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May 6, 2026

Arbitration on the Commercial List: Stays, Enforcement & Award Challenges in Ontario

Why the Commercial List?

The Commercial List offers a specialized forum for arbitration-related applications in complex commercial disputes. Its judges are well versed in the domestic *Arbitration Act*, the *International Commercial Arbitration Act* (ICAA), and the *UNCITRAL Model Law on International Commercial Arbitration* (Model Law), ensuring efficient and consistent management of stay motions, enforcement proceedings, and award challenges.

Stays of Court Proceedings in Favour of Arbitration

Ontario courts apply a strong presumption in favour of arbitration, reflecting both legislative intent and the Supreme Court's direction that arbitration agreements should be enforced in all but the clearest of cases. Under section 7(1) of the *Arbitration Act*, the Court must stay a proceeding where the parties have agreed to arbitrate, subject only to the narrow exceptions in section 7(2). The same principle applies in international matters under section 9 of the ICAA, which implements Article 8 of the Model Law and requires referral to arbitration unless the agreement is "null and void, inoperative or incapable of being performed."

The governing framework for a stay, now routinely applied in Ontario, was set out by the Supreme Court in *Peace River Hydro Partners v Petrowest Corp*. The applicant must show that: (1) a valid arbitration agreement exists; (2) the court proceeding was commenced by a party to that agreement; (3) the dispute is arguably within the scope of the agreement; and (4) no statutory or contractual exception applies. The threshold is intentionally low. The applicant need only establish an arguable case that these prerequisites are met, reflecting the competence-competence principle that arbitrators are presumed to rule on their own jurisdiction. As confirmed in *Husky Food Importers & Distributors Ltd v JH Whittaker & Sons Limited*, the *Peace River* framework applies equally to stays sought under both section 7 of the Arbitration Act, and section 9 of the ICAA, ensuring a consistent analytical approach across domestic and international arbitration proceedings.

The statutory exceptions to a stay are narrowly confined. Under

section 7(2), the Court may refuse a stay only where a party lacked capacity, the agreement is invalid, the dispute is non-arbitrable, the motion is delayed, or the matter is subject to default or summary judgment. Comparable limits under the Model Law have been applied with equal restraint.

Recent Supreme Court jurisprudence reinforces this narrow approach. In *TELUS Communications Inc v Wellman*, the Court confirmed that policy considerations cannot justify refusing a stay where a valid arbitration clause applies. In *Uber Technologies Inc v Heller*, an arbitration clause was struck down as unconscionable only in exceptional circumstances. *Peace River* added a limited insolvency-related exception, holding that arbitration may yield to the integrity of court-supervised proceedings, but insolvency alone does not render an agreement inoperative.

Taken together, these cases confirm that a stay remains the default outcome wherever an arbitration clause even arguably applies. Ontario courts interpret such clauses broadly, resolve doubts in favour of arbitration, and intervene only in the clearest cases, an approach consistently reflected on the Commercial List.

Recognition & Enforcement of Awards

Domestic Awards

Under section 50(1) of the *Arbitration Act*, a domestic arbitral award may, with leave of the Court, be enforced in the same manner as a judgment. Leave is granted unless the award has been set aside or is subject to a pending set-aside application under section 46. Challenges to enforcement are rare and mirror the limited grounds for setting aside, such as invalid agreement, lack of jurisdiction, or denial of procedural fairness. Ontario courts interpret these grounds narrowly and consistently emphasize deference and finality: enforcement is the default outcome, and refusal is reserved for exceptional cases where a fundamental procedural or jurisdictional defect is clearly established.

International Awards

International arbitral awards seated in or sought to be enforced in Ontario are governed by the ICAA, which incorporates the Model Law and gives effect to the New York Convention. Under Article 35, awards must be recognized and enforced unless one of the limited exceptions in Article 36 applies, such as incapacity, an invalid arbitration agreement, lack of notice or opportunity to present a case, an award beyond the submission's scope, procedural irregularity, or the award having been set aside at the seat. Enforcement may also be

refused if the subject matter is not arbitrable or if recognition would offend Ontario public policy. Ontario courts interpret these grounds narrowly, maintaining a strong pro-enforcement bias and intervening only where a clear violation of the enumerated grounds is proven.

Challenges & Set-aside Applications

Ontario courts continue to apply a highly deferential approach to applications seeking to set aside arbitral awards, whether brought under section 46 of the *Arbitration Act* or Article 34 of the ICAA. The trend in recent jurisprudence is clear: the grounds for judicial intervention remain narrow, and courts will not revisit the merits under the guise of procedural fairness or jurisdiction.

Domestic Awards

Under section 46 of the *Arbitration Act*, a domestic arbitral award may be set aside only for serious procedural or jurisdictional defects; for example, where the arbitration agreement is invalid, the tribunal exceeded its jurisdiction, or a party was denied a fair opportunity to be heard. The provision is not an alternate appeal route, and the threshold for intervention is deliberately high.

Ontario courts have repeatedly confirmed that errors of law or fact do not amount to jurisdictional errors. In *Alectra Utilities Corporation v Solar Power Network Inc* and *Mensula Bancorp Inc v Halton Condominium Corporation No 137*, the Court of Appeal held that even an unreasonable or incorrect interpretation of a contract does not engage section 46(1)3. A tribunal that has jurisdiction to decide a dispute does not lose that jurisdiction merely by deciding it “badly.” As the Court cautioned, section 46 cannot be used to bootstrap a review of an award’s correctness or reasonableness. This ensures that parties who have waived appeal rights cannot repackage alleged legal errors as “jurisdictional” to obtain what is effectively an appeal.

Ontario courts show strong deference to arbitral independence, intervening on procedural-fairness grounds only for serious defects that undermine the integrity of the process. In *Tall Ships Development Inc v Brockville (City)*, the Court of Appeal reversed an application judge’s decision to set aside three awards, cautioning that section 46 cannot be used as a broad appeal route to re-litigate mixed fact and law. Absent a genuine breach of natural justice or jurisdiction, domestic awards must stand; otherwise, arbitration would lose the efficiency and finality it is meant to secure.

The fraud and public-policy grounds under section 46 are

applied with equal restraint. In *Campbell v Toronto Standard Condominium Corporation No 2600*, the Court confirmed that fraud requires actual dishonesty, not mere equitable or "constructive" unfairness, and that public-policy review is reserved for violations of fundamental justice, which are exceedingly rare.

A rare example of a successful set-aside is *Alberta Cricket Association v Alberta Cricket Council*. There, the arbitrator failed to provide any reasons for a central finding, contrary to section 38(1) of the Arbitration Act, which requires written reasons. Justice Perell held that this omission amounted to a fundamental breach of procedural fairness and set aside the award.

Overall, recent Ontario case law shows a consistent theme of judicial restraint in reviewing domestic awards. Courts distinguish sharply between a true jurisdictional or fairness lapse and an arbitrator's mere error within jurisdiction. The former may justify set-aside; the latter does not. As one appellate judge noted, the task is to examine what the procedural error did to the reliability of the result, or to the fairness or appearance of fairness of the process. If the award remains fair and within the tribunal's authority, it will stand.

International Awards — Article 34 of the ICAA

Ontario's approach to international arbitration mirrors the same narrow stance applied to domestic awards, with the ICAA and Article 34 of the Model Law setting out the exclusive and exhaustive grounds for set-aside. These grounds, such as an invalid arbitration agreement, an inability to present one's case, excess of authority, improper tribunal composition, or conflict with public policy, are strictly procedural in nature. Courts have repeatedly emphasized that a set-aside application is not an appeal on the merits (*Clayton v Canada (Attorney General)*).

The *Clayton case*, arising from the *Bilcon* NAFTA arbitration, illustrates this principle. The investors sought to set aside the tribunal's award on the basis that it misapplied the law of causation. Both the Superior Court and the Court of Appeal rejected that argument, holding that even a serious or arguable legal error does not amount to a jurisdictional defect under Article 34. The decision reinforces that Ontario courts will intervene only where a procedural flaw undermines the fairness or integrity of the arbitral process, not simply because a party disagrees with the tribunal's reasoning or outcome.

Public policy challenges face the same high threshold. As *Clayton* confirmed, Article 34(2)(b)(ii) is "narrow and exceptional" and reserved for awards that truly offend Canada's

most basic notions of justice. An incorrect, harsh, or even unreasonable result does not suffice. Public policy is not a backdoor to reargue the merits.

Procedural fairness, however, remains non-negotiable. Two recent Commercial List decisions illustrate the limits. In *Aroma Franchise Company Inc v Aroma Espresso Bar Canada Inc*, the Court of Appeal reinstated an award despite the arbitrator's failure to disclose a separate, unrelated engagement with one party's counsel. The Court held that nondisclosure alone does not establish bias — the test is objective, asking whether a fair-minded observer would perceive a real risk of partiality.

By contrast, in *Vento Motorcycles Inc v Mexico*, the Court of Appeal found that undisclosed communications between Mexico and its party-appointed arbitrator created a reasonable apprehension of bias and mandated that the award be set aside. Once bias is established, the Court has no discretion to preserve the award: impartiality is fundamental, and any taint to it is fatal.

Taken together, these cases reaffirm that Article 34 operates as a narrow safeguard, not a second look. Ontario courts will intervene only for true violations of natural justice or jurisdiction, not to revisit findings on law or fact. This approach strengthens Ontario's reputation as an arbitration-friendly jurisdiction that values both finality and procedural integrity.

Appeals

In international commercial arbitrations, no appeal lies under the ICAA. This reflects the Model Law's principle of finality and minimal judicial intervention; an international award may be challenged only through the limited set-aside mechanism under Article 34. Ontario courts have repeatedly confirmed that the merits of an arbitral award are not open to review, and that intervention is reserved for fundamental procedural defects.

In domestic arbitrations, appeal rights are narrowly defined under section 45 of the *Arbitration Act*. A party may appeal on a question of law with leave of the Court, unless the arbitration agreement excludes that right. Appeals on questions of fact or mixed fact and law are available only if the parties expressly agree. The legislation also allows parties to contract out of appeals altogether, reinforcing the principle of party autonomy.

An error of law arises where an arbitrator applies the wrong legal test, omits an essential element of that test, or relies on factors that are legally irrelevant. As the Supreme Court explained in *Teal Cedar Products Ltd v British Columbia*, most issues of contractual interpretation are mixed questions of fact

and law, not pure questions of law.

Recent Ontario cases reinforce that appellate intervention is exceptional. Leave is granted only where there is a genuine, material legal issue whose resolution will add to the law's clarity or ensure fairness. Even then, the Court's task is not to reweigh evidence or substitute its own interpretation, but to determine whether the award is defensible in law.

Taken together, these principles reflect a coherent policy choice: appeals from arbitral awards are the rare exception. They preserve arbitration's defining features, party autonomy, efficiency, and finality, while allowing for limited correction of genuine legal error.

Conclusion

The Commercial List continues to set the standard for arbitration-related cases in Ontario. Its judges understand the realities of complex commercial disputes and bring practical experience to managing stay motions, enforcement applications, and award challenges. Recent cases confirm that Ontario courts will uphold party autonomy and finality, stepping in only when a clear procedural or jurisdictional flaw demands it. This balanced, arbitration-friendly approach makes Ontario, and the Commercial List in particular, a trusted forum for resolving international and domestic disputes efficiently and with confidence.