Alberta Court of Appeal clarifies procedure for appealing an arbitration award

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In a recent decision, *Esfahani v Samimi*, 2022 ABCA 178, the Alberta Court of Appeal settled the procedure for appealing an arbitration award under the Alberta *Arbitration Act*.

Appealing an arbitration award

Appealing an arbitral award is a difficult task. The goal of arbitration is to obtain a fair resolution of a dispute by an impartial tribunal without unnecessary cost or delay. Since the parties to an arbitration agreement have agreed to resolve their disputes by way of arbitration, it is rare for the courts to interfere with a decision of an arbitral tribunal.

Under the *Arbitration Act*, an appeal of an arbitral award depends on the language in the arbitration agreement. Parties may agree to allow appeals on question of law, questions of fact, or questions of mixed law and fact (see s. 44(1)). However, if the arbitration agreement is silent on the question of the right to appeal, the *Arbitration Act* requires a party to seek permission of the court to appeal the award and may only do so on a question of law (s. 44(2)). It should also be noted that the *Arbitration Act* requires that the court be satisfied that the appeal is sufficiently important to the parties and that the issue will significantly affect the rights of the parties.

Clarification of the procedure for appealing an award

In Alberta, the procedure for obtaining permission to appeal an arbitral award has been inconsistently applied in the case law.[1]

In *Esfahani v Samimi*, the Alberta Court of Appeal considered the proper procedure for appealing an arbitration award. In that case, the chambers judge had directed that the application seeking permission to appeal would be heard at the same time as the appeal on the merits. The chambers judge implied that there was an established practice of hearing the application for permission to appeal concurrently with the appeal. The Alberta Court of Appeal reviewed the case law and took the opportunity to settle the procedure to be undertaken when an arbitral award is appealed under s. 44(2) of the *Arbitration Act*.

The Court of Appeal made it clear that section 44(2) "…is a screening provision which restricts appeals to questions of law alone. This statutory restriction is a serious one, as is the attendant court gatekeeping role." The Court of Appeal reiterated that the stated goal of arbitration is to produce a finality of the dispute in an efficient and economical way and to minimize judicial involvement. The *Arbitration Act* clearly requires a bifurcated process when seeking leave to appeal an arbitration award.

In an effort to provide guidance to litigants seeking to appeal an award, the Alberta Court of Appeal stated the law and procedure regarding a section 44(2) appeal is as follows:

1. An appeal does not exist unless permission to appeal is granted.
2. If parties do not make the required election, permission to appeal is required and will be granted on questions of law only, subject to s 44(3) of the *Arbitration Act*.
3. An application for permission to appeal must be heard and decided first, and separately, not contemporaneously with the appeal of the arbitral award.

While the subject matter of this case related to an appeal of an arbitration award in the family law context, it still provides guidance to appeals of all arbitration awards in Alberta where there is no express right set out in the arbitration agreement. It is noteworthy that this matter has been before the Court of Queen's Bench once and the Court of Appeal twice and there is still more litigation to come before a court makes the final decision on appealing the arbitration award. In this situation, the aim of unnecessary cost and delay related to arbitration is all but eliminated due to the wording of the arbitration agreement in relation to appeal rights.

BLG's Construction lawyers are familiar with appeals of arbitral awards and can help navigate the process of appeal. We can also provide front-end assistance with drafting arbitration agreements to clarify the language with respect to appeals of arbitral awards.

[1] For an excellent overview of previous Alberta cases dealing with the procedure for obtaining permission to appeal pursuant to the *Arbitration Act*, see Justice Slatter's comments in the related decision: *Esfahani v Samimi*, 2021 ABCA 290.

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