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Appellate Review of Arbitral Decisions involving Contractual Interpretation: The Exception for Standard Form Contracts

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The Supreme Court of Canada recently held that issues of contractual interpretation were properly characterized as questions of mixed fact and law and that the standard of appellate review for arbitral decisions regarding such issues was reasonableness. The courts have subsequently established an exception to this standard for the interpretation of standard form contracts. This article will discuss this exception and its alleged expansion to "widely used" contracts to address when parties can rely on the deferential standard generally accorded to arbitral decisions.

The Supreme Court of Canada decision of *Sattva Capital Corp. v. Creston Moly Corp.*1 is well known for establishing that contractual interpretation is fundamentally a question of mixed fact and law. This decision increased the amount of deference accorded to arbitral decisions as most domestic arbitration legislation restricts appeals of such decisions to questions of law.2 Notwithstanding this general rule, the Court in *Sattva* stated that true questions of law can arise in the application of the principles of contractual interpretation such as: "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor."3 While *Sattva* should be seen as establishing a necessary but restrictive exception to an arbitrator's right to make a dispositive interpretation of a contract, a subsequent line of cases has created a further exception in the context of standard form contracts.

*Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*4 is illustrative of this point. Since *Sattva*, courts across the country had been conflicted as to whether to give deference to a first instance decision-maker's interpretation of a standard form contract.5 The issue in *Ledcor* was the interpretation of an exclusion clause in a standard form insurance contract. The Court found that the interpretation of a standard form contract was more appropriately classified as a question of law since standard form contracts are used between a large number of people and their interpretation has the potential to affect significantly more people than a privately negotiated contract between two parties.6 Justice Wagner also held that the reasons provided by Justice Rothstein in *Sattva* for applying a standard of reasonableness,

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[1] 2014 SCC 53 ["***Sattva***"]
[2] See for example: *Arbitration Act*, R.S.B.C. 1996 c.55, s. 31
[3] *Sattva*, *supra* at para. 53
[4] 2016 SCC 37 ["***Ledcor***"]
[5] See for example: *Vallieres v. Vozniak*, 2014 ABCA 290 ["***Vallieres***"]; *Posocco v. Battista*, 2016 ONCA 419
[6] *Ledcor*, *supra* at para. 39

such as the importance of the factual matrix, were less compelling when interpreting standard form contracts.7

Accordingly, the Court held that the standard of review when interpreting a standard form contract is correctness.8 Justice Wagner held that all parties benefit from the certainty and predictability provided by a recognized interpretation of a standard form contractual term.9

Ledcor creates an exception to *Sattva* for the interpretation of standard form contracts. It also had the effect of upholding a line of cases that had emerged since *Sattva* which had dispensed with the deferential standard of review for standard form contracts. 10

In the recent case of *Corydon Village Mall Ltd. v. TEL Management Inc.*,11 the Manitoba Court of Appeal suggested that this exception may be expanded further still to include contracts that are "widely used" in certain industries. *Corydon Village* cited several cases that had allegedly applied the "widely used" exception.12 However, upon review, it does not appear that the courts have as of yet substantively expanded the *Ledcor* exception.

In *True Construction v. Kamloops (City)*, Mr. Justice Harris held that the tendering documents used in a construction dispute were standard form and that they were "used widely in the tendering process throughout British Columbia."13 Similarly, in *Omers Energy*, the dispute involved the interpretation of a petroleum and natural gas lease agreement. The Alberta Court of Appeal conducted review on a standard of correctness in part because the lease was standard form with "broad use throughout the industry."14 A similar analysis and finding was conducted by the B.C. Court of Appeal in Precision Plating in the context of insurance.15 The policy considerations noted in *Ledcor* permeate these judgments.

Accordingly, the Manitoba Court of Appeal in *Corydon Village* may have mischaracterized the contracts at issue in the cases cited. While standard form contracts are necessarily of wide use, a widely used contract or term may not necessarily be of standard form.16 While the "widely used" exception may not currently extend beyond standard form contracts, the seeds have arguably been planted for a further erosion of *Sattva*. It would not be surprising to see parties argue that the policy considerations underlying *Ledcor* should be extended to certain types of contract terms that are routinely used.

While the Supreme Court's reasoning in *Ledcor* may be justifiable, it is also illustrative of the difficulty by the judiciary in balancing its desire for deference to first stage decision-makers while ensuring predictability in the law of contract. *Ledcor*, and the cases following it, suggest that the priority is the latter, as the underlying effect is to expand the application of the correctness standard in decisions involving contractual interpretation. In the context of a domestic arbitration involving a standard form contract, we can expect that the leave requirement and standard of review will be at least as intrusive as

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[7] *Ibid* at para. 26
[8] *Ibid* at para. 24
[9] *Ibid* at paras. 40-44
[10] See for example: *Vallieres*; *True Construction Ltd. v. Kamloops (City)*, 2016 BCCA 173 ["***True Construction***"]; *MacDonald v. Chicago Title Insurance of Canada*, 2015 ONCA 842.
[11] 2017 MBCA 8 ["***Corydon Village***"]
[12] These cases included *True Construction*; *Omers Energy Inc. v. Energy Resources Conservation Board (Alta)*, 2011 ABCA 251 ["***Omers Energy***"]; and *Precision Plating Ltd. v. AXA Pacific Insurance Co.*, 2015 BCCA 277 ["***Precision Plating***"].
[13] *True Construction*, *supra* at para 34
[14] *Omers Energy*, *supra* at para. 30
[15] *Precision Plating*, *supra* at para. 28
[16] The "take it or leave it" nature of a standard form contract may differ from a contract or term that is frequently used in an industry (John D. McCamus, *The Law of Contracts*, 2d ed (Toronto: Irwin Law, 2012) at 185).

before *Sattva*, given the policy rationale underlying the *Ledcor* exception. Moreover, we can expect that the arbitrator's determination of whether a particular clause is in standard form or "widely used" may itself be alleged by disappointed parties to constitute an error of law justifying leave to appeal. As a result, parties should be wary of relying on the finality of arbitrators decisions in commercial disputes which involve the interpretation of a standard form contract.

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