ARBITRATION APPEALS ON QUESTIONS OF LAW IN CANADA: STOP EXTRICATING THE INEXTRICABLE!

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In *Sattva Capital Corp. v Creston Moly Corp.*[1] ("*Sattva*"), the Supreme Court of Canada limited the availability of appeals from commercial arbitration awards on questions of law to those "rare" cases where the arbitral tribunal has made an "extricable error of law".[2] While the court provided some guidance as to how such errors should be identified, it is not surprising that creative counsel have tried to fit any and all grounds of appeal into this category, with some success. One result is that recent appellate decisions in Ontario and British Columbia have adopted different standards for the identification of extricable errors of law.

To eliminate the resulting uncertainty, to provide for a uniform national approach to this important question, and to enhance Canada's global place in arbitration, the Supreme Court of Canada will inevitably have to establish clear national parameters. The issue will take on even greater significance in Ontario if the province implements the recommendation of the Toronto Commercial Arbitration Society's Arbitration Act Reform Committee for a single statute governing all commercial arbitrations in Ontario and allowing appeals of both domestic and international arbitral awards if the parties opt in.

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[1] 2014 SCC 53.

[2] Under current Canadian arbitration legislation, appeals are permitted only in domestic arbitrations.

As we will discuss, the British Columbia courts have adopted an expansive view of extricable errors of law and the Ontario courts have adopted a narrow approach.

Ontario's approach should be preferred,[3] for at least three reasons.

First, the narrow approach is more consistent with Supreme Court of Canada jurisprudence; second, it is truer to the spirit of arbitration and the place of arbitration within the range of commercial dispute resolution options; and third, it provides greater certainty and predictability to parties that have contracted for arbitration to provide a final resolution to their disputes.

This article discusses two key appellate decisions issued in 2022, namely the decisions of the BC Court of Appeal in *Escape 101 Ventures Inc. v March of Dimes Canada* ("*March of Dimes*")[4] and of the Court of Appeal for Ontario in *Tall Ships Landing Development Inc. v Brockville (City)* ("*Tall Ships*")[5]. It explains why alleged errors in contractual interpretation by an arbitrator, no matter how much based on misapprehended facts, should not be characterized as extricable errors of law except in narrow and specific circumstances.

Before proceeding, we provide some caveats concerning the scope of our analysis.

First, we deal here with appeals on questions of law that are either permitted in domestic arbitration legislation (in most cases, only with leave of the court), or to which the parties have agreed in their arbitration agreements.

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[3] This is not to suggest that a narrow approach to extricable errors of law is unique to Ontario. For example, in *Christie Building Holding Company, Limited v Shelter Canadian Properties Limited*, 2022 MBKB 239 ("*Christie*"), The Manitoba Court of King's Bench followed the same approach as that of the Ontario courts. However, since the Manitoba Court of Appeal has not yet weighed in on the issue, we refer here to the "Ontario approach".

[4] 2022 BCCA 294, Fitch, Abrioux, and Voith JJA.

[5] 2022 ONCA 861, Doherty, Grant Huscroft, and Harvison Young JJA.

Second, this article is not intended to apply to statutory arbitrations and is of limited application to arbitrations arising from relationships affected by systemic inequalities in bargaining power, such as consumer and employment relationships. Our line of argument is specific to commercial arbitrations, those arising from voluntary agreements to arbitrate between commercial parties.

Finally, the exceptions to the general principle of arbitral competence-competence recognized in *Dell Computer Corp. v Union des consommateurs*[6] and *Uber Technologies Inc. v Heller*[7] do not affect the issues discussed here. This article focuses on the consequences when a valid arbitration agreement exists, and does not address questions of whether an arbitration agreement is valid.[8] Most saliently, the access to justice concerns that underpin the majority and concurring opinions in *Uber* are not implicated by the questions addressed in this article.

I. RELEVANT ARBITRATION PRINCIPLES

Since the *Tall Ships* and *March of Dimes* cases raise fundamental questions about the nature of arbitration and the relationship between arbitration and the courts, before discussing them we first review some relevant essential principles of commercial arbitration.

A commercial arbitration agreement is a contract: a private agreement subject to enforcement through the court system. While this may be a trite principle, its consequences are often forgotten. By agreeing to arbitrate, the parties choose to bind themselves to a set of jurisdictional and procedural outcomes. An arbitration agreement is said to have a dual effect: it confers upon the arbitral tribunal the power to issue a decision—an

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[6] 2007 SCC 34.

[7] 2020 SCC 16.

[8] That is, we are not concerned here with whether an arbitration agreement is "null and void, inoperative or incapable of being performed" within the meaning of Article 8 of the UNCITRAL Model Law on International Commercial Arbitration, on which the provincial International Commercial Arbitration Acts are based, or invalid under any of the grounds for invalidity recognized in the provinces' domestic Arbitration Acts.

award—that resolves the parties' dispute in a final and binding manner, and it ousts the jurisdiction of courts that would otherwise be seized of any disputes arising from the parties' relationship.[9] The possibility of an appeal from an arbitral award—in Canadian jurisdictions and in other jurisdictions that permit appeals—does not alter this fundamental precept.

Thus, when a court stays litigation of a dispute that is subject to a valid arbitration agreement, it does so for the same reason it enforces any contract: in order to hold the parties to their bargain. When a court enforces an arbitral award, it holds the parties to that same bargain.

This does not mean that parties have no recourse against an arbitral award. In all jurisdictions of which we are aware, including all Canadian provinces and territories and under federal legislation, an award may be set aside, either when the arbitration agreement itself is unenforceable, so that there is no valid bargain to which to hold the parties (for voidness, lack of capacity to contract, termination, violation of public policy, or other standard grounds of contractual invalidity), or when the arbitral process deviated from the arbitration agreement, so that enforcing the award would not uphold the parties' bargain (when the arbitral tribunal decided issues that the parties did not entrust to them, the composition of the tribunal or the arbitral procedure did not accord with the parties' agreement, one party was denied an opportunity to present its case, or the arbitral tribunal was corrupt or biased).

Appeals, even on questions of law, are antithetical to these principles. Nonetheless, all Canadian domestic arbitration statutes, except for those of Québec and the Federal government, provide losing parties, in specified circumstances (including where they have expressly so agreed), with recourse against arbitral awards in the form of appeals to the courts.[10]

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[9] For a more detailed explanation of the dual effect of arbitration agreements, see Gary B. Born, *International Commercial Arbitration*, 3rd ed (Kluwer Law International, 2021) at §8.01.

[10] Parties may also choose to permit appeals to a second arbitral tribunal, on whatever terms they have agreed, but such appeals are rare and outside the scope of this article.

This policy choice is intended in part to enable parties to be protected from outcomes arguably contrary to law, but more importantly to protect and uphold the consistency of the law itself. That is why most Canadian provinces permit appeals in domestic arbitrations (by default) only with leave of the courts and only on questions of law. As the Supreme Court observed in *Sattva*:

> One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation.[11]

The problem is that the availability of appeals also provides losing parties with opportunities to upset the basic tenets of their arbitration agreements at the expense of the winning parties and the public purse. As the last sentence of that passage from *Sattva* indicates, the corollary to the principle that losing parties may appeal questions of law in order to ensure the consistency of the law is the principle that appeals should not become just another "kick at the can".[12]

It follows that losing parties should not be permitted to escape from their arbitration agreements, inflicting costs and delays on winning parties and imposing costs on the public purse, by relitigating in an appellate context factual matters already determined by arbitrators. Such parties should be held

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[11] *Sattva*, *supra* note 1 at para 51.

[12] For a fuller discussion of this issue, see Joel Richler, "A Second Kick: Appeals in Canadian Domestic Commercial Arbitration" (2020) Adv Q 342. Making a similar point with respect to jurisdictional determinations by arbitrators, see J. Brian Casey, "Setting Aside: Excess of Jurisdiction or Error of Law?—A Second Kick at the Can" (2020) 1:1 Can J Comm Arb 37.

to their bargains, by which they entrusted those determinations to arbitral tribunals.

These considerations are especially salient when the decision under appeal involves contractual interpretation by the arbitral tribunal—a frequent occurrence, since commercial arbitrations "most commonly turn on issues of contractual interpretation".[13] In *Sattva*, the Supreme Court recognized that contractual interpretation involves questions 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".[14]

Accordingly, as the Supreme Court ruled in *Sattva*, appellate intervention is restricted to those cases where an error of law is extricable from the arbitral tribunal's mixed fact-and-law exercise of applying the principles of contractual interpretation to the words of the contract and its factual matrix. More precisely, "[l]egal errors made in the course of contractual interpretation include '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'."[15]

Most importantly, the Supreme Court in *Sattva* warned that "courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation."[16] Litigants will understandably "seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals,

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[13] Alan S. Rau and Edward F. Sherman, "Tradition and Innovation in International Arbitration Procedure" (1995) 30 Texas Intl L J 89, 101. See also James Spigelman, "The Centrality of Contractual Interpretation: A Comparative Perspective", The 2013 Kaplan Lecture (Hong Kong, 27 November 2013), online: <https://www.neil-kaplan.com/s/2013-The-Honourable-James-Spigelman-AC-QC-Issues-in-Contractual-Interpretation-A-Comparative-Perspec.pdf> accessed January 5, 2023 ("In my experience ... the majority of commercial disputes involve questions of contractual interpretation. Often, such questions are at the heart of the dispute.").

[14] *Sattva*, *supra* note 1 at para 50.

[15] *Ibid* at para 53, quoting *King v Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80 at para 21.

[16] *Sattva*, *supra* note 1 at para 54.

however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized."[17]

This is the context for the cases that motivated this article, all of which deal with alleged extricable errors of law by arbitral tribunals in their interpretations of contracts, and all of which were issued in the second half of 2022.

II. THE BRITISH COLUMBIA DECISIONS

In *March of Dimes*, the contract was for sale of a business. The purchase price was calculated as an initial payment plus an annual "earnout" based on the business's revenue over the following five years. The dispute arose over the value of the earnout, specifically whether revenue from contracts entered into after sale should be included in the calculation.[18]

In reaching his conclusion that some of the new contracts should be included, the arbitrator relied on evidence of the parties' post-contractual conduct to interpret their purchase and sale agreement, specifically the fact that Escape 101 did not object to March of Dimes' omission of a particular new contract from its revenue calculations. The arbitrator characterized this as an instance of admissible post-contractual conduct evidence to interpret an ambiguous contractual provision.[19]

The problem is that the new contract did not actually begin until the year after the arbitrator held that Escape 101 should have objected to its exclusion. At the time, there was nothing to which Escape 101 could object.[20] Still worse, it appears that the arbitrator never heard arguments from either party as to the relevance of this supposed subsequent conduct evidence.

Escape 101 sought leave to appeal on several bases, and leave was granted on the earnout issue, specifically that the arbitrator

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[17] *Ibid*. See also *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 ("Teal Cedar") at para 45.
[18] *March of Dimes*, *supra* note 4 at para 19.
[19] *Ibid* at paras 33-34.
[20] *Ibid* at para 38.

may have committed an extricable error of law in misapprehending the evidence.[21]

The BC Court of Appeal (per Voith JA) found that the arbitrator had indeed misapprehended the evidence, and ruled that this misapprehension constituted an extricable error of law. (This was the first case to reach the Court of Appeal under the new BC *Arbitration Act*,[22] which among other things requires that appeals from arbitral awards go directly to the Court of Appeal.[23])

The issue was whether, as Escape 101 argued, the arbitrator's misapprehension of the facts constituted an extricable error of law that might justify overturning the award. The Court reiterated earlier jurisprudence holding that, "a misapprehension of evidence that goes to the core of the outcome is an extricable error of law".[24] It later added, "[a] misapprehension of the evidence will warrant appellate intervention where a trial judge or arbitrator makes mistakes as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process."[25] Since the arbitrator had misapprehended the evidence, and this misapprehension was central to his reasoning and the outcome, the Court held that the arbitrator had made an extricable error of law. Finally, the Court held that due to the incompleteness of the evidentiary record, it lacked the evidentiary foundation

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[21] 2021 BCCA 313.

[22] British Columbia *Arbitration Act*, SBC 2020 c 2, s 59; RSBC 1996 c 55, s 31(1).

[23] See Lisa Munro, "B.C.—Material misapprehension of evidence is an extricable error of law " (23 September 2022), online (Arbitration Matters Blog): <https://arbitrationmatters.com/b-c-material-misapprehension-of-evidence-is-an-extricable-error-of-law-662/>. There was detailed argument about whether the legislature had intended to narrow the grounds for appeal when it amended the Act in 2020, but those issues are not relevant for present purposes because both the old and new versions of the Arbitration Act limit appeals to "questions of law".

[24] *March of Dimes*, *supra* note 4 at para 43.

[25] *Ibid* at para 74.

necessary to interpret the contract itself, so it remitted the case back to the arbitrator.[26]

It appears—at least from the Court of Appeal's portrayal of the award—that the arbitrator did indeed misapprehend the facts. In fact, both parties agreed that he had. One might argue that, on the assumption that the award was plainly wrong, the Court was correct in its ultimate decision to not let that award stand. But this would miss the salient point that the parties had agreed to a final determination of their dispute by their chosen arbitrator to the exclusion of the courts, the very point addressed by the Supreme Court in *Sattva*. In our view, the Court was wrong in finding that the arbitrator's misapprehension of the facts could be treated as an extricable error of law. No appeal ought to have been permitted.

The Supreme Court in *Sattva* emphatically admonished courts to exercise caution in identifying extricable errors of law from contractual interpretations.[27] Here, there was no evidence that the arbitrator "applie[d] an incorrect principle, fail[ed] to consider a required element of a legal test, or fail[ed] to consider a relevant factor", the examples of extricable errors of law given in *Sattva*. Instead, the arbitrator engaged in contractual interpretation, as he was empowered to do by the parties' agreement. Even if he erred in the process, that was a risk the parties accepted when they entrusted their dispute to arbitration. In line with their agreement and the BC *Arbitration Act*, such errors are not appealable.

It is telling to look at the cases that the Court of Appeal cited to establish the test for when a misapprehension of facts constitutes an extricable error of law.[28] None of them involved misapprehension of evidence for the purposes of contractual

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[26] *March of Dimes, supra* note 4 at para 108.

[27] The BCCA even cited the key passages in *Sattva*. *Ibid* at para 41. *See* Munro, *supra* note 23.

[28] *March of Dimes*, *supra* note 4 at para 43, citing *Sharbern Holding Inc. v Vancouver Airport Centre Ltd.*, 2011 SCC 23 at para 71; *Armstrong v Armstrong*, 2012 BCCA 166 at paras 65–67; *Bayford v Boese*, 2021 ONCA 442 at para 28; *Carmichael v GlaxoSmithKline Inc.*, 2020 ONCA 447 at para 125.

interpretation. What is more, not one involved an appeal from an arbitral award. They were all appeals from decisions of trial judges or administrative tribunals.

Context is critical. As the Supreme Court noted in *Teal Cedar*, the consequences of the distinction between questions of law and questions of mixed fact and law differ depending on the context. In civil litigation, the characterization of a question as one of mixed fact and law changes the standard of review; in an appeal from an arbitral award, "identification of a mixed question … defeats a court's jurisdiction".[29]

The difference arises because the scope of appellate jurisdiction turns not just on the type of determination under appeal (fact, law, or mixed fact and law), but also on the relationship between the appellate court and the first instance adjudicator. Regardless of whether any aspects of *Vavilov*[30] apply to appeals from commercial arbitrations (such as standards of review),[31] neither trial court nor administrative tribunal processes arise from contracts whereby the parties agree to oust the jurisdiction of the courts. In recognition of parties' autonomy to choose arbitration—and thereby to oust court jurisdiction—the Supreme Court of Canada and our legislatures have expressly limited the scope of appeals from arbitral awards. Holding the parties to their agreement to arbitrate includes holding them to their agreement that arbitral tribunals' decisions will be final.

It is important to note that limited appeal rights do not require that the arbitrator's award in *March of Dimes* had to stand. There was a route to a remedy.

As described by the Court of Appeal, the arbitrator relied on an interpretation of the evidence that was never argued by a party, and on which the parties had no opportunity to comment. If this was so, it would have been a reviewable procedural error:

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[29] *Teal Cedar*, *supra* note 17 at para 46.

[30] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[31] Whether any aspects of *Vavilov* apply to appeals from commercial arbitrations is expressly not addressed in this article.

denial of a reasonable opportunity to present one's case, and possibly even reasonable apprehension of bias. If these had been established on an application to set aside the award, a court may well have granted that relief.[32]

Unfortunately (although understandably), *March of Dimes* has already been followed. In *A.L. Sims & Son Ltd. v British Columbia (Transportation and Infrastructure)*, the BCCA granted leave to appeal on the basis of an alleged misapprehension of facts constituting an extricable error of law.[33] Dickson JA held that she was bound by her Court's decision in *March of Dimes*, although the respondent in that case has sought leave to appeal to the Supreme Court.[34]

However, Dickson JA chose to add in *obiter* that she supports the decision in *March of Dimes*: "Specifically, I agree that a material misapprehension of evidence going to the core of the outcome of an arbitral award can amount to an extricable legal error for purposes of s. 59 of the *Arbitration Act*."[35] Given the contrary authority in Ontario, which we discuss in the next section, *A.L. Sims* at minimum raises the prospect of an inter-provincial split in an area of substantial legislative overlap among the provinces' domestic arbitration statutes.

To be sure, BC's approach to the scope of appeals from arbitral awards is not uniformly interventionist. For example, in another recent case decided after *March of Dimes*, the BC Court of Appeal declined to overturn an arbitral award despite finding that the arbitrator had made errors of law.

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[32] British Columbia *Arbitration Act* at ss 58(1)(g) and 58(1)(h). As discussed below, the applicant in *Tall Ships* simultaneously appealed and moved to set aside the arbitral awards on the basis that the arbitrator's findings were based on arguments not made by the parties. Its application was rejected by the Court of Appeal as nothing more than a "bootstrap" of its unmeritorious appeal.

[33] 2022 BCCA 440.

[34] *Ibid* at para 42.

[35] *Ibid*.

Spirit Bay Developments Limited Partnership v Scala Developments Consultants Ltd.,[36] ("*Spirit Bay*") dealt with a construction dispute. Scala, the builder, initiated arbitration against Spirit Bay, the developer, seeking damages for unpaid invoices. Spirit Bay counterclaimed, alleging negligent work. The arbitrator found for Scala.

Spirit Bay appealed, alleging three extricable errors of law: that the arbitrator resorted to subsequent conduct evidence without first finding an ambiguity in the contractual terms; that the arbitrator erred in applying a "commercial reasonableness test" to interpretation of the contract; and that the arbitrator erred by granting unjust enrichment in a claim governed by an existing contract.

On appeal to the BC Supreme Court,[37] the application judge, Davies J, found that all three allegations of error were made out. However, he also found that the arbitrator's two errors with respect to contractual interpretation had no effect on the outcome of the award, and dismissed Spirit Bay's appeal in respect of those two issues. On the other hand, the application judge did set aside the award based on a finding that the arbitrator had erred in applying unjust enrichment to a claim that was covered by an existing contract, and remitted the case back to the arbitrator.

The Court of Appeal (per Hunter JA) in effect restored the arbitrator's award. With respect to the two contractual interpretation issues, the Court agreed with the application judge that the arbitrator's errors of law did not affect the result. Accordingly, they could not ground an appeal. For example, with respect to the role of commercial reasonableness in contractual interpretation, the Court emphasized that:

> … this analysis must be placed in the context of the requirement that parties can appeal

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[36] 2022 BCCA 407, Hunter, Stromberg-Stein, and Marchand JJA.

[37] The case came up before the new BC *Arbitration Act* came into force, which provides for appeals of arbitration awards directly to the Court of Appeal, with leave.

> arbitration awards on questions of law alone. The appellant has not identified an element of the Award that was affected by an erroneous application of the principle of commercial reasonableness. Accordingly, the possible overstatement of the principle by the arbitrator does not support setting aside the Award.[38]

With respect to the unjust enrichment issue, the Court found that, while the arbitrator could have explained his reasoning more clearly (and indeed made several "unnecessary … and potentially confusing" references to unjust enrichment[39]), he had in fact based his conclusions on breach-of-contract grounds, specifically that Spirit Bay's failure to pay for work received entitled Scala to treat the contract as having been repudiated. Since this was a finding of mixed fact and law, it was not appealable.[40]

While *Spirit Bay* appears to stand for a limited scope of appeals from arbitral awards, it is not inconsistent with *March of Dimes*. In *March of Dimes*, the arbitrator's error indisputably affected the outcome, while in *Spirit Bay* the court found either that the arbitrator had made no error of law or that his error did not affect the outcome. Moreover, in *March of Dimes*, the alleged extricable error of law came from misapprehension of the facts, while in *Spirit Bay* there was no alleged misapprehension of facts. Thus, BC courts appear to remain open to the possibility of extricating errors of law from arbitral tribunals' factual misapprehensions for the purposes of contractual interpretation where they affect the outcome.

Accordingly, despite the result in *Spirit Bay*, the approach of the BC courts remains worryingly contrary both to Supreme Court of Canada precedent (especially *Sattva*, but also the

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[38] *Spirit Bay, supra* note 36 at para 36.

[39] *Ibid* at para 50.

[40] *Ibid* at paras 47-48. *A*nother recent BC case also yielded a mixed outcome as to findings of extricable errors of law, albeit in the context of a statutory arbitration. See *Insurance Corporation of British Columbia v E.B.*, 2023 BCSC 120.

Supreme Court's overall approach to the relationship between arbitration and the courts) and to fundamental arbitration principles. It seriously misconstrues the role of the courts in relation to arbitral awards, which is not to be roving righters of wrongs, but rather to be guardians of party autonomy, the arbitration agreement, the arbitral process it gave rise to, and the integrity of the law. And it misconstrues the likely intentions of the parties when they agreed to arbitration.

III. THE ONTARIO DECISIONS

In *Tall Ships*, the Court of Appeal for Ontario determined an appeal from the decision of an application judge setting aside three arbitral awards arising from the same dispute. As the Court emphatically noted, it was "central to this appeal" that the parties had expressly agreed that the decision of the arbitrator would be final, subject only to appeals on questions of law.[41]

The dispute arose from a set of related contracts between Tall Ships and the City of Brockville establishing a public-private partnership to develop a waterfront property. Tall Ships made three claims. First, it claimed approximately $1,000,000 in remediation costs that Brockville refused to pay on the ground that the invoice was submitted after a contractual deadline to give notice of a dispute. Second, Tall Ships claimed $1,800,000 in construction costs beyond the estimated budget, allegedly incurred because the project grew in scope from the original plans. Third, Tall Ships claimed interest on its invoice, which it included in its statement of claim but which it had not notified Brockville it would claim prior to the contractual closing date.

In three awards, the arbitrator dismissed Tall Ships' claims. The remediation cost claim was dismissed because Tall Ships had not provided a notice of dispute until after a 15-day contractual deadline. Tall Ships was responsible for the additional construction costs since it breached an implied obligation as construction manager to notify Brockville of the cost overruns as they were incurred. Tall Ships' claim for

[41] *Tall Ships*, *supra* note 5 at para 2.

interest was estopped, as Tall Ships did not give notice of that claim before the date specified in the contract.

Tall Ships appealed to the Ontario Superior Court of Justice. Perhaps anticipating that the court would reject the appeals because they did not raise extricable questions of law, Tall Ships also relied on procedural unfairness grounds and applied to have the awards set aside on the basis that the arbitrator decided based on arguments not raised by the parties.

The application judge, Gomery J, held that the arbitrator had both made errors of law and committed instances of procedural unfairness in the process of interpreting the parties' contracts. Here, we are interested primarily in the alleged extricable errors of law. However, it is worth noting that the application judge accepted Tall Ships' position that the alleged legal errors also constituted a basis for setting the awards aside on procedural fairness grounds under section 46 of Ontario's *Arbitration Act*.[42]

As explained above, set-aside applications and appeals are distinct remedies designed to deal with different kinds of defects in an arbitral process. Indeed, the Court of Appeal noted in its decision overturning the application judge that mixing the two was inappropriate. It correctly observed that, by characterizing the arbitrator's interpretation of the parties' contracts as both legally erroneous and procedurally unfair, "the application judge effectively bootstrapped the substantive arguments."[43] Set-aside under section 46, the Court continued, is a "narrow basis" on which to attack an arbitrator's award. It

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[42] *Arbitration Act*, *1991*, SO 1991, c 17 ("*Arbitration Act*"). Tall Ships cited authority to the effect that the breach of a duty of procedural fairness is an error of law. Factum of Respondent Tall Ships Landing Development Inc. (on file with authors) at para 36, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. This appears to be the argument that the application judge accepted but that the Court of Appeal dismissed as "bootstrapping".

[43] *Ibid*.

is "not concerned with the substance of the parties' dispute and is not to be treated as an alternate appeal route."[44]

Returning to the application judge's findings of errors of law by the arbitrator, on the claim for remediation costs, the application judge held that the arbitrator made an error of law because his interpretation of the contracts as containing an implied "time of the essence" clause was "clearly unreasonable".[45]

On the cost overrun claim, the application judge held that the arbitrator erred in law by implying a term (for Tall Ships to keep Brockville informed of cost overruns) contrary to the established legal rules for implication of contractual terms and contrary to an express exclusion of liability in the Purchase Agreement. Since the contract contained an express term that appeared to exclude Tall Ships' liability for construction costs, the arbitrator's holding had to have been based only on his characterization of Tall Ships as a construction manager with notice obligations to Brockville, rather than on the elements of the legal test for implying terms. This, the application judge reasoned, was an error of law even under *Sattva*: that the arbitrator had allowed the factual matrix to overwhelm express contractual language.[46]

On the interest claim, the application judge held that the arbitrator's finding was erroneous in law because it relied on his previous finding that Tall Ships had a construction manager's notification duties.[47] Moreover, she held that the arbitrator's finding that Tall Ships was estopped from claiming interest stemmed from the same improperly implied duty, a finding that was "manifestly unfair" to Tall Ships.[48]

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[44] *Ibid*, citing *Alectra Utilities Corporation v Solar Power Network Inc.*, 2019 ONCA 254 at paras 20-27, 40-44, leave to appeal refused, [2019] SCCA No 202; *Mensula Bancorp Inc. v Halton Condominium Corporation No. 137*, 2022 ONCA 769, at paras 5, 40.

[45] *Tall Ships*, *supra* note 5 at para 27.

[46] *Ibid* at paras 56-57.

[47] *Ibid* at para 92.

[48] *Ibid*.

The Court of Appeal (per Harvison Young JA) reversed the application judge as to all three claims.

The Court held as a general matter that the judge had "erred by characterizing questions of mixed fact and law as extricable questions of law".[49] It emphasized the point that was not appreciated by the BC Court of Appeal in *March of Dimes*, namely that according to *Sattva* and its progeny, "judges exercising appellate powers … should be cautious about extricating questions of law from the interpretation process…. Failing to exercise such caution will result in the very inefficiencies, delays and added expense that choosing an arbitral process seeks to avoid."[50]

Further, the application judge erred by finding that the arbitrator's reliance on an unargued interpretation of the contract is an error of law where the interpretation was "clearly unreasonable", observing further that the deference due to arbitrators does not "displace the imperatives of fairness and reliability".[51] (It is worth noting in this regard that the City of Brockville did not accept that the arbitrator based his decision on submissions not made by the parties, arguing that those findings were supported by the evidence and submissions made by the parties.[52])

As the Court of Appeal emphasized, regardless of the appropriate standard of review, appeals from arbitral awards are not opportunities to litigate the case anew. One gets the sense that the application judge thought the role of a judge in reviewing applications for leave to appeal is to correct erroneous decisions by arbitrators. The Court of Appeal appropriately stepped in to correct this misunderstanding.

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[49] *Tall Ships*, *supra* note 5 at para 2.

[50] *Ibid* at para 3.

[51] *Ibid* at para 27.

[52] It is also noteworthy that the arbitration hearing was not transcribed, giving rise to some doubt as to what was actually submitted to the arbitrator at that hearing. The consequences of a limited record available to a court presiding over an appeal from an arbitral award are discussed in *Christie*, *supra* note 3 at paras 52-60.

As we have discussed, the Ontario *Arbitration Act* and Supreme Court of Canada precedent make clear that the role of courts in arbitration appeals is substantially narrower. The provincial legislatures have sought to restrict the scope of appeals, for the most part limiting them to questions of law unless the parties agree otherwise.[53] These limitations were enacted not in deference to the supposed wisdom of arbitrators, but rather in deference to the parties' agreement to have their dispute determined by an arbitral tribunal. After all, from the parties' perspective, the whole point of an arbitration agreement is to have their dispute resolved in arbitration rather than in court. Thus, while it is possible for an extricable error of law to arise in parts of an arbitral award, including those dealing with contractual interpretation, courts should be on guard for attempts to dress up determinations of fact or determinations of mixed fact and law (no matter how dubious) as errors of law.

Moreover, in *Tall Ships*, the parties had expressly limited the grounds of appeal to questions of law. It should be presumed that they did so because they wanted to guard against repetitive and costly re-litigation of factual issues in multiple fora. (The same could be said about the parties in the *March of Dimes* case.)

Narrowly construing the grounds of appeal is particularly important when the alleged error of law arises from contractual interpretation, which, since *Sattva*, is clarified to be an issue of mixed law and fact. As the Supreme Court remarked in *Sattva* (in a passage quoted by the Court of Appeal in *Tall Ships* at para 40):

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[53] In Ontario, under s 45 of the *Arbitration Act*, if the arbitration agreement so provides, an award may be appealed on questions of law (s 45(2)) or on questions of fact and mixed fact and law (s 45(3)). If the arbitration agreement does not deal with appeals, under s 45(1), a party may appeal an award "on a question of law with leave, which the court shall grant only if it is satisfied that, (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and (b) determination of the question of law at issue will significantly affect the rights of the parties." There are variances among the appeal provisions of provincial territorial acts. For example, in British Columbia, only appeals on questions of law are permitted. In Alberta, parties may not contract out of appeals on questions of law, with leave of the court. In Québec, no appeals are permitted.

> [C]ourts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *[Arbitration Act]*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized.[54]

Taking this admonition into account, the Court of Appeal overturned the application judge on all her findings of extricable errors of law. While one might disagree with the arbitrator's interpretations of the relevant contractual provisions, these were questions of "mixed fact and law which fell squarely within the purview of the arbitrator, by which process the parties had chosen to resolve this dispute, with appeals on questions of law only."[55]. The arbitrator, rather than improperly implying terms into the contract, "did precisely what he was asked to do: he interpreted the contract as a whole, within its relatively complex factual matrix of the agreements and relationships in play."[56]

Tall Ships was foreshadowed by two prior Ontario Superior Court of Justice decisions.

The first is *BBL. Con Design Build Solutions Ltd. v Varcon Construction Corporation* ("*BBL*"),[57] in which the application judge, Perell J, rejected as meritless BBL's application for leave to appeal. BBL hired Varcon to construct the underground shell of a residential building. Before construction was complete, BBL terminated the contract and served notice of arbitration. BBL and Varcon both accused the other of breaching the contract.

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[54] *Sattva*, *supra* note 1 at para 54.
[55] *Tall Ships*, *supra* note 5 at para 49 (emphasis in original).
[56] *Ibid* at para 81.
[57] 2022 ONSC 5714.

The arbitrator dismissed BBL's claims and allowed Varcon's counterclaims.

BBL applied for leave to appeal, arguing that "because the Arbitrator failed to interpret and apply the contract based on the express words of the Construction Contract in accordance with the governing principles of contractual interpretation, the Arbitrator made multiple errors of law."[58] It identified 45 separate instances, each comprising multiple errors of law, falling into 16 distinct categories of errors. Since the parties' agreement did not address the scope of appeals, only questions of law were appealable. Considering both the statutory language and case law, the Court helpfully set out the prerequisites for leave to appeal under s 45(1) of the *Arbitration Act*:

> a. First, the putative appellant must identify one or more arguable errors of law as opposed to questions of fact or questions of mixed fact and law.
>
> b. Second, the importance to the parties of the matters at stake in the arbitration must justify an appeal.
>
> c. Third, the identified question of law must significantly affect the rights of the parties. Once a question of law has been identified, the court must be satisfied that the determination of that point of law on appeal may prevent a miscarriage of justice.[59]

The application judge further set out a list, derived from extensively cited case law, of 18 principles he found "helpful" for differentiating issues of law from issues of fact and issues of mixed fact and law.[60] A key lesson to be taken from that list was:

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[58] *BBL*, *supra* note 57 at para 79.

[59] *Ibid* at para 86 (citations omitted).

[60] *Ibid* at para 88.

> [Q]uestions of contract interpretation and questions about whether a contract has been breached are questions of mixed fact and law. Extracting an error of law from an arbitrator's decision about the interpretation of and the performance of the terms of a contract in a breach of contract dispute is a very difficult assignment.[61]

The Court found that "the essence of BBL's argument for leave to appeal just comes down to an argument that the Arbitrator erred by looking to extrinsic facts to read the contract differently than what it plainly says."[62] Thus, BBL's claims of extricable errors of law failed because, even taking its arguments as correct, they would show only that the arbitrator erred in determining facts relating to whether the contract was breached, which are pure questions of fact. Even the alleged errors with respect to determining facts for the purposes of contractual interpretation were questions of mixed fact and law.[63]

The only actual extricable error of law alleged by BBL was that the arbitrator considered extrinsic evidence to interpret unambiguous contractual terms. However, the Court also found that BBL's understanding of the law of contractual interpretation was mistaken, as ambiguity is not a prerequisite to the use of extrinsic evidence to interpret a contract within its factual matrix.[64] The result was that since BBL had not alleged any extricable errors of law, its application for leave to appeal was dismissed.

The second case that presaged the outcome in *Tall Ships* was *The Tire Pit Inc. v Augend 6285 Yonge Village Properties Ltd.*

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[61] *BBL*, *supra* note 57 at para 89.

[62] *Ibid* at para 94.

[63] See also *Christie*, *supra* note 3 at para 135 (rejecting a similar allegation that an arbitrator's reliance on surrounding circumstances evidence to interpret the express terms of a contract constituted an extricable error of law).

[64] *BBL*, *supra* note 57 at paras 104-106, quoting *Sattva,* 2014 SCC 53 at paras 56-61.

("*Tire Pit*"),[65] in which the Ontario Superior Court of Justice again refused to grant leave to appeal for alleged extricable errors of law arising from contractual interpretation by an arbitrator. Tire Pit exercised its option to extend a commercial lease but the parties could not agree on the base rent. That determination was submitted to arbitration, and the arbitrator set the base rent at $50.00 per square foot.

Tire Pit sought leave to appeal, alleging 48 separate errors of law that the Court described as "extremely repetitive".[66] The application judge, Vermette J, refused leave to appeal, noting that most of the errors of law alleged by Tire Pit represented arguments it had made in the arbitration and that the arbitrator had rejected.[67]

Citing *Sattva*, the application judge found that all but one of Tire Pit's alleged errors clearly raised questions of fact or mixed fact and law; [68] Tire Pit did not identify any instances where the arbitrator allegedly failed to apply the correct legal test.[69] The other alleged error arguably raised a question of law, but the Court found it unnecessary to determine the character of the question since the complaint was meritless.[70]

The application judge therefore found that there was no question of law that could be a ground for leave to appeal. She went on to observe that, even if questions of law had been involved, none would have an impact beyond the parties, nor did they have "the degree of generality or precedential value that is generally expected of questions of law." Accordingly, granting leave to appeal would not contribute to the consistency of the law, "but, rather, would only provide a new forum for the parties to continue their private litigation".[71]

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[65] 2022 ONSC 6763.
[66] *Tire Pit, supra* note 65 at para 13.
[67] *Ibid* at para 14.
[68] *Ibid* at paras 17-19.
[69] *Ibid* at para 30.
[70] *Ibid* at paras 31-36.
[71] *Ibid* at para 37, quoting *Sattva*, *supra* note 1 at para 51.

IV. THE WAY FORWARD

In coming to our conclusion, we return to the two main forms of recourse Canadian law allows against a domestic arbitral award: set-aside and appeal.

In a set-aside application, the *outcome* of the arbitration *per se* is not determinative. Instead, grounds for set-aside arise from defects in the arbitrator's jurisdiction or the arbitration process.[72] An award that is scrupulously accurate in its characterization of the law and faultless in its identification and discussion of the facts may be subject to set-aside on such bases as that the arbitral tribunal decided issues outside its remit, or that one party was deprived of a reasonable opportunity to present its case. Equally, a poorly-written award replete with embarrassing legal errors may still withstand a set-aside application if the arbitral tribunal stayed within its jurisdiction, observed due process, and so forth.

In agreeing to arbitrate, parties must be taken to have agreed to have their disputes finally and efficiently determined by a decision-maker of their choice, to the exclusion of the courts. As the Court of Appeal for Ontario observed in *Tall Ships*, the application judge's decision setting aside the arbitrator's interpretation of the parties' contract not only contravened *Sattva*, but also undermined the parties' agreement:

> Characterizing the obligation to keep the [City of Brockville's] Steering Committee informed as an "implied term", such that it attracts a right to appeal in these circumstances, would entirely undermine the intent of these parties to submit this dispute, which arose out of a complex network of agreements and

[72] Cf *Tire Pit*, where the court rejected the applicant's motion to set aside the award for lack of procedural fairness, observing that "There is no basis to set aside the Award under subsection 46(1)6 or section 19 of the *Act*. The fairness arguments raised by Tire Pit all relate to the fairness of the decision, not the fairness of the process leading to the decision." *Ibid* at para 27. See also *Tall Ships*, *supra* note 5 to the same effect.

> relationships which developed over a decade, to arbitration, and would particularly frustrate their specific provision that only errors of law could be appealed.[73]

To the extent that our legislatures allow appeals on questions of law with leave, or allow parties to agree to have appeals on questions of law, unsuccessful parties should not be permitted to avoid their arbitration agreements by, in effect, treating their arbitrations as merely the first step in a litigation process. As an obvious example, even though the City of Brockville succeeded at the Court of Appeal, one would understand if it regretted its decision to arbitrate, and it may have achieved the same result at less cost and in less time had it proceeded with court litigation in the first instance.

The BC Court of Appeal in *March of Dimes* went off track because it failed to appreciate the importance of context in identifying which arbitral determinations involve questions of law, and therefore are appealable. If an appeal involves contractual interpretation by *any* first-instance adjudicator, courts should be "cautious in identifying extricable questions of law".[74] But if that first instance adjudicator is an arbitral tribunal, from which legislatures have expressly limited the scope of appeals, courts should be downright skeptical.

No doubt, cases will arise where an extricable error of law can be identified, but these will be very rare when the alleged error of law involves contractual interpretation.[75] If the appeal does not turn on the arbitral tribunal's interpretation of the contract, an extricable error of law may be more easily identifiable.[76]

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[73] *Ibid*.

[74] *Sattva*, *supra* note 1 at para 54. See also *Corner Brook (City) v Bailey*, 2021 SCC 29 at para 44.

[75] *Cf Christie*, *supra* note 3 rejecting all of the appellants' allegations of extricable errors of law in the arbitral tribunal's interpretation of the parties' contract.

[76] An example of an appeal from an arbitral award on an issue other than contractual interpretation is *Wastech*, where the main issue on appeal was

An extricable error of law may arise from contractual interpretation by an arbitrator in the three circumstances listed by the Supreme Court in *Sattva*: 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. While the Court stated that legal errors made in the course of contractual interpretation "include" those three circumstances, and thus may have intended to suggest that other such circumstances may exist, no others have been identified in subsequent jurisprudence.

More generally, when an appellant, or applicant for leave to appeal an arbitral award, alleges an error of law in an award, courts should consider the above three circumstances set out in *Sattva* and ask themselves primarily whether the alleged error involves misinterpretation of a statutory or regulatory provision or departure from an established common law principle. If not, courts should hesitate to accept that an appealable question of law exists.

When confronted with apparent egregious errors that lead to unfairness, like the arbitrator's misapprehension of the facts in *March of Dimes*, the temptation will be strong to find a way to "make things right" by overturning the arbitral tribunal's decision. If the arbitral tribunal has committed a procedural error in finding and analyzing the facts, setting aside the award is a viable option. However, if a court grants leave to appeal because the arbitral tribunal misapprehended key facts or because the court disagrees with the tribunal's interpretation of a contract, it will have fallen into the trap identified by Gascon J, writing for a unanimous (on this point) Supreme Court in *Teal Cedar*:

> Courts should … exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically

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the scope of contracting parties' duty of good faith performance. *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7.

> frame a mixed question as a legal question—for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments—are transparent. A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings.[77]

Inevitably, the issue of properly identifying extricable errors of law in arbitral awards will again come before the Supreme Court of Canada. When it does, it will present the Court with an opportunity to extend its series of judgments supportive of the concept of arbitration as a private process driven by party autonomy, and to make clear that Canada is committed to an arbitration regime that is consistent with international standards, commercial efficiency, and effective dispute resolution in a process chosen by the parties. The Court should take advantage of that opportunity to espouse, once again, the narrow approach to extricable errors of law exemplified by the Ontario judgments discussed in this article, and to reject the BC Court of Appeal's expansive approach.

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[77] *Teal Cedar*, *supra* note 17 at para 45 (citations omitted).