Ontario Appeals Court on Arbitration Act Restricting Appeals of Arbitrator Appointment

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In a recent decision by the Ontario Court of Appeal—*Toronto Standard Condominium Corporation No. 2299 v. Distillery SE Development Corp.*, 2024 ONCA 712—the court tackled the thorny issue of appealing court-appointed arbitrators. This case serves as a stark reminder of the limitations imposed by arbitration legislation on court intervention and the appealability of certain orders.

Background of the Dispute

The parties, Toronto Standard Condominium Corporation No. 2299 ("Condo Corp.") and Distillery SE Development Corp. ("Distillery"), were embroiled in a dispute arising from their Shared Facilities Agreement ("SFA"). The SFA contained a dispute resolution process that culminated in binding arbitration. Notably, it allowed the parties to agree on a single arbitrator or, failing agreement, to each appoint an arbitrator who would then select a single arbitrator.

In 2018, after unsuccessful negotiations and mediation, the Condo Corp. served a notice of arbitration and both parties agreed that the Honourable Colin Campbell, K.C. would serve as arbitrator. However, the arbitration did not proceed at that time.

Fast forward to 2022, the Condo Corp. served a fresh notice of arbitration, leading to disagreements over the scope of the arbitration and the identity of the arbitrator. While

Distillery insisted on the prior agreement to appoint Mr. Campbell, the Condo Corp. hesitated, proposing a different arbitrator before eventually expressing willingness to proceed with Mr. Campbell under certain conditions.

The Application to the Court

The Condo Corp. brought an application seeking, among other things, an order appointing Mr. Campbell as arbitrator and confirming that all issues raised in the 2022 notice were within his jurisdiction. Distillery opposed, arguing that the agreement to appoint Mr. Campbell had been repudiated and that the new issues required fresh negotiation and mediation as per the SFA.

Justice Julia Shin Doi of the Superior Court of Justice found that the agreement to appoint Mr. Campbell remained valid and that any disputes over the scope of the arbitration should be determined by Mr. Campbell himself. She dismissed Distillery's motion to quash the 2022 notice.

The Appeal and the Central Issue

Distillery appealed the decision, essentially on two grounds: first, that the application judge erred in not finding the agreement to appoint Mr. Campbell repudiated; and second, that even if the agreement stood, the judge erred in not limiting his appointment to the issues from the 2018 notice.

However, the crux of the matter before the Court of Appeal was whether an appeal from a court-ordered appointment of an arbitrator is permissible under the **Arbitration Act, 1991, S.O. 1991, c. 17**. Specifically, does Section 10(2) of the Act, which states, **"There is no appeal from the court's appointment of the arbitral tribunal,"** preclude such an appeal?

The Court of Appeal's Analysis

Justice Zarnett, writing for the court, concluded that the

order appointing Mr. Campbell was indeed made under Section 10(1) of the Act, and therefore, **no appeal lies by reason of Section 10(2)**.

Addressing Distillery's arguments, the court noted that even though the Condo Corp. did not explicitly cite Section 10(1) in its application, the authority to appoint an arbitrator under the Act is clear. The court emphasized that **Section 6 of the Act prohibits court intervention in matters governed by the Act, except as provided within it**.

Justice Zarnett interpreted "a person with power to appoint the arbitral tribunal" in Section 10(1)(b) as including situations where parties jointly have the power to appoint but fail to agree or one party refuses to follow through. He stated:

"The phrase 'person with power to appoint an arbitrator' is not limited to a person with the sole or exclusive authority to make the appointment. It clearly extends to a person whose power resides in the requirement for their agreement to an appointment."

This interpretation aligns with the purpose of the Act, which seeks to facilitate arbitration and limit court intervention. Allowing an appeal in this context would undermine these objectives.

Implications of the Decision

This decision underscores the importance of understanding the limitations imposed by arbitration legislation on appeals. Parties should be aware that when a court appoints an arbitrator under Section 10(1) of the Act, **there is no right of appeal**. Attempts to circumvent this by arguing the court acted outside its jurisdiction are unlikely to succeed if the appointment falls squarely within the Act's provisions.

Furthermore, the court reinforced that issues concerning the

scope of the arbitration and the arbitrator's jurisdiction are matters for the arbitrator to decide, not the courts. Justice Zarnett highlighted:

"An appointment order will always relate to a dispute to be arbitrated. In giving effect to the principle in s. 17 of the Act, which contemplates the arbitrator first ruling on his own jurisdiction… the application judge did not step outside the authority to make an appointment under the Act."

Key Takeaways

- **Section 10(2) of the Arbitration Act precludes appeals from court appointments of arbitrators made under Section 10(1).**
- **Parties jointly possessing the power to appoint an arbitrator fall under "a person with power to appoint" in Section 10(1)(b).**
- **Court intervention is limited under the Act, and attempts to use general jurisdiction to appeal such appointments are inconsistent with the Act's intent.**
- **Disputes over the arbitrator's jurisdiction and the scope of arbitration are to be determined by the arbitrator, not the courts.**

Conclusion

The *Toronto Standard Condominium Corporation No. 2299 v. Distillery SE Development Corp.* decision serves as a critical reminder of the limitations on appealing court-appointed arbitrators under arbitration legislation. Parties entering arbitration agreements must recognize that the courts have a limited role and that certain orders, once made, are final and not subject to appeal. Understanding these nuances is essential to navigating the arbitration process effectively.

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