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Courts and the Arbitral Process: Referrals of Questions of Law to the Court

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Commercial counterparties contemplating arbitration clauses as part of their contract want the terms of those provisions to meet all of the formal requirements, and accurately capture their intentions. Where they wish to include the ability to require the arbitral tribunal, at the request of one of them, to refer questions of law to the court, care must be taken to ensure their expectations are covered by such an agreement. Matters of contractual interpretation should not lightly be assumed to be questions of law subject to such a provision.

Experienced arbitrators and arbitration counsel will likely have more than passing familiarity with the various approaches to appeals of domestic arbitration awards under provincial legislation. Many, but not all, provinces (and not Quebec) provide in their legislation that where an arbitration agreement provides, appeals of arbitration awards lie as of right, and may extend not only to questions of law, but also questions of fact or mixed fact and law. Absent such an agreement, many, but not all provinces (and not Quebec) provide in their legislation that appeals are restricted to questions of law, and only if leave to appeal is first obtained.

So too is there likely to be more than passing familiarity with the various domestic rules and provisions which address the extent to which the courts may become involved in the arbitral process itself. In the case of questions of law that may crop up during an arbitration. It is generally the case that the determination of such questions is left to the arbitral tribunal under most provincial arbitration legislation. But not exclusively. In many provinces, the legislation also provides that a question of law may only be referred to the court by the tribunal or the parties on consent.

Perhaps somewhat less familiar is an arbitral agreement provision which requires an arbitral tribunal, upon the request of a party – without the consent of any other party – to refer a question of law to the court, or state a case for the court's opinion concerning such a question. In a jurisdiction where, not unusually, the arbitration legislation allows the arbitral tribunal to determine any question of law that may arise during an arbitration, and limits the ability of the court to intervene in matters addressed by that legislation, what is the proper view of such an agreement by the parties, and how is the arbitral tribunal to deal with such a request? Recall that in this scenario, the question is not referred to the court at the behest of the arbitral tribunal, or the parties together; rather, such a clause seems to contemplate the peremptory ability of one party to precipitate the court's involvement in the arbitration process.

It would seem clear that such a clause would permit either party to make such a request, which could extend to matters of contractual interpretation, amongst other matters. But equally clearly, the request must involve a pure question of law;. there would appear to be no room under such a clause to request that the arbitrator refer a question of fact or mixed fact and law to the court, let alone for the tribunal to accede to such a request.

In turn – depending to a large degree on the particular wording of the question sought to be removed to the court – this would trigger the need for an assessment by the arbitral tribunal of the sometimes vexing distinction between questions of law on the one hand, and questions of fact or mixed fact and law on the other.

That distinction has been immeasurably assisted by the Supreme Court of Canada's decision in *Sattva*

Capital Corp. v Creston Moly Corp.,[1] in which the Court, in the context of a commercial arbitration under the British Columbia *Arbitration Act*, determined to abandon the historical approach of treating the determination of the legal rights and obligations of parties to a written contract as a question of law. In the Court's view, interpreting a contract is an exercise of applying principles of contractual interpretation in light of the specific factual circumstances concerning the contract. As such, matters of contractual interpretation involve questions of mixed fact and law, and while pure questions of law may be extricable as part of the process, such instances, according to the Court, will be rare.

Given the problems associated with parallel court and arbitral processes, it is difficult to think of many sufficient reasons to include such a peremptory referral provision as part of an arbitration clause in a commercial agreement, and thus to override the usual authority of the arbitral tribunal to decide questions of law. Perhaps one sufficient reason would be where it is sufficiently important to have a court decision that applies to all other similar arbitral disputes.

However, that should not suggest to arbitrators and counsel that such a provision is *a propos* for the procedural niceties of arbitration, and, it does seem clear that more significant questions of contractual interpretation should no longer be readily assumed to be the proper subject of a request under such a provision.

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[1] 2014 SCC 53