

## Ontario Court of Appeal Reiterates Rare Circumstances to Set Aside an Arbitrator's Award

Jordanna Cytrynbaum, Robert Sniderman

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### Overview

In a recent decision of the Ontario Court of Appeal, *Tall Ships Development Inc v Brockville (City)*,<sup>1</sup> the Court overturned an application judge's ruling setting aside an arbitrator's award for purported errors in law. In particular, the Court held that these errors concerned questions of mixed fact and law, not questions of law, and were shielded from review as the parties explicitly agreed that the arbitrator's award could only be reviewed for questions of law.

The *Tall Ships* decision is the latest of a few recent appellate decisions that reiterate the narrowness of a court's power to set aside an arbitrator's decision, especially where the parties have limited the scope of possible review.<sup>2</sup> In such circumstances, alleged errors relating to contractual interpretation will usually amount to questions of mixed fact and law and will be insulated from review where, as here, only questions of law can be reviewed.

### Background

The litigation arose out of a partnership between the parties to develop a waterfront property complex. The parties understood that the construction budget estimate for the roughly 27,000 square foot building was \$7,400,000, and the City of Brockville would provide Tall Ships Landing Development Ltd (Tall Ships) with a fee for its work as construction manager.<sup>3</sup>

Once construction was completed, the building was nearly 6,000 square feet larger than designed and came in approximately \$1,800,000 over budget. The litigation concerned (1) whether Brockville was liable to pay the added construction costs, (2) whether Brockville could refuse to pay \$929,893 in remediation costs, and (3) whether Brockville was liable to pay interest on the invoices.<sup>4</sup>

Under the parties' agreement, disputes would be submitted to arbitration, and that the decision of the arbitrator was final, subject only to appeals on questions of law under s. 45(2) of the *Arbitration Act, 1991*.<sup>5</sup>

### Arbitral Awards

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Following a four-week arbitration hearing, the arbitrator issued three decisions rejecting Tall Ships' claims. While each decision addressed one of the three issues in dispute, the arbitrator made clear that the three awards were to be read together.<sup>6</sup> The arbitrator's rulings can be summarized as follows:

- With respect to remediation costs, the parties agreed that if Brockville rejected a request for payment, Tall Ships would be deemed to accept Brockville's determination unless challenged within 15 days – since Tall Ships did not challenge Brockville's rejection in the time allotted, Tall Ships could not claim these amounts;<sup>7</sup>
- With respect to cost overruns, Tall Ships, as construction manager, was obligated to report to Brockville and manage their expectations – despite this, Tall Ships failed to disclose that the project would be larger and more expensive than originally planned, and therefore “withheld information arbitrarily” and was liable for the cost overruns;<sup>8</sup> and
- With respect to the interest claim, Tall Ships was estopped from claiming interest on certain invoices since the parties did not contemplate interest owing in respect of those amounts, nor did Tall Ships advise of its intention to claim interest.<sup>9</sup>

## Application Judge's Decision

Tall Ships appealed the arbitral awards to the Ontario Superior Court of Justice and argued that the arbitrator made errors of law in rejecting each of Tall Ships' claims. The application judge accepted Tall Ships' arguments and found that:

- By requiring Tall Ships to challenge Brockville's decision within 15 days, notwithstanding that Brockville did not submit that decision in the 30-day period noted in the agreement, the arbitrator erred in improperly relying on an implicit “time of the essence” clause;<sup>10</sup>
- By holding that Tall Ships had various alleged obligations as construction manager, the arbitrator erred by improperly relying on an implied obligation under the agreement to keep Brockville apprised of changes to the budget or the size or design of the building;<sup>11</sup> and
- With respect to the interest claim, the arbitrator's analysis was based on the flawed findings with respect to Tall Ships' duties as construction manager, and accordingly, the decision was based on a legal error.<sup>12</sup>

The application judge also held that the arbitrator's decisions breached Tall Ships' procedural fairness rights under section 46 of the *Arbitration Act, 1991*, as Brockville did not plead or argue an implied “time of the essence” clause or Tall Ships' alleged duties as construction manager.<sup>13</sup>

## Appeal Decision

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On appeal, a unanimous panel of judges allowed Brockville's appeal and overturned the application judge's decision, thereby reinstating the arbitrator's rulings. On each issue, the Court held that the application judge mistakenly characterized the arbitrator's findings as questions of law rather than questions of mixed fact and law. In particular, the Court reasoned that the arbitrator's analysis was part of the very task the parties wanted the arbitrator to complete (i.e., to analyze and interpret the contracts at issue), and consequently, per the parties' agreement to only allow appeals on questions of law, the arbitral awards were insulated from review.

The Court emphasized that "the heart of the task which the parties agreed to have the arbitrator determine was the interpretation of the contractual arrangements between these parties" and that, under their agreement, "only questions of law could be subject to appeal."<sup>14</sup> This context was of utmost importance to the decision to allow Brockville's appeal.

The Court held it was not a reasonable interpretation to suggest that the arbitrator was implying a "time of the essence" clause when reading the decisions as a whole. Rather, "time of the essence" was only referenced in two paragraphs of the lengthy arbitral awards, and in context, the language was not used as a term of art, but an acknowledgement that the contract deemed Tall Ships as accepting Brockville's decision if it did not respond in 15 days.<sup>15</sup> Accordingly, the Court held that this "was a question of mixed fact and law which fell squarely within the purview of the arbitrator", and was shielded from review.<sup>16</sup>

Similarly, when considering Tall Ships' obligations as construction manager, and whether they were liable for cost overruns, the Court recognized that the arbitrator found that Tall Ships had knowledge of the true size and cost of the project "in sharp contrast" to Brockville's knowledge, but never corrected Brockville's belief that construction would not exceed \$7,400,000. In that context, the Court held that the arbitrator was not imputing implied terms and obligations into the contract, but rather acknowledging Tall Ships' general duty, as part of its duty of good faith, "to keep [Brockville] apprised of financial risks as the project continued."<sup>17</sup> This was also a question of mixed fact and law, and thereby shielded from review.<sup>18</sup> With respect to the interest claim, the Court reiterated their determination that findings regarding Tall Ships' obligations were matters of mixed fact and law, and thereby shielded from review.<sup>19</sup>

When addressing the application judge's arguments regarding procedural fairness rights, the Court generally disagreed with Tall Ships' position, and held that Tall Ships had an opportunity to respond to the points raised. Crucially, the Court criticized the application judge's acceptance of these arguments, as they were used to "bootstrap" the findings relating to alleged 'questions of law.' The Court made clear that, while a party may appeal an arbitral award on procedural fairness grounds under section 46 of the *Arbitration Act, 1991*, this section "cannot be used as a broad appeal route to bootstrap substantive arguments attacking an arbitrator's findings which the parties had agreed would be immune from appeal."<sup>20</sup>

## Going Forward

The Court's decision in *Tall Ships* reinforces that courts will only intervene to set aside arbitral awards in narrow circumstances – particularly where parties agree that the arbitrator's decision will be final and subject to review only on questions of law. In these circumstances, questions of mixed fact and law cannot be impugned as they fall squarely within the arbitrator's purview. While a reviewing court *may* find an extricable error of law within a question of mixed fact and law, it will be a rare case where questions of law will amount to extricable errors of law, especially in cases involving contractual interpretation.<sup>21</sup>

In the course of negotiating and concluding contracts, parties regularly include provisions setting out how disputes will be resolved. These provisions may take the form of either a dispute resolution clause within a larger agreement (as in this case) or a separate arbitration agreement. When drafting and negotiating these clauses or agreements, parties should consider the scope of issues that will be referred to arbitration and related procedures, as well as the scope of potential review of an arbitrator's award.

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<sup>1</sup> 2022 ONCA 861 [*Tall Ships*].

<sup>2</sup> For another recent case, see *Mensula Bancorp Inc v Halton Condominium Corporation No 137*, 2022 ONCA 769.

<sup>3</sup> *Tall Ships* at paras 4-7.

<sup>4</sup> *Tall Ships* at paras 8-11.

<sup>5</sup> SO 1991, c 17.

<sup>6</sup> *Tall Ships* at paras 41 and 90.

<sup>7</sup> *Tall Ships* at paras 18-23.

<sup>8</sup> *Tall Ships* at paras 51-53.

<sup>9</sup> *Tall Ships* at para 91.

<sup>10</sup> *Tall Ships* at para 25.

<sup>11</sup> *Tall Ships* at paras 55-57.

<sup>12</sup> *Tall Ships* at para 92.

<sup>13</sup> *Tall Ships* at paras 26 and 55.

<sup>14</sup> *Tall Ships* at para 39.

<sup>15</sup> *Tall Ships* at paras 42-45.

<sup>16</sup> *Tall Ships* at para 49.

<sup>17</sup> *Tall Ships* at paras 74-80.

<sup>18</sup> *Tall Ships* at paras 80-82.

<sup>19</sup> *Tall Ships* at paras 93-96.

<sup>20</sup> *Tall Ships* at paras 2, 82, and 95.

<sup>21</sup> See, e.g., *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para 133.