O. 1991, c.17 (the Act), domestic arbitration awards are notoriously difficult to appeal to the courts.

The Act limits most appeals to questions of law, only with leave of the court and where the parties have not expressly prohibited an appeal or where the parties have not otherwise allowed a more expansive form of appeal in their contract.

Commercial arbitration promotes finality. Parties who agree to resolve their disputes outside of litigation will be held to that choice.



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Judges interpret the Act narrowly and strictly, as to do otherwise would allow an unwarranted and untimely challenge of the arbitrator’s decision. In fact, a recent decision of the Ontario Court of Appeal, *Campbell v. Toronto Standard Condominium Corp. No. 2600*, 2024 ONCA 218, illustrates the courts’ reticence to provide judicial oversight of an arbitral award.

Question of fraud

Campbell did not engage an appeal of an arbitral award per se. Rather, it involved an application to set aside an award under s. 46(1)9 of the Act on the basis that it was obtained by fraud. The arbitration related to a dispute between a former condominium unit owner and his condominium board.

The arbitrator ruled that the owner had breached the condominium’s rule against leasing his premises as a short-term rental, such as an Airbnb. The arbitrator awarded the condominium corporation $30,641 in costs for having to deal with the matter (the Award).

Under s. 47(1) of the Act, the owner either had to appeal the Award under s. 45 of the Act or seek to

set it aside under s. 46, both within 30 days.

The owner did not do so.

However, s. 47(2) of the Act carves out an exception to the 30-day time limit for appeals or applications to set aside arbitration decisions in cases where the applicant alleges fraud.

Having not appealed or brought an application to set aside the Award within 30 days, the owner brought an application under s. 46(1)9 of the Act alleging that the Award was obtained by fraud.

The owner claimed that the condominium corporation had committed fraud by agreeing to proceed with the arbitration to determine the issue of costs. However, the corporation then expanded the issues at arbitration to address the entire history of the dispute between the parties.

On application to the Ontario Superior Court, the Application Judge set aside the Award and allowed the application beyond the 30-day time limit under s. 47(2) of the Act.

The Superior Court held that while the condominium corporation did not commit actual fraud with an intent to deceive, it committed "constructive fraud" by initially agreeing to proceed on the issue of costs alone. The condominium board appealed the Application Judge's decision. The Court of Appeal set aside the Application Judge's order and restored the original order of the arbitrator.

Arbitral awards' challenges under the Act are strictly limited

The Court of Appeal began its analysis with the principle that the "central purpose" of arbitration under the Act is to provide contracting parties "with access to a method of dispute resolution that can be more expedient and less costly than going to court": citing *Uber Technologies v. Heller*, 2020 SCC 16, and *TELUS Communications Inc. v. Wellman*, 2019 SCC 19.

The Act promotes limited court intervention following an arbitral award by circumscribing the ability to appeal an arbitral award under s. 45 of the Act and providing for a 30-day deadline for any such appeal or application to set aside an arbitral award under s. 46.

Section 47(2) recognizes two exceptions to the 30-day deadline to commence an appeal or application to set aside an arbitral decision, namely where the applicant or appellant alleges corruption or fraud in the arbitration process:

> 47(1) An appeal of an award or an application to set aside an award shall be commenced within thirty days after the appellant or applicant receives the award, correction, explanation, change or statement of reasons on which the appeal or application is based.
>
> (2) Subsection (1) does not apply if the appellant or applicant alleges corruption or fraud.

Given the policy of promoting finality of the dispute under the Act, however, any provision allowing for the setting aside of an arbitral award based on fraud (and extending the 30-day limitation period for bringing such an application to the court) shall be interpreted narrowly and strictly.

Section 46 is not an alternative means to appeal the arbitral award:

> In [a previous 2022 decision of the Court of Appeal, *Tall Ships Development Inc. v. Brockville (City)*, 2022 ONCA 861], this court again reiterated … that the basis for setting aside an arbitral award under s.46 of the Act is narrow, is not concerned with the substance of the parties' dispute, and is not to be treated as an alternate appeal route.

In this case, the Application Judge erred by expanding the definition of ordinary "fraud," which requires evidence of dishonesty, under ss. 46 and 47 of the Act.

The equitable concept of "constructive fraud" as adopted by the Application Judge, by contrast, is

much broader and "eliminates the requirements of knowledge and intent to deceive."

Here, the condominium corporation did not commit a dishonest act or actual fraud in expanding the arbitration beyond the issue of the corporation's costs. It was appropriate and necessary for the arbitrator to consider factors such as the history of the complaints against the unit owner, the length of the proceedings and the reasonableness of the owner's behaviour.

In the Court of Appeal's view, the Application Judge's expansive definition of "fraud" under the Act allowed the unit owner to circumvent the finality of the arbitrator award and undermine the 30-day time limit to challenge the arbitrator's decision in court:

> In my view, expanding the meaning of the word fraud under s.46(1)9 and s.47(2) to include constructive fraud would be at odds with the case law. It risks significantly undermining the principles of efficiency and finality, because the nature of constructive fraud is much broader than that of fraud itself, as the application judge recognized …
>
> Expanding the meaning of "fraud" also risks inviting strategic enlargement of the grounds for setting aside an arbitral award [under s.46], as illustrated in this case.

Limited recourse to the courts

Campbell is consistent with the recent body of case law from the Ontario Court of Appeal, which holds parties to their contractual commitment to resolve their dispute by way of arbitration. Once that choice is made, recourse to the courts is severely limited. Not only does this approach promote finality and adherence to the parties' choice of resolution forum, but it also mitigates the strain on judicial resources.

In our current litigation system, where courts are overburdened and endeavouring to provide timely justice, circumscribing the parties' ability to appeal or set aside a decision after what is often a lengthy arbitration makes eminent sense.

It ensures that parties do not gratuitously pursue a "second kick at the can" in the courts.

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