

When “Final” Means Final: The High Price of an Unappealable Error in Arbitration in a Road Reconstruction Contract

Transportation & Logistics

1 October 2026

The Ontario Superior Court of Justice has held that an arbitration agreement may prevent a party from appealing an arbitration award on a question of law, even when the arbitrator made a legal error. The decision highlights why arbitration agreements must address appeals clearly. Parties should decide at the outset whether an award can be appealed and make sure the agreement says so.

In *Tedescon Infrastructure Ltd. v. The County of Simcoe*, the words “final and binding” kept the Court from correcting a legal error that could be separated from the facts. The award therefore stood even though its central premise did not: the contractor’s refusal to return to the project was both contractually justified and an abandonment of the contract.[1]

That conflict makes *Tedescon* more than a warning about giving up appeal rights. It shows a recurring risk in arbitration during an active construction project. A process intended to resolve quantities, extras, and delay claims can grow, without a matching change to the arbitration agreement, into a dispute about termination, refusal to perform, and the remaining value of the contract. Finality remains valuable. But it has a cost, and that cost is greatest when the dispute changes after the parties have chosen the process.

Section 45 of the Ontario’s *Arbitration Act, 1991* provides a narrow way to appeal a legal question when a court gives permission and the arbitration agreement does not address appeals. The Act also lets parties exclude that route, either expressly or by implication.[2] In *Tedescon*, the road works contract incorporated the OPSS.MUNI 100 general conditions and contemplated a separate agreement to arbitrate. That later agreement described the process as “final and binding” twice.

Justice Akazaki read those words as excluding an appeal under s. 45(1). The conclusion followed Ontario appellate decisions treating “final” language as ending further court review and was consistent with the surrounding circumstances of the agreement.[3] The fact that the arbitration agreement appeared to be the arbitrator’s standard wording did not reduce its effect: the parties could have changed it before signing. Nor did the standard-form general conditions conflict with the separate arbitration agreement. The Justice held that the parties contemplated a separate agreement about the arbitration process and did not themselves preserve an appeal on the merits.

Section 46 of the Act sets out the grounds on which an award may be set aside. Finality does not remove the availability of this provision, but those grounds were not a substitute for an appeal. *Tedescon* argued that the award went beyond the issues submitted to the arbitrator and that calculation errors and unclear accounting denied procedural fairness. The Court rejected both arguments. A jurisdictional challenge asks whether the arbitrator decided a dispute the parties put before him; it does not allow a court to review whether his reasoning followed the evidence or the parties’ submissions. Similarly, even an obvious arithmetic or methodological error is not, by itself, unequal treatment or a denial of natural justice. This distinction protects s. 46: serious problems with the process can still be reviewed, but an alleged error on the merits does not become a fairness complaint simply because no appeal is available.[4]

This distinction matters. “Final and binding” is often treated as standard language confirming that an award must be followed. *Tedescon* gives the phrase real effect: in the right statutory and contractual setting, it can prevent even an application for permission to appeal an identifiable legal question. Counsel should therefore treat it as a negotiated risk term, not ceremonial wording.

When the parties signed the arbitration agreement in April 2022, their dispute involved familiar construction issues: change orders, quantities, delayed payments, and extensions of time under an approximately \$10 million unit-rate road reconstruction contract. By spring 2023, the project relationship had broken down. Tedescon alleged 80 breaches and unfair contract administration, relied on GC 7.10 to suspend work, refused the County’s demand to return to the project, and was later replaced by another contractor.

The parties changed their arbitration pleadings to add the consequences of the stoppage, but they did not reconsider the “final and binding” language. That omission mattered. The Court emphasized that either party could have questioned whether the existing arbitration agreement covered the new fundamental-breach issues or negotiated an exception allowing an appeal. Instead, both parties brought the expanded dispute into the original process.[5]

The practical lesson is to pause and review the dispute-resolution process whenever the pleadings materially change. Has the case moved from valuing work to deciding whether the contract survived? Has the potential loss shifted from individual line items to completion costs or the remaining contract value? Are new legal questions likely to decide the result? If so, the parties should consciously confirm, revise, or replace the original appeal arrangements before the hearing, not after the award.

On the merits, the Court’s analysis was direct. The arbitrator found that Tatham Engineering, the County’s designer and contract administrator, had treated the County more favourably. That conduct justified Tedescon’s suspension under GC 7.10. Yet the arbitrator also held that Tedescon’s refusal to return to the project amounted to abandonment and repudiation, a refusal to perform the contract, entitling the County to damages for the cost of hiring a replacement contractor, subject to a 25% reduction.

Those findings could not both be right. As Justice Akazaki put it, “[j]ustification for stoppage and abandonment are two sides of the same coin. It must land on one side or the other.”[6] Repudiation requires words or conduct showing an intention not to remain bound by the contract. A refusal to work may meet that test when a contractor insists on payment that is not yet due or wrongly claims a right to stop that does not exist.[7] But those cases do not fit a contractor that properly uses an express suspension right in response to an owner’s default.

The missing element was breach. If GC 7.10 relieved Tedescon of the obligation to continue working while the County’s defaults continued, staying off site could not itself breach that obligation. The arbitrator had also awarded Tedescon \$1,046,723.29 for Extras that were wrongly disallowed and \$468,806.41 in delay damages. Those findings supported, rather than weakened, the factual basis for the suspension.[8]

This is a useful example of “binary logic” in notices and pleadings: the facts must point to one of two positions, not both. An owner alleging abandonment should identify the exact obligation requiring continued performance and explain why any claimed right to suspend was unavailable, defective, waived, or cured. A contractor should connect its notice to the contract clause, the default that triggered the suspension, the amounts that were overdue, and the conditions for returning to work. Labels such as “abandonment” and “refusal to perform” cannot replace that contract analysis.

The decision also shows that a contract administrator’s role is not only operational. Tatham’s preferential treatment was treated as conduct by the County and provided the contractual basis for the stoppage. Its rejection of Extras helped create both the cash-flow pressure and the legal basis for Tedescon’s refusal to return to the project.[9]

Owners should protect an administrator’s independence with a clear mandate, consistent methods for valuing work, well-reasoned decisions, and records that separate technical assessments from owner preferences. Contractors should keep timely records of inconsistent treatment, unanswered support for claims, and departures from the contract’s valuation process. A later tribunal will examine not only whether a claim was rejected, but also how and why it was rejected.

The arbitrator tried to recognize the County’s role in causing the stoppage by reducing its damages by 25%. The Court questioned that approach. *Arcamm Electrical Services Ltd. v. Avison Young Real Estate Management Services LP* allows a reduction in contractual damages when a plaintiff’s conduct increased its loss; it does not add ordinary contributory negligence as a separate rule in contract law. Here, if the stoppage was justified, Tedescon had not breached the contract and there was no breach to divide between the parties. If the stoppage was unjustified, only conduct that caused the County’s loss to increase after the abandonment could support a reduction.[10]



The point is broader than the calculation. A percentage reduction cannot replace identifying the obligation that was breached, the cause of the loss, and the loss that can be recovered. Dividing damages may adjust the amount after liability is established; it cannot reconcile findings that the same conduct was both justified and a breach.

The effect of finality was concrete. The award required Tedescon to pay the County a net \$511,243.13, including HST. If an appeal had been available, the Court would have removed the County's damages claim and awarded Tedescon \$2,598,518.75: \$1,046,723.29 for unpaid Extras, \$468,806.41 for delay costs, and \$1,082,989.05 for unpaid holdbacks.[11] The Court also noted, without deciding the issue, that the County's decision to keep the replacement contractor while Tedescon's stoppage remained justified might itself have supported a claim that the County had repudiated the contract.[12]

The County's protective cross-application also failed in the Court's hypothetical analysis. Although the Court would have granted permission to appeal, the proposed argument, that a contractor that abandons a contract should receive no credit for work already performed, depended on the same flawed assumption that Tedescon had repudiated the contract.[13]

Checklist for Drafting and for Dispute Management

- **Choose finality deliberately.** Say clearly whether appeals on legal questions are allowed, excluded, or limited to specific issues; do not assume everyone gives the same meaning to standard wording.
- **Add a checkpoint.** Require the parties to reconsider the appeal arrangements when the pleadings add termination, refusal to perform, fraud, or another issue that materially changes the stakes.
- **Tie suspension to the contract.** A notice should name the relevant clause, the breach that triggered the suspension, the cure requested, the date the suspension takes effect, and the conditions for returning to work.
- **Test the “binary” premise early.** Before alleging abandonment, ask whether the contractor still had a contractual duty to continue working. Before suspending, confirm that all contractual requirements for suspension have been met.
- **Review contract administration.** Clear, even-handed, and well-documented decisions reduce the risk that project administration will become evidence that the owner breached the contract.
- **Analyze damages only after liability.** Do not use a percentage reduction to avoid deciding whether the conduct was a breach at all.

The drafting choice need not be all or nothing. Parties can preserve the statutory permission route for legal questions while making factual and valuation findings final; allow appeals only above an agreed monetary threshold; or identify a short list of legal issues that remain open to review. They can also pair a limited appeal right with a fast timetable and continued payment of undisputed amounts. The goal is to reserve court oversight for errors that could distort the parties' bargain without repeating the entire arbitration in court.

Another safeguard is a requirement to revisit the scope of the arbitration. If an amended pleading introduces termination, refusal to perform, or exposure to completion costs, the clause can require the parties to discuss promptly whether the original appeal arrangements still fit. If they cannot agree, the existing agreement might remain in place, but the required discussion would prevent the quiet procedural drift seen in *Tedescon*. This approach respects commercial finality while recognizing that the right process for a disputed quantity may not be the right process for deciding whether the contract survived.

Tedescon does not weaken the finality of arbitration; it shows how strong that finality can be. Courts may identify an error, explain why it matters, and still refuse to correct it because the parties chose a process with no appeal. For construction participants, the answer is not to automatically preserve every appeal. It is to match the level of finality to the dispute being arbitrated and to revisit that choice when a payment dispute on an active project becomes a fight over whether the contract itself survives.

[1] *Tedescon Infrastructure Ltd. v. The County of Simcoe*, 2026 ONSC 3548, at paras. 1-7, 19, 71-84 [*Tedescon*].

[2] *Arbitration Act*, 1991, S.O. 1991, c. 17, ss. 3, 45(1).

[3] *Baffinland Iron Mines LP v. Tower-EBC G.P./S.E.N.C.*, 2023 ONCA 245, at paras. 41-44, 54; *Denison Mines Ltd. v. Ontario Hydro* (2002), 58 O.R. (3d) 26, 2002 CanLII 20161 (C.A.), at paras. 4, 16; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at para. 47.



[4] *Tedescon*, supra note 1 at paras. 28–40, 44–58; *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254, at para. 43; *Smyth v. Perth and Smiths Falls District Hospital*, 2008 ONCA 794, at para. 17.

[5] *Ibid.* at paras. 56, 58–60.

[6] *Ibid.* at paras. 71–75.

[7] *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 1999 CanLII 664, at para. 40; *D & M Steel Ltd. v. 51 Construction Ltd.*, 2018 ONSC 2171, at para. 54; *Tedescon*, supra note 1 at paras. 75–79.

[8] *Tedescon*, supra note 1 at paras. 65, 80–81.

[9] *Ibid.* at paras. 8, 15, 65, 80.

[10] *Arcamm Electrical Services Ltd. v. Avison Young Real Estate Management Services LP*, 2024 ONCA 925, at paras. 34–45; *Tedescon*, supra note 1 at paras. 72–74.

[11] *Tedescon*, supra note 1 at paras. 2, 83–84.

[12] *Ibid.* at para. 82.

[13] *Ibid.* at paras. 85–88.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

Author



Rui M. Fernandes

Partner and Co-Chair, Transportation and Logistics Group

416.203.9505

rfernandes@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com