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Appeal of Arbitral Award is a Hearing de Novo

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An application to set aside an arbitral award for lack of jurisdiction is a hearing *de novo*, not a review or appeal from the decision of the tribunal – with the caveat that where a party has participated fully in the arbitration, its failure to raise a piece of evidence before the tribunal may be relevant to the weight the court should assign to that evidence.

In *Russian Federation v. Luxtona Limited*, 2023 ONCA 393, the Court of Appeal considered an order of the Divisional Court 2021 ONSC 4604, in which the Divisional Court addressed two issues: 1) whether the application judge had jurisdiction to revisit an interlocutory issue that Justice Dunphy had previously decided; and 2) whether the appeal to the application judge was a review or a hearing *de novo* on which new evidence was admissible without satisfying the test for admission of new evidence on appeal. The Divisional Court held that the application judge had the jurisdiction to revisit the interlocutory issue. On the second issue, it held 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. (paras. 6-8) Luxtona sought and was granted leave to appeal to the Court of Appeal where the Court addressed the following three issues:

1) Did the Divisional Court properly consider the competence–competence principle when deciding that the words “decide the matter” in Article 16 of the Model Law as adopted in Ontario’s International Commercial Arbitration Act (“ICAA”), mean that Russia can file the Fresh Evidence as of right?

2) Did the Divisional Court err in concluding that there was an “international consensus” that parties may file fresh evidence as of right in jurisdictional set-aside applications?

3) Did the Divisional Court err in deciding the appeal based only on an interpretation of Article 16 and without regard to Article 34?

Issue 1 – Competence-Competence

The Court rejected Luxtona's argument that the Divisional Court erred by not referring to the competence-competence principle. Article 16(1) of the Model Law provides that an arbitral tribunal may rule on its own jurisdiction. The Court held that the competence-competence principle is "fundamental to international commercial arbitration." (paras. 28-30)

The competence-competence principle means that the arbitrator must first resolve a jurisdiction challenge. It does not require any special deference be paid to the arbitral tribunal's determination of that issue. The Court held that the principle "is best understood as a 'rule of chronological priority', rather than 'empowering the arbitrators to be the sole judge of their jurisdiction.'" (paras. 32-34)

Because courts retain the final say over questions of jurisdiction, they must be "unfettered by any principle limiting its fact-finding ability". (para. 38) An application to set aside an arbitral award for lack of jurisdiction is therefore a hearing *de novo*, not a review or appeal from the decision of the tribunal. (para. 40) The Court held that there is a "significant caveat" to that principle, however: "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". (paras. 41-42)

Issue 2 – International Consensus

The Court rejected the appellant's submissions that the Divisional Court erred when it held that there was a "strong international consensus" in favour of its conclusion that a *de novo* hearing was appropriate in this case. The Court of Appeal found that the weight of international authority supported the Divisional Court's conclusion. (paras. 43-44) Accordingly, it found no error in the Divisional Court's determination that there was a strong international consensus in favour of a *de novo* hearing. (para. 49)

Issue 3 –Article 16/Article 34

The Court of Appeal was not persuaded by the appellant's argument that the Divisional Court had erred by concentrating only on Article 16 of the Model Law and ignoring Article 34 for two reasons. First, the Court found that the Divisional Court explicitly set out both Articles of the Model Law and considered the leading cases relating to both provisions. (para. 51) Second, the Court found that the Divisional Court correctly interpreted Article 16(3) as providing for a hearing *de novo*, instead of a review or an appeal. It held that there was nothing in the language of Article 34(2)(a)(i) or (ii) that suggested that the nature of the proceeding under each Article is any different. (para. 52)

The appeal was therefore dismissed.