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Ontario Court of Appeal confirms de novo hearings in applications to decide arbitral tribunal's jurisdiction under the Model Law

JUNE 15, 2023 5 MIN READ

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The Court of Appeal for Ontario, in *Russian Federation v. Luxtona Limited*,[1] recently affirmed that the UNCITRAL Model Law on International Commercial Arbitration — which is in force in Ontario under the *International Commercial Arbitration Act* (the Model Law) — prescribes a *de novo* hearing in a court application to determine the arbitral tribunal's jurisdiction following an initial decision of the arbitral tribunal. On a *de novo* hearing, the parties are entitled as of right to adduce evidence, including expert evidence on foreign law, relevant to the jurisdictional issue.

Background

Luxtona, a former shareholder of a Russian energy company, alleged that Russia violated provisions of the *Energy Charter Treaty*[2] relating to investment protection.

Russia is a signatory to the Treaty but has not ratified it. Luxtona asserted that Russia agreed provisionally to apply the Treaty, including its arbitration provisions (to the extent that this provisional application was not inconsistent with Russia's constitution, laws and regulations). Russia opposed the provisional application, arguing that the Treaty's arbitration provisions were inconsistent with Russian law.

The arbitral tribunal determined that it had jurisdiction to arbitrate Luxtona's claims against Russia. The arbitral tribunal was "seated" in Toronto, meaning that the Ontario courts had jurisdiction over an appeal from the initial decision of the arbitral tribunal on jurisdiction.

Procedural history

Russia applied to the Ontario Superior Court to set aside the decision.

Russia filed new expert evidence on Russian law in support of its application, which Luxtona opposed. Justice Dunphy of the Commercial List determined that Russia could file fresh evidence on its appeal of the arbitral tribunal's decision on jurisdiction.

The case was subsequently assigned to Justice Penny, whom the parties asked to decide additional evidentiary issues respecting Russia's new evidence. Justice Penny determined that, as an application judge, he was not bound by Justice Dunphy's prior interlocutory ruling. He concluded that Russia was not entitled, as of right, to file evidence on the application and

could only do so if it could meet the test for admission of fresh evidence on appeal set out in *Palmer v. The Queen*[3] or bring itself within one of the exceptions to the principle that review of an arbitral decision is based on the record before the tribunal.

Russia appealed Justice Penny's interlocutory decision declining to admit its proposed fresh evidence to the Divisional Court. The Divisional Court held that Justice Penny had jurisdiction to revisit Justice Dunphy's interlocutory ruling and that jurisdictional set-aside applications are hearings *de novo* and, therefore, the parties can, as of right, introduce evidence that was not before the tribunal.

Luxtona sought and was granted leave to appeal the Divisional Court's decision, which was ultimately dismissed by the Court of Appeal.

The competence-competence principle is a rule of chronological priority

The Court of Appeal found that the Divisional Court properly considered the competence-competence principle. This principle serves to (a) resolve a legal loophole where an arbitral tribunal that finds itself lacking jurisdiction would lose its ability to make a ruling to that effect and (b) promote efficiency by limiting a party's ability to delay arbitration through court challenges to the tribunal's jurisdiction.

As set out in *Dell Computers v. Union des consommateurs*,[4] as a general rule, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator (which was done in this case). The competence-competence principle does not require special deference to be paid to an arbitral tribunal's determination of its own jurisdiction. Aligned with jurisprudence from the U.K., France and Singapore, the court must be unfettered by any principle limiting its fact-finding ability since it retains final say over questions of jurisdiction.

While there is no need to apply the *Palmer* test strictly, where a party has participated fully in the arbitration, its failure to raise a piece of evidence before the tribunal may be relevant as to the weight the court should assign that evidence.

The strong international consensus in favour of a *de novo* hearing

The Court of Appeal held that the Divisional Court's decision was supported by a strong international consensus in favour of a *de novo* hearing, including the leading case from the U.K. Supreme Court, *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*.[5]

In *Dallah*, the judges confirmed that it is consistent practice of courts to examine, or re-examine, for themselves the jurisdiction of arbitrators. The Court of Appeal noted that several other countries, including Hong Kong, Singapore and Australia, have explicitly endorsed and followed the reasoning in *Dallah*.

Article 34 of the Model Law supports the finding for a *de novo* hearing

Finally, the Court of Appeal held that the Divisional Court did not err in allegedly concentrating on only Article 16 of the Model Law and ignoring Article 34, which sets out

when a court may set aside an arbitral award. The Divisional Court correctly interpreted Article 16(3) as providing for a proceeding *de novo*, rather than a review or an appeal. Nothing in the language of Article 34(2)(a)(i) or (iii) suggests that the nature of the proceeding under those articles is any different.

Key takeaways

Parties to an international commercial arbitration agreement with a seat in Ontario now have greater clarity on the evidentiary procedures an Ontario court will apply in the context of jurisdictional set-aside applications under article 16. Parties should be prepared for a *de novo* hearing that may include tendering — or responding to — new evidence that was not before the arbitral tribunal.

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[1] 2023 ONCA 393.

[2] 17 December 1994, 2080 UNTS 95.

[3] [1980] 1 SCR 759 (SCC).

[4] 2007 SCC 34.

[5] [2010] UKSC 46.