Focus ALTERNATIVE DISPUTE RESOLUTION

On appeals, the provinces differ

William Horton

RED_FROG / ISTOCKPHOTO.COM

> ...[T]here is a growing body of opinion that court appeals are basically inconsistent with the utility of arbitration as a meaningful alternative to court litigation.
>
> **William Horton**
> William G. Horton
> Professional Corporation

Commercial arbitration now exists as a vibrant national practice in Canada with parties, counsel and arbitrators regularly crossing provincial boundaries to achieve more efficient, expert determinations of commercial disputes than courts can often provide. Yet, in each province, the awards themselves are subject to idiosyncrasies of statutory appeal provisions and the varying approaches of the courts. Often the result is that the value of arbitration as an alternative to litigation is eviscerated.

Around a quarter of a century ago, important new advances in international arbitration were imported into Canada with the adoption of the UNCITRAL Model Law by all jurisdictions. The result was that all appeals on the merits (whether on law, facts or mixed fact and law) were abolished for international commercial arbitration awards. In 1990, the Uniform Law Conference of Canada considered whether the same should obtain in non-international commercial arbitration but decided that "different considerations apply" in such cases. The recommendations of the ULCC in its *Uniform Arbitration Act* (revised in 1995) retained a right of appeal on a "question of law" with leave of the court, which could be overridden by the agreement of the parties or supplemented with broader agreed appeal rights. However, this recommendation was not uniformly adopted.

The Canadian federal *Commercial Arbitration Act*, followed the example of the Model Law for all arbitrations (whether international or not) and did away with all rights of appeal on the merits. The Quebec *Civil Code* takes the same approach and excludes all rights of appeal on the merits.

The Newfoundland and Labrador *Arbitration Act* makes no provisions for appeals on the merits but allows awards to be set aside for arbitrator "misconduct," which N&L judges interpret to include "errors of law or fact." Prince Edward Island is the same.

Some provinces only provide for an appeal if the parties expressly provide for it: Nova Scotia and the three territories.

Ontario and Saskatchewan come closest to adopting the ULCC uniform act with respect to appeals. However, in Ontario, the leave provision has become so trivialized by judicial interpretation that leave applications are simply heard at the same time as the appeal itself. If you don't get leave you lose the appeal. If you win the appeal, you get leave.

In British Columbia, Alberta, Manitoba and New Brunswick it is not possible to contract out of an appeal on a question of law with leave. A further variation is that in British Columbia it is possible to waive all rights to appeal after the arbitration has started (no statistics on how often that has happened). The most extreme examples of appeal processes destroying the inherent value of arbitration as an alternative to court litigation come from some of these provinces (including the *Sattva Capital* case, in which the appeal process took over 5½ years).

The Alberta Law Reform Institute recently called for legislative reform allowing for appeals only where the parties have provided for them by agreement.

The Domestic Arbitration Law Project ("DALP") is the new task force of the Uniform Law Conference of Canada, chaired by Gerry Ghikas of Vancouver. Its objective is to develop a new *Uniform Arbitration Act* for non-international arbitration in Canada. A key issue is what appeals of arbitration awards, if any, should be contemplated by provincial legislation.

Although many arbitration practitioners (including counsel and arbitrators) fear that limiting or eliminating options to appeal awards on their merits may make parties to disputes (and, perhaps more to the point, their lawyers) reluctant to use arbitration, there is a growing body of opinion that court appeals are basically inconsistent with the utility of arbitration as a meaningful alternative to court litigation. (Of course, other considerations may apply with respect to other types of dispute such as consumer or family, as recognized in present legislation.)

Every reason parties may choose arbitration is compromised by an appeal. Confidentiality of the existence of the dispute and the parties to the dispute, and possibly some of the evidence, is destroyed. Even if the arbitration process may be as expensive as litigation in getting to the award, the appeal will automatically add cost and delay. The existence of an appeal may also result in strategic behaviour within the arbitration process that adds to the cost and detracts from the flexibility. The choice by the parties of a specific arbitrator or tribunal to decide their dispute will be overridden by a judge or judges assigned by the court system. The neutral forum of arbitration will be replaced either by an appeal to the courts of the jurisdiction in which one of the parties is located, or to a court that has no connection whatever to the dispute.

Of course, the loser in any process may regret not having another opportunity to change the result. But losers in arbitration and litigation are equally likely to be unhappy with the result, and for much the same kinds of reasons.

William Horton is an arbitrator and mediator of Canadian and international business disputes.