

SCC clarifies law of contract interpretation

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The Supreme Court's clarification of the law of contract interpretation is important in the commercial real estate context.

The Supreme Court of Canada's recent decision in *Sattva Capital Corp. v. Creston Moly Corp.* ("Sattva") clarifies several important aspects of contract interpretation and addresses the availability of appeals of commercial arbitral awards.

This decision is important in the commercial real estate context; contract interpretation disputes frequently arise in commercial real estate agreements and leases, many of which require that such disputes be arbitrated.

Facts

In the *Sattva* case, the contract provided that a finder's fee of US \$1.5 million would be paid for brokering an introduction to acquire a mining property in Mexico. The fee was to be paid in shares no later than five days following the close of the transaction.

However, the parties disagreed on the valuation date of the shares, and consequently the number of shares that were to be paid. There were two competing interpretations of the contract. The parties submitted their dispute to arbitration under British Columbia's *Arbitration Act*.

Leave to appeal

Appeal rights from a commercial arbitration decision are narrowly circumscribed in Canadian domestic and international arbitration legislation.

Generally, rights of appeal are restricted to questions of law and leave to appeal is required, unless the arbitration agreement provides otherwise.

Supreme Court

The issue here was whether Creston Moly Corp.'s appeal regarding the arbitrator's interpretation of the contract raised a question of law, as required under s. 31(2) of British Columbia's *Arbitration Act*.

The Supreme Court of Canada unanimously decided that the contract interpretation issue raised on the appeal was not a question of law but, rather, a question of mixed fact and law; therefore, leave to appeal from the arbitrator's decision should *not* have been granted.

The Supreme Court of Canada unanimously decided that the contract interpretation issue raised on the appeal was not a question of mixed fact but, rather, a question of mixed fact and law: therefore, leave to appeal from the arbitrator's decision should not have been granted.

Contract interpretation

Sattva confirms that most contract interpretation issues will be treated as a question of mixed fact and law

as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

This approach marks a deliberate shift from the British common-law position that the interpretation of a contract is a question of law.

Questions of law

However, the Supreme Court has left the door open for certain limited contract interpretation issues to be

treated as pure questions of law. These include:

- legal errors made in the course 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; and
- issues in contract law that engage substantive rules, such as the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and the like.

The Supreme Court cautioned that while it may be possible to identify an extricable question of law from what has been initially characterized as a question of mixed fact and law, the circumstances in which this will occur are rare as the goal of contract interpretation is inherently fact-specific.

Principles of interpretation

The guiding principle in contract interpretation is to determine "the intent of the parties and the scope of their understanding."

This determination requires reading the contract as a whole and giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time the contract was formed.

Factual matrix

Surrounding circumstances should be used to deepen the decision-maker's understanding of the objective intentions of the parties.

While the factual matrix includes "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man", there are limits.

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Specifically, the evidence should be objective evidence of the background facts at the time of the execution of the contract that were known or reasonably ought to have been known by both parties.

Parol evidence rule

Sattva confirms that evidence concerning the factual matrix does not run afoul of the parol evidence rule; the factual matrix is used solely as an interpretive aid for determining the meaning of the words chosen by the parties, and not to change or overrule the meaning of those words.

Standard of Reasonableness

The Supreme Court held that in the context of commercial arbitrations, where appeals are restricted to questions of law, the standard of review will be reasonableness. This standard will apply *unless* the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise.

Under the reasonableness standard of appellate review, the relevant inquiry is whether the arbitrator's decision on the question at issue is unreasonable, keeping in mind that the decision-maker is not required to refer to all the arguments, provisions or jurisprudence, or to make specific

findings on each constituent element, for the decision to be reasonable.

Significance

The decision in *Sattva* serves as an important reminder that it will be very difficult to appeal from an arbitrator's interpretation of a contract.

Since the release of the Supreme Court's decision in this case, several trial and appellate courts across Canada have applied *Sattva* in a wide range of contract disputes, including disputes arising under leases and agreements of purchase and sale.

Western case law

In *Vallieres v. Vozniak*, the Alberta Court of Appeal considered whether a restrictive covenant registered against property was a permitted encumbrance under a residential purchase contract.

In *Domo Gasoline Corp. v. 2129752 Manitoba Ltd.*, the Court of Appeal of Manitoba heard an appeal from a judge's decision on an appeal from an arbitrator's award regarding whether the sale of cigarettes, oil products and gift certificates was designated as promotional and, thus, excluded from the calculation of additional rent as provided for in the lease.

Ontario case

Recently, the Ontario Court of Appeal heard the appeal in *2249778 Ontario v. Smith*. That case involved

a restaurant lease interpretation dispute. The issue was whether the installation of an ATM machine in the tenant's restaurant fell within the scope of the permitted use clause.

The Court of Appeal's decision will likely be very instructive on how the Supreme Court's guidance in *Sattva* regarding the principles of contract interpretation is applied in the context of a litigated dispute over the interpretation of a commercial real estate contract

REFERENCES: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, paras. 50 and 47; *Vallieres v. Vozniak*, 2014 ABCA 290, 2014 CarswellAlta 1565 (Alta. C.A.), additional reasons 2014 ABCA 384, 2014 CarswellAlta 2096 (Alta. C.A.); *Domo Gasoline Corp. v. 2129752 Manitoba Ltd.*, 2014 MBCA 76, 2014 CarswellMan 375 (Man. C.A.), leave to appeal refused from 2014 MBQB 87, 2014 CarswellMan 165 (Man. Q.B.); *2249778 Ontario v. Smith*, 2014 ONSC 93, 2014 CarswellOnt 392 (Ont. S.C.J.), affirmed 2014 ONCA 788, 2014 CarswellOnt 15703 (Ont. C.A.) (At the time of writing this article, the Ontario Court of Appeal's decision in this case was under reserve.)

BRIEFLY SPEAKING

EMPLOYMENT LAW: The *Accessibility for Ontarians with Disabilities Act, 2005* comes into force for organizations with at least 50 employees in Ontario on **January 1, 2015**. The Act requires public and private organizations in Ontario to take **proactive steps to eliminate barriers to the participation of individuals with disabilities in Ontario society**.

The **Integrated Accessibility Standards Regulation** enacted under the Act applies to all organizations that provide **goods, services or facilities** to the public or other third parties and that have a minimum of **one employee** in Ontario. The Regulation obligates organizations to **implement various accessibility policies and plans** and to conduct **staff training** on the Act and the **Ontario**

Human Rights Code as it relates to individuals with disabilities.

There are **staggered deadlines** for **private sector compliance** with the requirements under the **Regulation**, largely depending on whether a company is a **small organization** (i.e., with a minimum of one, but less than 50, employees), or a **large organization** (defined above). Note that **organizations with at least 20**

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