THE REFORM OF APPEALS PROVISIONS IN CANADIAN COMMERCIAL ARBITRATION STATUTES

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Whenever reform of Canadian arbitration statutes is considered, the subject of appeals from awards is always a focus of acute attention. There are at least three reasons for this. First, apart from Québec and under the federal arbitration statute, every province has separate acts for domestic and international arbitrations. All the domestic acts permit appeals in certain circumstances, while all of the international acts—modeled on the *UNCITRAL Model Law on International Commercial Arbitration* (the "Model Law")—make no mention of appeal rights and thus preclude appeals from awards.[1] Without any apparent logical basis, there is a stark difference between domestic and international cases.

Second, on the domestic side, appeal rights vary from jurisdiction to jurisdiction. In Ontario, parties are permitted to agree to the availability of appeals on questions of law, mixed fact and law, or fact. If they do not "deal with" (i.e., preclude) appeals on questions of law in their arbitration agreements, they are entitled to appeal on questions of law with leave.[2] The Alberta, Saskatchewan, Manitoba, and New Brunswick Acts are

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[1] The Model Law was promulgated in 1985 and adopted by Canada soon thereafter. It was amended in 2006, with the 2006 version adopted by Ontario and British Columbia, respectively, in 2017 and 2018.

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

substantially the same, except that in Alberta and New Brunswick, parties may not contract out of appeals on questions of law.[3] A provision unique to Alberta is that parties may not appeal on a question of law that has been "expressly referred to the arbitral tribunal for decision".[4] In Manitoba, parties may in their arbitration agreements provide for appeals directly to the Court of Appeal, in which case the normal test for leave will not apply and the Minister of Justice must be satisfied that the arbitration relates to a matter of major importance to the province.[5] In Nova Scotia, no appeals are permitted unless the parties opt in by providing in their arbitration agreements for rights of appeal on questions of law, fact, or mixed fact and law.[6] In British Columbia before 2020, parties could contract out of appeals on questions of law, but only after the commencement of an arbitration.

As to jurisdictions with domestic acts that pre-date the Model Law, Newfoundland and Labrador's statute is silent as to appeals, save for a provision that awards may be set aside where an arbitrator has committed misconduct, or where awards have been improperly procured.[7] In Prince Edward Island and the Territories, parties are able to opt into appeals by contract.[8]

Finally, in Québec and under the federal commercial arbitration statute, there are no rights of appeal. The arbitration

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[3] *Arbitration Act*, RSA 2000, c A-43, s 44(1-3); *The Arbitration Act*, SS 1992, c a-24.1, s 45(1-2); *The Arbitration Act*, CCSM, c A120, s 44(1), (2), and (5); *Arbitration Act*, RSNB 2014, c. 100, s 45(1—3).

[4] *Arbitration Act*, RSA 2000, c A-43, s 44(3).

[5] *The Arbitration Act*, CCSM., c A120, s 44(1), (2), and (5).

[6] *Commercial Arbitration Act*, SNS 1999, c 5, s 48(1—2).

[7] *Arbitration Act*, RSNL 1990, c A-14, s 14(1).

[8] *Arbitration Act*, RSPEI 1988, c A-16, s 21(2); *Arbitration Act*, RSY 2002, c 8, s 26(1); *Arbitration Act*, RSNWT (Nu) 1988, c A-5, s 27(1); *Arbitration Act*, RSNWT 1988, c A-5, section 27(1).

provisions of Quebec's *Code of Civil Procedure*[9] and the federal *Commercial Arbitration Act*[10] both adopt the Model Law.

Third, and most important, appeal rights arguably engage a clash between two foundational arbitration precepts. On one hand, the central aim of commercial arbitration is efficiency and finality.[11] As Jan Paulsson wrote, "The idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision makers".[12] On the other hand, arbitration is contractual, and on this basis it is often observed that parties should be free to bargain for court appeal rights should they wish.

Domestic arbitration legislation was reconsidered almost a decade ago by the Uniform Law Conference of Canada, which released its Uniform Arbitration Act in 2016. As noted in the ULCC Commentary, the Uniform Act reflected a consensus of opinion that appeals on questions of fact and questions of mixed fact and law should no longer be permitted in domestic arbitrations, and that the scope of appeals on questions of law should be limited. The Uniform Act provides that parties are only able to appeal on questions of law arising from arbitral awards with leave of the courts that would hear such appeals, and only if they provided for such an appeal in their arbitration agreements (an "opt-in" right). Appeals on questions of mixed fact and law and on questions of fact are precluded. To obtain leave, applicants must show that: (i) the question of law would significantly affect their rights; (ii) leave might prevent a miscarriage of justice; (iii) the question of law is of importance

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[9] Arts 620-655 CCP.

[10] *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp).

[11] *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32, at paras 1, 74, and 83, Gascon J [*Teal Cedar*].

[12] Jan Paulsson, *The Idea of Arbitration*, 1st ed (Oxford: Oxford University Press, 2013) at 1.

to a class or body of persons of which the applicant is a member; or (iv) the question of law is of general public importance. Finally, appeals would go directly to provincial courts of appeal.

Consistent with the ULCC's stated objectives, British Columbia enacted a reformed domestic arbitration act in 2020.[13] Thereunder, parties may by contract opt into rights of appeal, but only on questions of law. Conversely, parties may agree to preclude all appeals, including appeals on questions of law. Where they do not opt out of all appeals or are silent on appeals, they may appeal on questions of law with leave. The statutory test for leave to appeal resembles the test in the Uniform Arbitration Act. Finally, all appeals and applications for leave to appeal are made directly to the British Columbia Court of Appeal.

After much discussion, the Arbitration Act Reform Committee of the Toronto Commercial Arbitration Society (the "AARC") also followed the ULCC's recommendations. It proposed that: (i) parties may opt into rights of appeal directly to the Ontario Court of Appeal; and (ii) such appeals may only lie in respect of questions of the laws of Canada or any of its provinces and territories. The AARC considered and rejected any default or non-consensual rights of appeal and any process that would require leave to appeal. Thus, without opting in, there are no rights of appeal.

In making these recommendations, the AARC deliberately chose not to address several of the appeal-related issues that have occupied Canadian courts for years. The AARC recommendations do not deal with the vexing question of what constitutes an "extricable question of law" as contemplated by the Supreme Court of Canada in *Sattva Capital Corporation v Creston Moly Corporation*,[14] and *Teal Cedar Products Ltd. v*

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[13] *Arbitration Act*, SBC 2020, c 2.

[14] *Creston Moly Corp. v Sattva Capital Corp.,* 2014 SCC 53 [*Sattva*].

British Columbia.[15] Similarly, the AARC report does not consider the question of standard of review and, more particularly, whether *Canada (Minister of Citizenship and Immigration) v Vavilov*[16] has any application to commercial arbitration. Also, since it would eliminate the leave to appeal process, the AARC Report does not deal with any issues relating to tests for leave to appeal. The AARC considered that these types of issues are best resolved by the courts without further and perhaps fruitless or counterproductive legislative action.

The proposals made by the AARC meet several important objectives, which should be shared, or at least considered, as other Canadian jurisdictions contemplate changes to their own legislation.

First, a reformed and consolidated Ontario Commercial Arbitration Act (the "CAA") would eliminate the artificial distinction between domestic and international arbitration. It is easily observed that domestic cases can be as complex and as important to the parties as international cases. Conversely, many international cases are comparatively small and straightforward. Apart from the possible application of non-Canadian law in international cases seated in Canada, the legal issues that present themselves in domestic and international cases are the same.

Moreover, while it is true that appeal rights in international arbitration are rare, they are not unknown. In New Zealand, under a single act covering both domestic and international arbitration, parties in international cases may opt into appeal rights.[17] In England, which also maintains a single act, there is an opt-out regime for appeals. In Singapore, parties in

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[15] *Teal Cedar*, *supra* note 11.

[16] *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65.

[17] *New Zealand Arbitration Act 1996*, sched 2, s 5.

international cases can, and often do, avail themselves of appeal rights by opting into that state's domestic act.[18] In Canada, it is an open question whether parties may have appeals in international cases simply by agreeing to conduct their cases under our domestic statutes. If there are sound policy reasons for limiting appeals, what is sauce for the domestic goose should be sauce for the international gander.

Second, there should be a significant reduction in the absolute number of arbitration appeals. While most appeals are now made in respect of questions of law, parties do bargain for expanded appeal rights, and arbitration agreements that permit appeals on questions of fact or mixed fact and law are not unknown. Such agreements are often made with little thought given to the actual utility of appeals or the costs associated with adding litigation to arbitration.

As a matter of sound arbitration policy, and consistent with the goal of easing the congestion in our courts, parties who consider the use of arbitration should be taken to accept that arbitration is an alternative to litigation, and should produce final determinations of commercial disputes without the need for protracted and expensive court intervention following the issuance of final awards. As well, parties should be assumed to understand that their investment of time and money in an appeal process be limited to a rare and narrow range of situations. Where parties have a legitimate or perceived need for court appellate intervention in the resolution of their disputes, they should as a matter of policy and efficiency opt for litigation at the outset.

It is important to note that the suggested limitation on appeal rights would not make Canada an outlier in the arbitration world. To the contrary, Canada is now an outlier to the extent that it provides for broad-ranging appeal rights, albeit only from domestic awards. In England, for example, while there

[18] *Singapore International Arbitration Act 1994*, s 15.

is an opt-out regime, appeals are permitted only on questions of law. In order to appeal absent agreement of the parties, leave must be obtained under a rigorous test that requires that all of the following criteria be met: (i) the question will substantially affect a party's rights; (ii) the question is one that the tribunal was asked to determine; (iii) the decision in issue is "obviously wrong" or, if a matter of general public importance, subject to "serious doubt"; and, (iv) despite the parties' agreement to arbitrate, "it is just and proper in all the circumstances for the court to determine the question".[19]

In Australia, using New South Wales as an example, only appeals on questions of law are permitted. Parties must opt into the appeal regime by agreement made no later than three months after issuance of the final award, meaning that as a practical matter they must have consented to the possibility of appeals when they made their arbitration agreements. Even with this agreement of the parties, appeals are only permitted with leave of the appellate court, using the same rigorous test as in England.[20]

As to the United States, it is worth noting that under the *Federal Arbitration Act* the grounds upon which awards may be "reviewed" are limited to miscalculations, mistakes in the description of persons, things or property, excess of jurisdiction and imperfections in matters of form "not affecting the merits of the controversy", fraud, corruption, due process issues and arbitrator misbehavior, the latter of which has been interpreted to include the problematic doctrine of "manifest disregard of the law".[21] In practice, this doctrine is rarely invoked, let alone successfully invoked. Apart from "manifest disregard of the law", the foregoing grounds are provided for under the set-aside

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[19] *England & Wales Arbitration Act 1996*, c 23, s 69.

[20] *Commercial Arbitration Act 2010* (NSW), 2010/61, s 34(a).

[21] *Federal Arbitration Act*, 9 USC § 1—14 (1947).

provisions of the provinces' domestic arbitration acts and the Model Law.

Third, under the recommended CAA, the gate-keeping function of the leave to appeal process would be eliminated. The benefits of this gate-keeping function are illusory. In the vast majority of cases, leave is granted, so the leave process contributes little other than to add time, expense, and legal uncertainty. It also forces judicial attention to issues that may not be legally significant and worthy of the courts' attention. In many instances, leave has been granted purely on the basis that an appeal is of importance to the losing party because that party has lost and it is possible that a legal error was made.[22] Leave to appeal provisions only exist to preserve the possibility of appeals where parties have not expressly agreed to waive the principle of arbitral finality. Under a reformed CAA, parties will make their decisions to provide for appeal rights when they make their arbitration agreements, which is as it should be: the time of contracting is the time that parties focus on delineating their respective rights and obligations.

Fourth, a streamlined appeal process that would eliminate appellate proceedings at the trial court level serves to put arbitral awards on the same footing vis-à-vis the appellate court as judgments obtained at trials. To parties that opt for appeals, there is an inherent logic in having awards made by arbitrators of their choice appealed to the same level of court authority that hears appeals from trial judges. There is an inherent illogic in having awards appealed to trial judges at the lowest levels of the courts, chosen at random and having no necessary expertise in the subject-matter of the awards under appeal. This illogic is aptly illustrated by the fact that in many cases, the arbitrators selected by the parties are themselves retired appeal court judges. Further, appeals directly to the Court of Appeal mitigate

[22] See, as stark examples, *Aronowicz v Aronowicz* (2007), 84 OR (3d) 428 (SC), 2007 CanLII 1885; *Camerman v Busch Painting Limited et al*, 2020 ONSC 5260.

against the time and expense associated with appeals by eliminating additional time-consuming and expensive levels of appeal. Finality delayed is often finality denied.

Fifth, and perhaps most important, is the AARC's recommendation that Ontario's appeal regime be opt-in as opposed to opt-out. The obvious consequence of an opt-out regime (such as the new regime in British Columbia) is that appeal rights exist when no action is taken by arbitral parties.

Given the contractual nature of arbitration and the foundational principles of finality and cost-and-time efficiency, the current situation of widespread appeals to the courts should not be allowed to continue. Appeals rights should not exist as a matter of default. Parties should, at the outset of their commercial relationships, be required to weigh the costs and benefits of appeals. Their lawyers should be required to consider the possibility of appeals, and the resultant delays to final dispute resolution, as part of the bargaining process. This should entail considerations of why arbitration is being selected as an alternative to litigation, what types of disputes are likely to arise between the parties, what types of arbitrators will be chosen and how many, whether the contemplated disputes are likely to engender the type of legal issues that should require court determination, and whether there will be a need for confidentiality that would be eviscerated by appeals to public courts. Such a focus on the need for appeals at the outset may well entail consideration of an obvious alternative: appeals to appellate arbitral tribunals, with appeal panels, procedural rules, standards of review, and scope of appeal provisions open to full negotiation by the parties.

Finally, and as a matter of principle as well as sound policy, an opt-in appeal regime will clarify that arbitration is an alternative to litigation, not simply one stage of a multi-tiered court process.

As noted at the outset, the subject of appeals invokes the foundational arbitration principles of finality and efficiency, together with the principle of contractual autonomy. The AARC recommendations are consistent with and flow from the precepts of the Model Law, the revisitation of appeal rights by the ULCC, and (with some deviation) the legislative reforms in British Columbia. This is fully consistent with the consolidation of Ontario's two arbitration acts into a single act, and the creation of a single appeal regime that respects these foundational principles. Ontario should adopt the AARC recommendations and other provinces should follow suit.