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**The Standard of Review on Appeals
From Domestic Arbitral Awards
Should be Open to Party Agreement**

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The Standard of Review on Appeals From Domestic Arbitral Awards Should be Open to Party Agreement

James Plotkin*

One of arbitration's defining features is its flexibility. Parties to an arbitration agreement enjoy broad discretion to design their dispute resolution process as they see fit. Despite the prominence of party autonomy as a cornerstone of arbitration, courts have at times placed limits on the procedural flexibility emblematic of arbitration. One such case is the Ontario Court of Appeal's decision in Dominion, wherein the Court decided that parties to an arbitration agreement may not determine in advance which standard of review the Court shall apply on the appeal of an arbitral award. This paper argues that the limit that the Court in Dominion placed on party autonomy was unwarranted. Specifically, the Court, as other courts have done, placed an over-reliance on administrative law principles without considering arbitration law principles that, if considered, would militate in favour of according parties the ability to determine their appellate standard of review in advance.

...

La souplesse est l'un des traits caractéristiques de l'arbitrage. De fait, les parties d'une convention d'arbitrage jouissent d'une très grande discrétion dans l'élaboration d'un mécanisme de règlement de différends propre à leur entente. Bien que l'autonomie des parties soit aux fondements de l'arbitration, les tribunaux ont parfois imposé des limites à la souplesse procédurale qui la rend si distincte. C'est entre autres ce qui est arrivé dans l'affaire Dominion, décision de la Cour d'appel de l'Ontario, dans laquelle le banc des juges a statué que les parties d'une convention d'arbitrage ne peuvent déterminer à l'avance la norme de contrôle judiciaire que la Cour doit appliquer en appel d'une sentence arbitrale. Cet article soutient qu'il n'était pas justifié pour la Cour de limiter ainsi l'autonomie des parties. La Cour, comme d'autres tribunaux l'ont fait auparavant, s'est fiée de manière excessive aux principes directeurs du droit administratif sans tenir compte des principes fondamentaux du droit de l'arbitrage. Une attention adéquate à ces principes militerait en faveur d'impartir aux parties la possibilité de déterminer à l'avance la norme de contrôle judiciaire applicable en appel.

I. Introduction

One of arbitration's most attractive features is procedural flexibility, permitting parties to customize their process to best suit particular needs. This is commonly known as the "party autonomy" principle. Party autonomy means that, subject to limited exceptions, parties may, *inter alia*, decide which disputes are arbitrable, who will adjudicate, how the procedure will run and which outcomes or remedies the adjudicator may impose. In *The Dominion of Canada General Insurance Company v Unifund Assurance Company*, the Ontario Court of Appeal took a step toward limiting party autonomy. It ruled that a court hearing an appeal under section 45 of the *Arbitration Act, 1991* ("the Act")¹ is not bound by a term in the parties' arbitration agreement stipulating the applicable standard of review.²

This paper argues that parties' ability to agree in their arbitration agreements on a standard of review for appeals should not be circumscribed. Although the Court of Appeal's reasoning in *Dominion* is correct in the administrative law context, it fails to account for salient differences arbitration law brings to bear on the analysis. This decision is one of several arbitration-related decisions in recent years wherein a reviewing court immediately resorted to administrative law principles without examining the legislative framework and relevant arbitration law principles.³ Despite notable similarities, like presumptive expertise and enhanced efficiency, arbitration and administrative law comport important differences. Sometimes, as here, arbitration principles justify a departure from the administrative law method. In that regard, this paper is not meant *per se* as a case comment on *Dominion*. Rather, it aims to indicate why the particular limit the Court of Appeal placed on party autonomy in *Dominion* was unjustified and founded on inapplicable legal principles.

The Author wishes to note the position taken in a previous writing: the standard of review framework set out by the Supreme Court of Canada in *Sattva Capital Corp v Creston Moly Corp* is flawed in that it maintains correctness on constitutional questions and questions centrally important to the legal system and outside the arbitrator's expertise.⁴ The thesis was that, due to fundamental differences between certain principles underlying arbitration law and administrative law (and the public legal system

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¹ SO 1991, c 17.

² 2018 ONCA 303, 290 ACWS 3(d) 681 [*Dominion*].

³ See for example *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, [2014] 2 SCR 633 [*Sattva*] and *Intact Insurance Company v Allstate Insurance Company of Canada*, 2016 ONCA 609, 268 ACWS (3d) [*Intact*] discussed below.

⁴ James Plotkin, "Deference Deference Shall You Do, For This Is Arbitral Review: Why Canadian Courts Should Exercise Maximal Deference When Reviewing Commercial Arbitral Awards For Legal Errors" (2018) 27:1 Can Arbitration and Mediation J 17.

generally), the Court erred in preserving any of the “correctness categories” identified in *Dunsmuir v New Brunswick*.⁵ The Court, it is argued, should have instead created a blanket reasonableness standard for all appeals on questions of law from arbitral awards subject to a narrow exception for constitutional questions when at least one party to the arbitration is a state entity subject to the Constitution. However, that text did not contemplate situations, like *Dominion*, where the parties expressly stipulate a standard of review in an arbitration or submission agreement. Rather, it analyzed the default standard of review framework (i.e. where the parties have not agreed in advance on the standard of review) and argued, similarly to here, that the Supreme Court placed an overreliance on administrative law principles to the detriment of applicable arbitration law principles, namely party autonomy and the private nature of arbitral justice. Consequently, the Author stands by blanket reasonableness review of arbitral awards for all the reasons originally espoused, with one *proviso*: presumptive reasonableness gives way if, and only if, the parties agree to appeals on the correctness standard. As discussed in section C(2)(b) below, party autonomy—the underlying basis for the general rule of curial deference in arbitration—also grounds the exception of non-deference upon agreement.

II. Parties’ standard of review selection is inoperative under Ontario jurisprudence

In *Dominion*, the Ontario Court of Appeal weighed in on whether parties may pre-select a standard of review in the event of an appeal from an arbitral award. It decided the answer is no, relying in part on its previous decision in *Intact Insurance Company v Allstate Insurance Company of Canada*.

Dominion dealt with a dispute between insurers as to liability under Ontario’s *Statutory Accident Benefits Schedule* (SABS) to the *Insurance Act*.⁶ The SABS regime provides a no-fault compensation scheme for people involved in automobile accidents in Ontario. Under the scheme, the claimant must first claim against his or her own insurer (if the claimant is uninsured, there are provisions permitting him or her to claim against another insurer). The involved insurance companies then determine, according to the order of priorities set out in the SABS regulation, which of them is liable for the coverage.⁷ Insurers are to resolve priority disputes by arbitration.⁸ In this instance, the insurers had included a standard of review term in their arbitration agreement. They agreed that the reviewing court would apply

5 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

6 *Insurance Act*, RSO 1990, c 18.

7 O Reg 34/10.

8 *Insurance Act*, *supra* note 5 at s 275(4).

correctness to appeals on questions of law and reasonableness on questions of mixed fact and law.⁹

In its decision, the Court of Appeal first determined it owed no deference to the Superior Court Judge's decision on the applicable standard of review.¹⁰ It went on, however, to find itself equally unconstrained by the parties' chosen standard of review as expressed in their arbitration agreement.¹¹ The Court relied on the Supreme Court's decision in *Monsanto Canada Inc v Ontario (Superintendent of Financial Services)*, holding that the standard of review, as a question of law, lies with the court.¹² The Court went on to ascertain the applicable standard in accordance with its previous case law. It referred to *Intact*, wherein Justice LaForme held that the administrative law framework applies to appeals from insurance arbitrations. In *Intact*, the Court found that the Supreme Court's decision in *Sattva* determined reasonableness to be the applicable standard of review.¹³ For good measure, the *Intact* Court took on an administrative law contextual analysis to again arrive at a reasonableness standard.¹⁴

As of this writing, *Dominion* has been applied once to negate parties' express standard of review selection.¹⁵ Indeed, in *Northbridge*, also an insurance case, the party seeking to uphold the agreement argued that reasonableness review on legal questions hinders legal certainty and encourages "arbitrator shopping".¹⁶ Without commenting on these arguments, the Court (rightly) felt bound by *stare decisis* and refused to give effect to the parties' agreement on the standard of review.¹⁷ Although *Dominion*, *Intact* and *Northbridge* were insurance-related cases, nothing in the Court's reasons indicate that the holding is limited to that statutory regime, or to statutorily mandated arbitration generally. On the contrary, the Court's statement was framed broadly to encompass even purely contractual arbitration. It did not attempt to distinguish insurance arbitration from standard commercial arbitration. Although there might be some differences, the fact that the *Act* is applied as the procedural law in both cases makes it difficult to see how those differences could bear on whether the parties should be free to determine their standard of review in advance.¹⁸

9 *Dominion*, *supra* note 2 at para 26.

10 *Ibid* at para 25, citing *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, at para 43 [2003] 1 SCR 226 [*Dr Q*].

11 *Ibid* at para 26.

12 2004 SCC 54 at para 6, [2004] 3 SCR 152 [*Monsanto*].

13 *Intact*, *supra* note 3 at paras 40–45.

14 *Ibid* at para 25.

15 *Northbridge v Intact Insurance*, 2018 ONSC 7131, 299 ACWS (3d) 833 [*Northbridge*].

16 *Ibid* at para 6.

17 *Ibid* at paras 4, 6.

18 This position is expanded upon in section C(2)(c) *below*.

III. Parties should be permitted to stipulate their desired standard of review

Dominion disregards the party autonomy principle, which militates in favour of permitting party agreement on the standard of review (1). In coming to the opposite conclusion, the Court mistakenly relied upon principles derived from judicial review of administrative action (2). When one properly considers arbitration theory, and discards inapplicable administrative law doctrines, the rationale for permitting parties to specify the standard of review in arbitration or submission agreements becomes clear.

A. *Dominion disregards the party autonomy principle*

Party autonomy, or contractual freedom, is the fundamental principle underpinning arbitration as a means of resolving disputes. At base, it is the notion that parties may devise a custom-made dispute resolution process, and that courts should not interfere, save on a tightly circumscribed set of matters.¹⁹ In the words of one prominent author, “*it is fundamental to the concept of party autonomy that the parties may craft any remedy or dispute resolution mechanism they wish.*”²⁰

This principle is present in the *Act* and its counterparts in New Brunswick, Alberta, Saskatchewan and Manitoba, which are based on the 1990 *Uniform Arbitration Act* promulgated by the Uniform Law Conference of Canada (ULCC). Although the ULCC proceedings from 1989 signal the participants’ view that judicial intervention might prove more acceptable in domestic arbitration as compared with international arbitration, party autonomy nevertheless pervades the *Act* and its counterparts.²¹ This is consistent with the notion that arbitration is a “*private dispute resolution*

19 See, for example, *Inforica Inc v CGI Information Systems and Management Consultants Inc*, 2009 ONCA 642 at para 14, [2009] OJ No 3747 [*Inforica ONCA*]; *Newfoundland and Labrador v ExxonMobil Canada Properties*, [2017] NLTD(G) 80 at para 712, 279 ACWS (3d) 185 (Nfld SC) [*ExxonMobil Canada*]; *Alenco Inc v Niska Gas Storage US, LLC*, 2009 ABQB 192 at paras 27–29, [2009] AWLD 2127 [*Alenco Inc*].

20 J Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd ed (New York: Juris, 2017) at 96.

21 See generally “Proceedings of the Seventy-first Annual Meeting” (August 1989), online (pdf) : *Uniform Law Conference of Canada* <ulcc.ca/images/stories/Past_Proceedings_PD-F/1989ULCC0071.pdf> [https://perma.cc/Y3AV-JKK8] [*ULCC Proceedings*]. Note that any following reference to the *Act* should, unless the context indicates otherwise, be understood as applying to all of the domestic arbitration acts based on the ULCC Uniform Arbitration Act; “Alberta Law Reform Institute, Final Report 103 – Arbitration Act: Stay and Appeal Issues” (2013) at paras 9– 18, online (pdf): *CanLII* <commentary.canlii.org/w/canlii/2013CanLII-Docs389.pdf> [https://perma.cc/X3X3-3T9N] [*ALRI*].

process” that “exists entirely outside the Court system and occurs only by agreement of the parties.”²²

The party autonomy principle is by no means limited to domestic arbitration, or Canadian arbitration for that matter. Indeed, international commercial arbitration authorities recognize party autonomy as foundational.²³ It inheres strongly in the UNCITRAL Model Law on International Commercial Arbitration (Model Law)²⁴ upon which the legislation governing international commercial arbitration is based (or inspired) in all Canadian provinces and territories.²⁵ It is worth noting that the *Act* was designed to exist in harmony with Model Law-based legislation.²⁶ Accordingly, all international and most domestic Canadian arbitration legislation is intended to maximize the scope of what may be left to party agreement.

The Supreme Court of Canada and other courts have long since recognized party autonomy as a central tenet of arbitration and a basis for providing considerable flexibility in agreements to arbitrate.²⁷ However, before *Dominion*, the case law said little on the specific question of whether party autonomy extends to selecting a standard of review on appeal. In *Inforica Inc v CGI Information Systems and Management Consultants Inc*, Justice Chapnik hinted that parties could in fact set the standard of review in advance.²⁸ Relying on then applicable jurisprudence, the Court applied the correctness standard to an issue going to the tribunal’s jurisdiction. In so doing, it validated the notion that parties could set a standard of review in

22 ALRI Final Report, *supra* note 21 at paras 9, 28.

23 See, for example, Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 6th ed (Oxford: Oxford University Press, 2015) at 355; Stephan W Schill, “Developing a Framework for the Legitimacy of International Arbitration” in Albert Jan van den Berg, ed, *Legitimacy: Myths, Realities, Challenges*, Vol. 18, (Alphen aan den Rijn: Kluwer Law International, 2015) at 810, citing Edward Brunet, “The Core Values of Arbitration” in E Brunet, RE Speidel, JE Sternlight And SH Ware, eds., *Arbitration Law in America – A Critical Assessment*, (Cambridge: Cambridge University Press, 2006) 3 at 4–5.

24 UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration*, Explanatory Note by the UNCITRAL Secretariat, (1985) at para 36 [*UNCITRAL Arbitration Rules*]; Gary B Born, *International Commercial Arbitration*, 2nd ed (Alphen aan den Rijn: Kluwer Law International, 2014) at 1590; Blackaby et al, *supra* note 23 at 355.

25 Casey, *supra* note 20 at 27–34. In British Columbia, the *International Commercial Arbitration Act*, RSBC 1996 c 233 is largely based on, but does not expressly incorporate, the Model Law. Quebec has not adopted the Model Law as such. Instead, Art 649 CCP states that if international trade interests, including interprovincial trade interests, are at issue, the court may consider the Model Law, its amendments and the *travaux préparatoire* and Secretary-General’s official commentary on the Model Law.

26 *ULCC Proceedings*, *supra* note 21 at 126–127.

27 *Desputeaux v Éditions Chouette (1987) inc*, 2003 SCC 17 at paras 22, 67–9, [2003] 1 SCR 178 [*Desputeaux*]; *Deuterium of Canada Ltd v Burns and Roe, Inc*, [1975] 2 SCR 124 at 137, 44 DLR (3d) 693 [*Deuterium of Canada*]; *Rhéaume c Société d’investissements l’Excellence inc*, 2010 QCCA 2269 at para 80, citing John EC Brierley, “Une loi nouvelle pour le Québec en matière d’arbitrage”, (1987) 47 R du B 259 at 263–64 [*Rhéaume*].

28 [2008] OJ No 4695 (QL) (ONSC) [*Jevco Insurance*].

their agreement, and that such agreement would bind the reviewing court:

[8] It is trite law that matters of jurisdiction attract a standard of review of correctness (internal citation omitted). Moreover, decisions of private arbitrators are generally subject to the same standard. As stated by Nordheimer, J. in *Jevco Insurance Co v Pilot Insurance Co* (2000), 2000 CanLII 22402 (ON SC), 49 O.R. (3d) 760 (SCJ) at para 9:

I agree with the submissions of counsel for the applicant that the standard of review on an appeal from a private arbitration (absent any specific provision to the contrary in the arbitration agreement) is one of correctness. I respectfully adopt the analysis and conclusion reached by MacPherson, J. in this regard in *887574 Ontario Inc v Pizza Pizza Ltd* (internal citation omitted).

[9] In the present case, nothing in the private arbitration agreement would displace the presumption of a standard of review of correctness... (Emphasis added)

The Superior Court decision was overturned on appeal, but with no reference to the standard of review at all, let alone whether the parties could choose it.²⁹

Party autonomy, though critical, is not absolute. Even the *Act*, which permits parties to contract out of or vary nearly all its provisions, provides in section 3 (actually titled “Party Autonomy” in the Alberta statute) that certain provisions are mandatory.³⁰ Limits on party autonomy have been recognized in international context, such as preserving natural justice, protecting weaker parties, protecting the public good and ensuring appropriate recourse to courts.³¹ That said, when asking whether the parties to an arbitration agreement may or may not agree to certain content, the point of departure should always be presumptive permissibility.

Unfortunately, party autonomy is nowhere considered by the Court of Appeal in *Dominion*.³² Instead, the Court rendered inoperative the

²⁹ *Inforica ONCA*, *supra* note 19.

³⁰ The mandatory provisions are ss 5(4) (“Scott v Avery” clauses), s 19 (equality and fairness), s 39 (extension of time limits), s 46 (setting aside award), s 48 (declaration of invalidity of arbitration), s 50 (enforcement of award). In Quebec, Art 622 CCP prevents the parties from excluding any provisions speaking to the court’s jurisdiction, “those relating to the application of the adversarial principle or the principle of proportionality” and the right to notice of a document or an arbitral award’s homologation or annulment.

³¹ See Mia Louise Livingstone, “Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?” (2008) 25 J Int’l Arbitration 5 at 529–36.

³² In fairness, the decision in the court below (*Unifund Assurance Co. v. Dominion of Canada General Insurance Co.* 2016 ONSC 4337) also failed to address party autonomy or justify reliance on the parties’ chosen standard of review scheme. At para 19, the Court simply states the parties’ arbitration agreement calls for correctness review on questions of law but provides no further analysis.

parties' choice of standard based on a rule developed in the administrative law context. As explained in the following section, that transposition is inapposite. The Court's failure to consider party autonomy is unsurprising since that principle, so fundamental to arbitration, plays no real role in administrative law. Parties to administrative proceedings do not select the process or decision-maker; these are imposed. That distinction forms part of the justification for treating party agreement on the standard of review differently in arbitration.

B. Misplaced reliance on administrative law principles

In relying on administrative law principles to negate the parties' standard of review selection, the Court of Appeal's decisions in *Dominion* comport two flaws. First, and unlike in administrative law, party agreement on what would normally constitute a purely legal matter is permissible in arbitration because of the inherent flexibility generated by the party autonomy principle (a). Second, the Court seems to misapprehend the doctrinal basis for deference to arbitrators, which is, once again, party autonomy. It instead refers to the presumptive reasonableness on "home statute" interpretation applicable in administrative law, which is wholly inapplicable to arbitral tribunals (b).

a. Party agreement permissible on matters of law

The Court in *Dominion* did not feel bound by the parties' standard of review agreement, labeling it "not determinative".³³ This is true in the administrative law context, from which the case law adopting that principle originates.³⁴ The arbitration context is materially different, however.

As a preliminary matter, this statement, drawn from a 2004 Supreme Court decision, though still correct in its context (i.e. that courts must assess the standard of review for themselves) has not aged well, and has become somewhat overbroad in light of that Court's subsequent jurisprudence.³⁵ Reasonableness now reigns as the presumptive standard on questions of law arising out of an administrative decision-maker's home statute or a closely connected one.³⁶ In administrative law, one can no longer say the courts

33 *Dominion*, *supra* note 2 at para 26.

34 *Monsanto*, *supra* note 12 at para 6. This remains the law post-Dunsmuir, see e.g. *Delios v Canada (Attorney General)*, 2015 FCA 117, [2015] FCJ No 549 [*Delios*]; *Erasmov v Canada (Attorney General)*, 2015 FCA 129 at para 27, [2015] FCJ No 638 [*Erasmov*].

35 *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 22, [2016] 2 SCR 293 [*Edmonton East*], citing *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 46, [2015] 2 SCR 3 [*Mouvement laïque québécois*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34, [2011] 3 SCR 654 [*Alberta Teachers*].

36 *Ibid.*

must always assure the law is applied correctly.

The same can be said for arbitration law. In *Sattva Capital Corp v Creston Moly Corp*, the Supreme Court largely (though not entirely) imported the *Dunsmuir* administrative standard of review framework—together with the presumptive reasonableness developed in the post-*Dunsmuir* expansion and fortification of deferential review—into arbitration:

[106] ...In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (internal citation omitted).³⁷

The Court of Appeal in *Dominion* did not reference *Sattva*, which remains the precedent case addressing the standard of review for appeals on questions of law from domestic commercial arbitral awards.³⁸ Perhaps the Court failed to cite *Sattva* since the case at bar dealt with statutory rather than contractual arbitration.

However, *Sattva* is not limited to contractual arbitration; the standard of review framework in that case applies generally to appeals on questions of law under the various provincial domestic arbitration statutes.³⁹ The Supreme Court in *Teal Cedar* itself applied *Sattva* to a statutory arbitration under British Columbia's *Forestry Revitalization Act*.⁴⁰ Had the *Dominion* Court considered Justice Rothstein's reasoning in *Sattva*, it might have recognized that deference to arbitrators is founded on the very same agreement and consent it refused to honour in this case.

Furthermore, as a matter of statutory interpretation, the scheme of the *Act* appears to support the parties' freedom to agree on the standard of review. The section 45 appeal provision does not figure among those the parties cannot vary or exclude.⁴¹ If the parties are free to vary or exclude section 45's application, it is unclear why stipulating the standard of review

³⁷ *Sattva*, *supra* note 3.

³⁸ *Sattva* was reaffirmed in the very first paragraph of *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32, [2017] 1 SCR 688 [*Teal Cedar*].

³⁹ *Sattva* was decided in the context of the *British Columbia Arbitration Act*, RSBC 1996 c 55 (then called the *Commercial Arbitration Act*). However, *Sattva* has been applied to appeals on questions of law under domestic arbitration legislation in other provinces. See, for example, *Toronto Standard Condominium Corporation No 2256 v Paluszkiwicz*, 2018 ONSC 2329 at para 72, 291 ACWS (3d) 18 [*Toronto Standard Condominium Corp*]; *Elchuk v Gulansky*, 2019 SKQB 23 at para 37, 302 ACWS (3d) 19 [*Elchuk*]; *SG Ceresco Inc v BroadGrain Commodities Inc*, 2018 MBQB 120 at para 14, 296 ACWS (3d) 13 [*SG Ceresco Inc*].

⁴⁰ SBC 2003, c 17, s 6(4). *Teal Cedar*, *supra* note 38 at para 2.

⁴¹ The appeal provision reads as follows: "If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court 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." See *Arbitration Act*, *supra* note 1.

would not simply amount to an articulation of that right. The *Sattva* framework applies only to appeals, not applications to set aside awards under section 46 of the *Act* (and its counterparts). Accordingly, the only provision in the *Act* that the *Sattva* framework covers is one the parties are free to vary. The Court of Appeal's analysis does not give due consideration to the parties' freedom to modify or outright exclude the appeal process. In so doing, the Court started on the wrong doctrinal footing, which led it directly to an administrative law analysis.

The decision in *Dominion* further neglects the fact that arbitral justice, as a dispute resolution system, runs parallel to the public justice system.⁴² Not only do the parties control what law applies, they control whether any defined law applies. Although section 31 of the *Act* states the tribunal shall decide the dispute “*in accordance with law, including equity*”, parties are free to contract out of that provision. They may instead choose to empower the tribunal to decide *ex aequo et bono* (according to its conscience).⁴³ Assuming the parties want law to apply, they may select Ontario law, foreign law or even a private code or set of non-binding legal rules, such as the UNIDROIT Principles of International Commercial Contracts.⁴⁴ Parties can theoretically invent their own, unique set of rules for resolving disputes arising between them. Take a stark illustration: the parties may agree to have their dispute arbitrated under Ontario law as it existed on (for example) January 1, 1992, but with certain substantive alterations of the parties' own making. To tell a court to apply a morphed version of the law from a previous point in time is ludicrous, yet nothing prevents parties from arbitrating a dispute on that basis.

This flexibility in selecting legal rules is a feature of party autonomy. If the parties are free to select whether any and, if so, which legal rules, apply, and if they may even go as far as altering an existing body of law, it seems strange to draw the line at the standard of review. Finally, on this point, one of the reasons the court must decide the standard of review in the administrative law context is that the jurisprudence becomes binding. In *Dunsmuir*, the Supreme Court teaches that the first step in ascertaining the applicable standard of review is determining whether the jurisprudence

42 *Desputeaux*, *supra* note 27 at para 40 ; *GreCon Dimter inc v JR Normand inc*, 2005 SCC 46 at para 38, [2005] 2 SCR 401 [*GreCon*]; *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 para 132, [2007] 2 SCR 801 [*Dell Computer Corp*]; *Seidel v TELUS Communications Inc*, 2011 SCC 15 at para 99 (the points of intersection between the public and private justice systems are strictly limited by the applicable domestic or international arbitration legislation), [2011] 1 SCR 531 [*Seidel*].

43 Various international and domestic arbitral institutions have promulgated rulesets expressly speaking to this point. They generally say that the tribunal is not to decide the dispute *ex aequo et bono* unless the parties specifically agree. See, for example, ICDR Canada, *Canadian Dispute Resolution Procedures* (2015) at art 31(3); *UNCITRAL Arbitration Rules*, *supra* note 27 at art 35(2); ICC, *ICC Arbitration Rules*, (2017) at art 21(3).

44 Available at *UNIDROIT* <unidroit.org/instruments/commercial-contracts/unidroit-principles-2016> [<https://perma.cc/6R83-UQWW>].

settles the matter.⁴⁵ If a Court were to set the standard of review based on the parties' agreement, that agreement could ultimately bind future litigants.⁴⁶ In contrast, by giving effect to the parties' choice in an arbitration agreement to have legal determinations reviewed for correctness, the court does not pronounce itself on the standard of review applicable to the discrete legal point in issue. There is no threat of the parties' chosen standard of review binding future courts since the determination is necessarily fact-specific—the fact that a contract between “A” and “B” contains a review clause calling for correctness on questions of law has no binding effect on future disputants. The reviewing court must examine the agreement between the parties in each case to determine whether they agreed on the standard of review in advance, or whether the default regime in *Sattva* applies. When there is not specific agreement, the arbitral standard of review is already set per *Sattva*.

In administrative law, the standard may differ depending on various factors, including the particular decision-maker, the nature of the issue, and whether the decision-maker is interpreting its home statute or a closely related statute. Not so in arbitral review where, subject to the two lingering correctness categories imported from the administrative law framework (constitutional questions and questions of central importance to the legal system outside the decision-maker's expertise), the arbitral standard of review is invariably reasonableness, unless of course the parties expressly agree otherwise. Put differently, the arbitral standard of review framework does not require the versatility to deal with the myriad of administrative decision-makers, from quasi-judicial tribunals, to front-line adjudicators, to ministers. The same default standard of review framework set out in *Sattva* applies to *all* domestic arbitral tribunals, regardless of the subject-matter, importance of the issue to the parties, or any other contextual factor habitually applied to determine the standard of review in administrative law. There are accordingly no jurisprudential consequences to allowing agreement on the standard of review in the arbitration context. The standard of review framework can be summed up simply as “reasonableness by default and correctness by agreement”.

b. Misapprehended justification for deference to arbitral tribunals

The rationale for deference to arbitrators on questions of law is predicated on party autonomy itself. Justice Rothstein explained in *Sattva*

⁴⁵ *Dunsmuir*, *supra* note 5 at para 62 (this has arguably been tempered in the post-*Alberta Teachers/Edmonton East* world given the push towards overriding presumptive reasonableness, but the statement still stands since, as of this writing, *Dunsmuir* has not officially been overturned).

⁴⁶ One might argue that a case applying an agreed upon standard of review would not have precedential value. That may be, assuming the reasons makes obvious that the judge gave effect to the parties' agreement on the standard of review. Depending on the judge and drafting style, that may or may not be the case.

that an arbitrator's expertise is presumed, based on the parties' having chosen that particular person to adjudicate.⁴⁷ But when those same parties also decide that the person they selected should not enjoy deference on certain sorts of issues, it follows that the deemed expertise is curtailed. One could conceive of practical reasons why parties might wish to have an arbitrator's legal conclusions reviewed for correctness. For example, consider a highly technical dispute where the parties appoint a non-lawyer ("lay") arbitrator with substantial knowledge in the relevant field. In that case, the parties selected the arbitrator for his or her technical expertise, not legal acumen. Those parties might be quite content for the reviewing court to defer on factual matters, but prefer that a more discerning eye be applied to legal issues should they arise. If that is their will, there appears to be no statutory or principled reason for denying that procedural variant. On the contrary, the *Act's* framework supports it. Note that absent agreement to the contrary, it is appropriate to presumptively apply reasonableness on questions of law, regardless of what the arbitrator's actual skills are. As Justice Rothstein said in *Sattva*: "*where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties.*"⁴⁸

Thus, the only basis for rebutting the presumption would be an express agreement on a non-deferential standard of review. After all, if reasonableness is based on implied confidence in arbitral expertise, an express term calling for correctness not only overrides the presumption as a technical matter, it altogether eliminates the rationale for the presumption in the first place. In other words, if the arbitration agreement—the sole source from which an arbitrator derives deemed expertise justifying curial deference—indicates that the parties want non-deferential review notwithstanding having chosen the individual arbitrator(s), any justification for deference falls away. Without an express agreement, however, the deference presumption should remain irrebuttable.⁴⁹

The reliance in *Dominion* upon the "home statute presumption" to justify deference to arbitral tribunals deciding SABS priority disputes is also misplaced. Such an approach ignores salient differences between public administrative justice and private arbitral justice. The *Insurance Act* is not the arbitral tribunal's home statute. Arbitral tribunals do not have home statutes. Their "enabling act" is not the *public* act of the legislature, but the *private* act of two or more parties exercising their civil rights to submit a dispute to arbitration. Paradoxically, the Ontario Court of Appeal has itself

⁴⁷ *Sattva*, *supra* note 3 at para 105.

⁴⁸ *Ibid.*

⁴⁹ For a more fulsome defence of this irrebuttable presumption, please see Plotkin, *supra* note 4 at 21–3.

recognized this distinction in the past.⁵⁰

As noted previously, an arbitrator's deemed expertise flows from the parties' having selected that person, presumably based on experience and attributes; it does not flow from a given statute calling for some class of disputes to be arbitrated. While much arbitration is statutorily directed, it often arises out of contractual agreement.

Further, deference to "enabling statute" (home or related statute) interpretation in the administrative context is justified in part on the deemed institutional expertise inherent to administrative decision-makers.⁵¹ Patent examiners only examine patents. Human rights tribunal members only hear human rights complaints. Arbitrators, on the other hand, could be called upon to adjudicate disputes of diverse description.

Indeed, the very same individual arbitrator could, in theory, adjudicate both: 1) a labour law grievance requiring recourse to human rights legislation; and 2) a patent infringement or licensing dispute engaging the same patent validity principles applied by examiners in the Canadian Intellectual Property Office. Is this hypothetical arbitrator deemed an expert in patent and labour/human rights law by dint of the applicable legislation governing those areas? Surely not. Any deference accrues directly (and solely) from the parties' agreement on the individual appointee(s). The source of deemed expertise exemplifies a case in which administrative law and arbitration law principles stand in direct contradiction. In administrative law, expertise is deemed on the institutional level such that the individual decision-maker's identity is irrelevant.⁵² In arbitration, the deemed expertise inheres in the individual through the parties' selection.⁵³ Both form part of the basis for a generally deferential posture in their respective areas, but for different and mutually exclusive reasons.

- c. No distinction between statutory and contractual arbitration as regards to party-selected standard of review

A final query is whether to draw a distinction between statutory and contractual arbitration for the purpose of permitting party agreement on the standard of review. The answer is no. Since the arbitrator's deemed

⁵⁰ *Rampton v Eyre*, 2007 ONCA 331 at para 19, [2007] OJ No 1687 [*Rampton*]. See also *GPEC International Ltd. v Canadian Commercial Corp.*, 2008 FC 414 at para 12, 166 ACWS (3d) 207 [*GPEC International*].

⁵¹ *Edmonton East*, *supra* note 35 at para 33; *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59 at para 53, [2011] 3 SCR 616 [*Nor-Man*]; *Dunsmuir*, *supra* note 5 at para 68.

⁵² *Edmonton East*, *supra* note 35 at para 33; *Nor-Man*, *supra* note 50 at para 53; *Dunsmuir*, *supra* note 5 at para 68.

⁵³ *Sattva*, *supra* note 3 at para 105. One could consider the party-arbitrator relationship as an *intuit personae* contract (where the individual is hired for their particular qualities that cannot be replaced). See *Canadian National Railway Co v Norsk Pacific Steamship Co*, [1992] 1 SCR 1021, 91 DLR (4th) 289 [*Norsk*].

expertise does not derive from statute, there is no reason why the statute itself should alter the parties' ability to sculpt the arbitral process, unless of course it contains provisions expressly constraining that ability. Those provisions would have to be express since party autonomy is the rule, and restriction the exception. In that regard, it is important to recall there is no "default" procedure for arbitration, except, perhaps, in the most general sense, a private adjudication that is adversarial in nature. Although counsel sometimes simply conduct arbitration under their home court rules, expressly or impliedly (the Author has witnessed firsthand examples of both), that is not the default. As always, the parties are still operating under an express or tacit agreement to proceed in a certain way. It would thus be improper to limit the parties' choice in crafting their dispute resolution process absent some affirmative, statutory reason for doing so.

The purported distinction between statutory and contractual arbitration is therefore illusory inasmuch as the statute requiring resolution by arbitration does not also set further parameters. The provision at issue in *Dominion*, for example, simply says that the dispute must go to arbitration in accordance with the *Act*, but does not set any further rules or constraints. Note that the *Insurance Act* expressly incorporates the *Act* by reference. There should therefore be no doubt that parties to an arbitration provided for in the *Insurance Act* ought to enjoy the same rights as other disputants who submit to arbitration under the *Act*. In any event, the *Act* automatically applies to arbitration under other statutes unless excluded, so the legislature need not expressly incorporate the *Act* into a statute for the parties to enjoy the normal adaptability arbitration provides.⁵⁴ In light of this, and on the assumption that parties may select a standard of review in a commercial arbitration under the *Act*, there is no reason parties to an arbitration provided for by statute (and falling under the *Act*) should not enjoy the same freedom.

IV. Conclusion

The rules of the game in arbitration always begin, and often end, with the parties' agreement. Subject to the narrow bases for court interference and mandatory provisions in the *lex arbitri* (in this case the *Act*), arbitration law and policy in Canada has been decidedly respectful toward party autonomy, and has likewise recognized arbitration as a private dispute resolution system running largely in parallel with the public legal system. The parties' choice to pre-select the standard of review applicable to appeals from arbitral awards is not one of the areas in which a pressing public policy consideration demands encroachment on private party choice.

Administrative law rules and doctrines are sometimes helpfully adopted in the arbitral context. But they are not always applicable. Canadian

⁵⁴ *Arbitration Act*, *supra* note 1 at s 2(3).

courts have, at times, had difficulty assessing where administrative law principles cease to apply to arbitration. In the Author's view, and as expressed elsewhere, the review framework cast in *Sattva* is imperfect due to overreliance on administrative law principles to the detriment of party autonomy. Misadventures like those that occurred in *Dominion* and *Intact* are avoidable. When faced with an opportunity to apply administrative law rules in the arbitration context, the court should take a step back and first examine whether the rule is consonant with party autonomy and the consent-based nature of arbitration. If not, a tailor-made solution for arbitration (or adoption of an existing solution applied in international arbitration) might prove necessary.⁵⁵

55 Courts should look to international arbitration authorities for inspiration. However, the same caution about overreliance on administrative law principles applies to overreliance on international arbitration authority in the domestic context since not every single rule, doctrine or practice translates cleanly.