**Focus** ALTERNATIVE DISPUTE RESOLUTION

# Arbitration appeals becoming more of a gamble

**Mark Veneziano**

Rather than deal with long court lists and endless motions, many commercial parties choose to resolve their disputes through arbitration. Before committing, though, parties should consider and balance resolving the dispute in a cost-efficient and quick manner versus keeping their appeal options open.

In some jurisdictions, arbitral awards are rarely appealable. In *Sattva Capital Corp. v. Creston Moly Corp.* [2014] S.C.J. No. 53, the Supreme Court significantly curtailed the availability and scope of appeals under the B.C. *Arbitration Act* by holding that most issues of contractual interpretation are questions of mixed law and fact. The B.C. *Arbitration Act* allows parties (with leave or by consent) to appeal an arbitral award only on questions of law.

Not all jurisdictions limit appeals of arbitral awards to questions of law. But even where it doesn't directly limit parties' rights of appeal, *Sattva* still signals an important shift towards judicial restraint in reviewing commercial arbitration. This restraint flows from the voluntary nature of arbitration: since the parties themselves choose to submit to arbitration as an alternative to the courts, courts should give considerable deference to arbitrators and limit themselves to the role of ensuring the consistency in the law.

Choosing arbitration may hamstring a party's ability to appeal an unfavourable decision, without actually increasing efficiency. This is exactly what happened in *Boxer Capital Corp. v. JEL Investments Ltd.* [2015] B.C.J. No. 75, the latest instalment in a protracted legal dispute that has been winding its way through the courts since early 2009. What started as a simple commercial arbitration ballooned into a multi-year saga of leave applications and appeals — and a good lesson in what not to do.

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The dispute in *Boxer* was over the interpretation of a contract. In 2007, the parties — JEL Investment Ltd., and Boxer Capital Corp. and Yanco Management Ltd. — entered into a formal co-ownership agreement that set out the terms of their joint venture to purchase real property in North Vancouver. Under the contract, the parties agreed to put in more than their fair share of the down payment, and JEL would own a larger proportion of the property than it had paid for. However, under the agreement, all the profits of the venture would go to the parties until they had recovered the extra capital they had contributed.

But before the parties had recovered any of the extra capital, JEL triggered the contract's shotgun provision and was therefore obliged to purchase the parties' interest. The parties disagreed about the price. JEL felt that it was only obliged to pay the parties the value of their shares. The parties, however, claimed that the contract had an implied term requiring JEL to pay them the extra capital as well.

The parties referred the matter to an arbitrator. Thus began a long series of proceedings that dragged on for years. The parties sought leave and appealed almost every decision. They held a second arbitration, then appealed its outcome too. The British Columbia Court of Appeal counted nine judicial proceedings and two arbitrations.

The BCCA was not impressed: this procedural history was "inconsistent with the objectives of commercial arbitration." It emphasized that commercial arbitration is intended to be an alternative to the court system, not an additional layer of litigation. The court even opined in *obiter* that if *Sattva* had been decided earlier, leave in this case might never have been granted.

*Boxer* is a strong endorsement of judicial restraint in reviewing arbitration. But it also demonstrates that narrowing the jurisdiction of courts to review arbitral decisions can have implications beyond leave applications. In *Boxer*, it influenced the court on a question of issue estoppel.

The estoppel question arose as follows:

- The first arbitrator found that the contract contained an implied term.
- JEL was granted leave to appeal this decision, but on one ground only — that the arbitrator had failed to apply established principles of law in implying a term.
- Justice Richard Goepel allowed the appeal, finding that the term should not have been implied because it was not necessary to give business efficacy to the parties' intentions. To explain why, he found an efficacious way to interpret the contract without implied terms.

In the course of construing the contract, Justice Goepel decided the compulsory buyout did not fully separate the parties' interests. This conclusion, the parties claimed, estopped JEL from arguing in a later proceeding that the parties had no continuing interest in the joint venture. But JEL denied that issue estoppel applied, claiming that Justice Goepel's conclusion on this issue was not fundamental to his decision.

The BCCA characterized Justice Goepel's jurisdiction on appeal very narrowly. Determining whether the arbitrator had failed to apply established principles of law did not require Justice Goepel to construe the contract himself — that task went beyond the court's role in reviewing an arbitral award. The conclusion he drew was therefore not fundamental to his decision, so that issue estoppel did not apply.

After *Sattva*, choosing arbitration is a gamble: parties stand to save a lot in legal expenses if they win, but they may have no recourse to the courts if they lose. But *Boxer* demonstrates that the principles in *Sattva* are important beyond the context of leave applications. They represent a continuing shift in judicial attitude towards commercial arbitration that can influence other types of decisions as well.

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# **Leverage:** Not much confidentiality in litigation

**Continued from page 11**

Other factors:

- Confidentiality, where it exists in the arbitration agreement, is often a prime factor for franchisors to prefer arbitration where reputational damage to the brand is a risk. That is not necessarily so for franchisees, where public exposure of evidence and potentially negative findings may play an important strategic leverage for franchisees. An early mediation provides a franchisor with an even better opportunity to try to resolve the case on a confidential basis.
- Where the franchise relationship is ongoing and both parties have an interest in preserving the relationship, arbitration may be preferred by both sides. In a continuing relationship, mediation is the best hope for maintaining an amicable and viable business relationship between the parties, and for that reason it ought to be pursued aggressively.
- Where the franchise arbitration agreement designates an arbitration tribunal to handle all disputes across the system, franchisees may be concerned about a reasonable apprehensive of bias.
- In a franchisee's claim, if the respondents include alleged franchisor's associates or affiliates for liability under franchise disclosure legislation, such parties are not typically express parties to the franchise arbitration agreement.
- Group claims by franchisees pose their own unique difficulties, starting from the enforceability of class action waivers, to the change in the dynamics of pursuing large group claims through an arbitration.

Properly assessed and handled, an arbitration can be beneficial in many cases to the interests of the franchisor and franchisee. However, it cannot be said that arbitration is better or worse than litigation for all franchise disputes, in all circumstances.

Where a choice exists for whatever reason between arbitration and court litigation, counsel for each side should pragmatically assess a wide range of factors to determine the preferable route. Sometimes, a mediation with an experienced mediator may help frame and analyze all relevant issues. Even if a final settlement cannot be achieved, an agreement may be achieved on advancing the dispute in the appropriate forum.

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