

CITATION: The Corporation of the Town of Saugeen Shores v. 2706913 Ontario Inc.
2026 ONSC 4927
COURT FILE NO.: CV-26-00000020-0000
DATE: 2026-08-27

SUPERIOR COURT OF JUSTICE – ONTARIO
207 Cayley Street, Walkerton ON N0G 2V0

RE: The Corporation of the Town of Saugeen Shores, Applicant

AND:

2706913 Ontario Inc., Respondent

BEFORE: Justice Kurz

COUNSEL: Laura Book, for the Applicant

Jeffrey Radnoff, for the Respondent

HEARD: July 30, 2026, In person

ENDORSEMENT

Introduction

[1] The Applicant, the Corporation of the Town of Saugeen Shores (the “Town”) and the Respondent, 2706913 Ontario Inc. (the “Lessee”) are engaged in a conflict over the delay in the completion of the construction project described below. While there is no disagreement about the fact of the delay, the parties disagree as to its cause. In particular, the Lessee claims that the construction delays are caused by the unexpected events defined as “Force Majeure” in their lease agreement. The Town disagrees and seeks to terminate the Lease.

[2] Even more to the point in this application, the parties also cannot agree on whether their conflict must be resolved through arbitration or litigation. To that effect, the Town applies for a declaration that its dispute with the Lessee is not arbitrable and must instead be determined through the litigation process.

[3] However, in this application, the Town is not asking this court to resolve the underlying dispute between the parties. Rather, it is simply asking the court to adjudicate the venue that should determine the Force Majeure issue.

[4] For the reasons which follow, I find that the issue of whether the dispute between the parties is arbitrable is itself subject to arbitration. Thus, with that finding, I dismiss this application.

Background

[5] The parties agree that there are no factual disputes in this application. They appear to agree on the facts set out below.

[6] The Town wished to develop a portion of its land located near the Port Elgin main beach for a development to be known as Cedar Crescent Village (the “Project”). To effect that development, the parties entered into a lease on December 19, 2019, for the development of the Project (the “Lease”). The Town prepared the initial draft of the Lease.

[7] The Lease contains the dispute resolution provisions which are the subject of this application. It also defines the term, “the Project”, as “collectively the Project Lands and the Building”.

[8] Following the signing of the Lease, the parties entered into three further agreements:

1. The Site Works and Servicing Agreement, dated June 13, 2022 (the “SWSA”), meant to give effect to the intent of the Lease and the development of the Project;
2. The First Amending Agreement, dated June 13, 2022, updating the legal description of the lands but not changing the dispute resolution provisions of the Lease;

3. An agreement confirming the Lease, dated October 11, 2022; and
4. The Second Amending Agreement dated February 26, 2025. That agreement sets out deadlines for the Lessee to fulfill occupation requirements for the two buildings in the Project, known as the North and South Buildings. Under the Second Amending Agreement, the North Building was to be occupied by February 2, 2026, and the South Building by May 18, 2026, with a total completion date of September 14, 2026.

[9] The Lessee states that the Second Amending Agreement was negotiated to address the delays in the Project caused by the Covid-19 pandemic and the Town's inability to deliver the lands described in the original Lease. The Lessee also states that the Town asked it to delay construction of the Project until September 2025 because of summer traffic and the anticipated imminent litigation brought by a local resident, John Mann, challenging the validity of the Lease. That litigation was commenced in late July 2025 (the "Mann Litigation"). It concluded on May 19, 2026, when Juginovic J. dismissed the Mann Litigation.

[10] On February 2, 2026, counsel for the Lessee wrote to the Town requesting an extension of the occupancy date for the North Building. That letter also contained a Notice to Arbitrate under art. 13.1 of the Lease (the "First Notice to Arbitrate") in the event the Town refused the extension.

[11] The First Notice to Arbitrate alleged that the Lawsuit represented Force Majeure, as defined in the Lease and the SWSA. The First Notice to Arbitrate stated that the alleged Force Majeure "directly impeded [the Lessee's] ability to, among other things, continue construction" and "created an unforeseen condition precedent to the financing" of the Project.

[12] The art. 1.1 interpretation provision of the Lease defines the term, Force Majeure, as follows:

"Force Majeure" means any happening, condition or thing beyond the control of a Person which could not reasonably have been anticipated and avoided by such person which delays or prevents such person from performing any of its obligations hereunder, financial inability excepted.

[13] Article 39 of the SWSA also contains a Force Majeure clause. It reads as follows:

No party shall be liable or responsible to the other party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement (except for any obligations to make payments to the other party hereunder), when and to the extent such failure or delay is caused by or results from acts beyond the impacted party's ("Impacted Party") reasonable control, including, without limitation, the following force majeure events ("Force Majeure Event(s))...

[14] Article 13.1 of the Lease is its arbitration clause, which applies to those provisions of the Lease which are arbitrable. It states:

Arbitration. The Lessor and Lessee will at first instance make reasonable efforts to resolve any disputes under this Lease amicably through negotiation. If any arbitration is expressly permitted or expressly required under this Lease, arbitration proceedings shall be commenced by the party desiring arbitration...

[15] Rather than grant the requested extension, the Town issued a Notice of Event of Default to the Lessee under both the Lease and the SWSA (the "Notice of Default"). Citing art. 12.1(f) of the Lease, the Notice of Default stated that the Lessee is in default of the Lease and reserved the right to terminate the Lease, even as the parties address the Force Majeure issue. The Town also denied that the Mann Litigation was a Force Majeure event or that the issue was arbitrable under the Lease.

[16] Article 2(h) of the Amending Agreement replaces the Lease's original Event of Default Provisions under art. 12.1(f) with a term which identifies an Event of Default as including:

Occupancy Requirements for the North Building/North Area shall not have been attained by the North Area Date [set out in the Lease] ...

...

Provided that should the [Town's Chief Building Officer] identify any deficiencies preventing the completion of the Occupancy Requirements and an Occupancy Permit, then the Lessee shall have an additional thirty (30) day period to complete or correct such deficiencies, and, with the consent of the Lessor, not to be unreasonably withheld, and provided the Lessee continues to diligently and assiduously work to complete or correct such deficiencies, such additional time as may be reasonably required.

[17] The Town's Chief Building Officer attended at the Project lands. He found that there was no construction on the site or visible signs of work in progress, and that those deficiencies prevented the Lessee from satisfying the art. 12.1(f) occupancy requirements within 30 days.

[18] The Town thereafter gave notice to the Lessee that it intended to bring this application regarding the method of determination of the Force Majeure issue. The Town commenced this application on March 16, 2026.

[19] On May 16, 2026, the Lessee's counsel served a Supplementary Notice to Arbitrate on the Town (the "Supplementary Notice"). That Supplementary Notice cited art. 8.2 and 8.3 of the Lease. Article 8.2 deals with Operating Standards while art. 8.3 dealing with the availability of arbitration over Operating Standards disputes. Both provisions should be read along with art. 13.1, set out above. The Supplementary Notice stated, in part:

Section 8.3 provides that where the Town alleges the Lessee has failed to adhere to the Operating Standards defined in Section 8.2 of the Lease, and the Lessee disputes such allegation, either party may submit the matter to arbitration in accordance with Section 13.1 of the Lease.

...

TAKE FURTHER NOTICE that the Default Notice constituted notice within the meaning of Section 8.3 of the Town's opinion that the Lessee had failed to adhere to the Operating Standards. The conditions precedent to arbitration under Section 8.3 have accordingly been met. The Lessee disputes the Town's allegation in its entirety. The Lessee's inability to achieve the North Area Date is directly attributable to the litigation commenced by John Mann against the Town

(the “Mann Litigation”), which challenges the validity of the Lease itself and which, as previously notified, constitutes a force majeure event under the Lease and the Site Works and Servicing Agreement dated June 13, 2022. Any failure to adhere to the Operating Standards arising from the Mann Litigation is attributable to force majeure.

[20] Article 8.2 of the Lease states:

Operating Standards. The Lessee shall operate and manage the Project and in furtherance of its obligation to do so, the Lessee shall:

...

(e) Perform and, where desirable, contract **for all things necessary for the proper and efficient management, operation and maintenance of the Project and performance of every other reasonable act whatsoever in or about the Project to carry out the intent of this Lease;**

(the foregoing herein referred to as the "Operating Standards").

[Emphasis added]

[21] Art. 8.3 of the Lease states:

Adherence to Operating Standards. In its operation of the Project the Lessee shall be prudent, responsible and responsive to suggestions of the Lessor. If the Lessor is of the opinion that the Lessee is not adhering to the Operating Standards in any respect, the Lessor may give notice thereof to the Lessee and a reasonable opportunity to adhere to the Operating Standards. **If the Lessee disputes the Lessor's allegations that the Lessee has failed to adhere to the Operating Standards, either the Lessee or the Lessor may submit the alleged failure to arbitration in accordance with Section 13 .1...**

[Emphasis added]

[22] The Town responded to the Supplementary Notice. It stated that it disputes the Lessee’s assertions that its Notice of Default and May 5, 2026 correspondence engaged art. 8 of the Lease, and that the issues thereby raised are arbitrable. As a

result, the Town filed, on consent, an Amended Notice of Application in this proceeding, seeking to address the additional issues raised in the Supplementary Notice.

[23] In further response to the Town's amended position, the Lessee additionally argues that s. 17 of the *Arbitration Act*, 1991, S.O. 1991, Ch. 17 and the "competence-competence principle" require the issue of the arbitrator's jurisdiction to be resolved at first instance by the arbitrator.

Issues

[24] The parties frame the issues in this application differently, but they amount to the same two questions:

1. Who should decide whether the issues between the parties are arbitrable under art. 13.1 of the Lease, this court or an arbitrator?
2. If this court is the venue which should decide whether the issues between the parties are arbitrable, are they arbitrable under art. 13.1 of the Lease?

[25] For reasons set out below, I find that an arbitrator selected pursuant to art. 13.1 of the Lease should decide whether the issues between the parties are arbitrable under art. 13.1 of the Lease. In light of that finding, it is unnecessary for me to decide the second issue above and decline to do so.

Issue No. 1: Who should decide whether the issues between the parties are arbitrable under art. 13.1 of the Lease, this court or an arbitrator?

Positions of the Parties

[26] The parties agree that on a preliminary basis, a decision must be made as to whether their issues are arbitrable. But who should make that decision? Each party has a clear position which contradicts that of the other.

[27] The Town says that the court must adjudicate the issue of arbitrability. The Lessee says that it must be the arbitrator who decides and that the issue must first be

put to the arbitrator under the competence-competence principle and s. 17 of the *Arbitration Act*.

Applicable Authorities

[28] Under s. 17 of the *Arbitration Act*,

17 (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

[29] Once made, that decision is subject to this court's review, as set out in s. 17(8):

(8) If the arbitral tribunal rules on an objection as a preliminary question, a party may, within thirty days after receiving notice of the ruling, make an application to the court to decide the matter.

[30] Section 17(1) of the *Arbitration Act* represents a codification of the competence-competence principle. In the seminal case which both parties cite, *Dell Computer Corp. v Union des consommateurs*, 2007 SCC 34, [2007] 2 SCR 801, at para. 70, the majority of the Supreme Court stated that according to that principle, "arbitrators should be allowed to exercise their power to rule first on their own jurisdiction."

[31] At para. 84-86 of *Dell*, Deschamps J., writing for the majority of the Supreme Court of Canada, laid out the application of the competence-competence principle, when faced with the issue of the applicability of an arbitration clause, as follows:

84 First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced,

since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.

85 If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.

86 Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process.

[32] In *Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 SCR 118 Abella J., writing for the majority, adopted the following summary of the principles set out in *Dell*, as described in its companion proceeding, *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35 [2007] 2 S.C.R. 921, at para. 11 as follows:

The majority of the Court held that, when an arbitration clause exists, any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone. Where a question concerning jurisdiction of an arbitrator requires the admission and examination of factual proof, normally courts must refer such questions to arbitration. For questions of mixed law and fact, courts must also favour referral to arbitration, and the only exception occurs where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration.

[33] Abella J. added at para. 35 that the principles cited above apply to Ontario's *Arbitration Act*.

[34] At para. 36 Abella J. further defined the “essential question” raised by the term “superficial review”, found at para. 85 of *Dell*, as “whether the necessary legal

conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties”.

[35] In *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, [2022] 3 SCR 265, at para. 41, Côté J. explained the rationale behind the principle that a challenge to an arbitrator’s jurisdiction should generally be resolved at first instance by the arbitrator. She wrote that “[t]his reflects the presumption that arbitrators have fact-finding expertise comparable to that of courts, and that the parties intended an arbitrator to determine the validity and scope of their agreement”.¹

Summary of the Parties’ Arguments

[36] The Town’s basic position is that arbitration terms set out in art. 8.2 and 8.3 apply only to the operational phase of the Lease; that is, management and operation of day-to-day issues once the Project is capable of operation. In other words, those provisions only begin to apply following completion of the development and construction phase of the Lease.

[37] The Town adds that the competence-competence principle does not apply to the choice of decision-maker here because the exceptions to that principle apply instead. It asserts that the issues between the parties are purely legal or at least questions of mixed fact and law. In any event, they are not complex. They can be resolved through a superficial review of the documentary record and the application of the principles of contractual interpretation found in the oft-cited decision, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633, at para. 47.

[38] The Town asserts that a superficial review of the Lease will show that it offers only a few discrete areas in which arbitration is available in the event of a dispute

¹ Citing J. K. McEwan and L. B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations*. Toronto: Thomson Reuters, 2022 (loose-leaf updated February 2022, release 1), at s. 5:10.

between the parties. In particular, art. 12.1(f) of the Lease, as amended and set out above, which the Town relies upon in its Notice of Default, contains no arbitration clause. Thus, any issue regarding the Notice of Default or the application of the doctrine of Force Majeure must clearly be litigated.

[39] The Lessee disagrees. It argues that the application of the principle of Force Majeure, found in both the Lease and the SWSA, to the dispute between the parties is a question of contractual interpretation. Thus, it is one of mixed fact and law: *Sattva*, at para. 50. So too is the issue of the application of the art. 8(3) arbitration clause arising out of the Operating Standards provisions of the Lease under art. 8(2)(e). In order to decide whether that principle applies to the parties' dispute, the decision-maker must look to a number of provisions of the Lease, particularly:

1. the interpretive provisions of art. 1.1;
2. the deadlines for the completion of construction of the Project set out in art. 4.2 as amended;
3. articles 8.2 and 8.3, as cited above;
4. art. 12.1(f) regarding events of default;
5. art. 13.1, dealing with arbitration.

In addition, the decision-maker will have to consider para. 39 of the SWSA regarding Force Majeure.

[40] Further, the Lessee writes in its factum that the person interpreting those Lease provisions would have to consider the negotiations between the parties regarding the Lease and the Second Amending Agreement. As the Lessee's counsel writes:

This exercise involves consideration of the three affidavits of the Town's Chief Administrative Officer, as well as the Donnini² Affidavit, all of which deal with the parties' intentions during negotiations, the deponents' competing interpretations of Article 8, complaints about the Lessee's timing and motives with respect to construction delays, and the Town's knowledge of the 2025 Mann Litigation during the negotiations.

[41] The Lessee adds that the Town itself asks the court to interpret the Lease in light of the contractual negotiations between the parties.

Analysis

[42] I agree with the Lessee that the competence-competence principle applies to this case and that the exceptions to that principle do not apply. I make that finding for the following reasons:

1. As set out above, the issue before the court is one of contractual interpretation rather than one of pure law: *Sattva*, at para. 50;
2. Thus, the issues between the parties must usually be determined through arbitration unless the exceptions set out in *Dell* apply;
3. The broad wording of art. 8.2 of the Lease, particularly the words: "every other reasonable act whatsoever in or about the Project to carry out the intent of this Lease" are at least amenable to the interpretation offered by the Lessee. They are not simply amenable to superficial review, as defined by Abella J. in *Uber*, above.
4. I do not find that the Lessee requested arbitration for the purpose of delay. The Lessee requested arbitration as soon as the substantive issues between the parties arose. It served its First Notice to Arbitrate on

² Piergiorgio Donnini is the President of the Lessee.

February 2, 2026. The parties could have entered into arbitration at that time. Had they done so, the process may well have been completed by now. The Lessees later served their Supplementary Notice to Arbitrate on May 16, 2026, only after the Town refused arbitration and brought this application.

5. For the reasons cited by the Lessee above, I find that the issues in this application cannot be resolved based only on a “superficial consideration of the documentary evidence in the record” (*Dell*, at para. 85).
6. I add that the Town itself makes the Lessee’s point when it asks the court to look beyond a superficial consideration of the relevant documents. At para. 42 of its factum, the Town “submits that the parties did not intend for the use of the language in Section 8.2(e) to create a general or freestanding governing obligation governing all aspects of the Lease. Had that been the intent of the parties, they would not have deliberately isolated it to Article 8 – Ongoing Operations”. That paragraph twice refers to the intent of the parties, while relying on the evidence of its Chief Administration Officer, as set out in paras. 38 – 41 of the Town’s factum.
7. Finally, as the Ontario Court of Appeal wrote in *Ciano Trading and Services C.T. & S.R.L. v. Skylink Aviation Inc.*, 2015 ONCA 89, at para. 7: “the case law recognizes that where it is unclear if the arbitrator has jurisdiction, it is preferable to leave the issue to the arbitrator pursuant to the competence-competence principle.”

Conclusion

[43] I find that the issue of the arbitrability of the issues in dispute between the parties must first be determined by an arbitrator selected pursuant to art. 13.1 of the Lease.

[44] Having made that finding, it is not necessary to consider the remaining issue cited above and I decline to do so.

[45] For the reasons cited above, I dismiss this Application. If a judge of this court is required to appoint an arbitrator under art. 13.1 (a) of the Lease, I will remain seized of this matter in order to make that determination.

Costs

[46] The parties should attempt to resolve the issue of costs on their own. If they are unable to do so, the Respondent, as the successful party in this proceeding, may submit its costs submissions of up to three pages, double spaced, one-inch margins, plus a bill of costs/costs outline and offers to settle, within 14 days of release of this endorsement. It need not include the authorities upon which it relies so long as they are found in the commonly referenced reporting services (i.e. CanLII, LexisNexis Quicklaw, or WestlawNext) and the relevant paragraph references are included. The Applicant may respond in kind within a further 14 days. No reply submission will be accepted unless I request it. If I have not received any submissions within the time frames set out above, I will assume that the parties have resolved the issue and will make no costs order.

Kurz J.

Released: August 27, 2026