REFORMING ARBITRATION APPEALS: THE NEW ULCC *UNIFORM ARBITRATION ACT*

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On August 15, 2016, the Uniform Law Conference of Canada[1] ("ULCC") adopted a new *Uniform Arbitration Act* ("*UAA*"), which will serve as a reference point across Canada for future legislative change relating to non-international arbitration (sometimes known as "domestic" arbitration). Key, and potentially controversial, recommendations regarding arbitration appeals are the subject of this article.

The new *UAA* was produced after much analysis and consultation by the Domestic Arbitration Law Project ("DALP") of the ULCC. The report of the DALP and the new *UAA* represents extensive work carried out by a working group of arbitration specialists from across Canada chaired by Gerry Ghikas, Q.C., of Vancouver.[2]

Because legislation and legal cultures with reference to non-international arbitration differ markedly among the provinces of Canada, and also differ between federal arbitration legislation and that of the provinces, the ultimate solutions proposed in the new *UAA* will be viewed differently in different parts of the country. There is no issue on which this observation is more evident than the issue of appeals from arbitration awards to the courts.

NEW *UAA* PROVISIONS REGARDING ARBITRATION APPEALS

This article focuses on the following key recommendations embedded in the new *UAA* with respect to appeals from arbitration awards:

1) no appeals to the court would be allowed with respect to questions of fact or questions of mixed fact and law;

2) appeals to the court on questions of law would be allowed only if the agreement to arbitrate specifically so provides;

* The views expressed in this article are those of the author and not necessarily those of the ULCC, the working group of the ULCC Domestic Arbitration Law Project or any individual associated with that project other than the author.

3) appeals on questions of law would be made directly to the court of appeal of the enacting province, with leave of that court.

This article focuses exclusively on the subject of commercial arbitration. Those Canadian arbitration statutes that are otherwise of general application often contain exceptions for non-commercial arbitration, for example family disputes. The new *UAA* applies to all arbitrations and leaves it to the enacting jurisdictions, if and when they adopt the new *UAA*, to make whatever exceptions the enacting jurisdiction considers appropriate.

THE STATUTORY BASIS FOR APPEALS

On the issue of appeals to the court from arbitration awards, it should be noted at the outset that in Canada there is no inherent right of appeal and the jurisdiction of the courts to hear appeals from arbitration awards is purely statutory.[3] This context, described well by the Supreme Court of Canada in *Kourtessis v. Minister of National Revenue*,[4] needs to be kept in mind:

> Appeals are solely creatures of statute; see *R. v. Meltzer*, [1989] 1 S.C.R. 1764, at p. 1773. There is no inherent jurisdiction in any appeal court. Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate courts and to the Supreme Court of Canada have become so established and routine that there is a widespread expectation that there must be some way to appeal the decision of a court of first instance. But it remains true that there is no right of appeal on any matter unless provided for by the relevant legislature.
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> There are various policy reasons for enacting a procedure that limits rights of appeal. Sometimes the opportunity for more opinions does not serve the ends of justice … A further policy rationale, and one that is important to the case before this Court, is that there should not be unnecessary delay in the final disposition of proceedings … As well, there is the simple value of a final decision to resolve a dispute without the costs, in time, effort and money, of further hearings.[5]

CURRENT CANADIAN LEGISLATION REGARDING ARBITRATION APPEALS

Currently, under the Canadian *Commercial Arbitration Act*[6] (a federal statute that adopts a Commercial Arbitration Code based on the UNCITRAL Model Law) and under the Québec *Code of Civil Procedure*[7] no appeal on the merits[8] is available from any arbitration award to the courts. Other provinces allow for appeals in certain circumstances, subject to varying degrees of party control. In British Columbia[9] and Alberta[10] there is a right of appeal (subject to obtaining leave of the court) on questions of law—a right that cannot be avoided by a pre-dispute agreement of the parties. In British Columbia parties may contract out of a right of appeal on a point of law if they do so *after the arbitration has started*. In Alberta there is no right to appeal on a point of

law "which the parties expressly referred to the arbitral tribunal"—a situation that is unlikely to arise except after a dispute has arisen and specific points of law can be identified as being linchpins of the dispute.[11] In Manitoba[12] parties may appeal on any grounds if their agreement so provides; however, if the agreement does not provide for an appeal on a question of law, a party may appeal on a question of law with leave of the court. Ontario[13] and Saskatchewan[14] take a common approach that adopts the recommendations of the previous *UAA* by allowing the parties to fully opt into or out of all types of appeals from arbitration awards while providing that, *in the absence of any agreement*, there will be a right to appeal on a question of law with leave of the court. Newfoundland and Labrador[15] provides for no appeal on the merits in its arbitration statute. Nova Scotia,[16] Prince Edward Island[17] and the three territories[18] allow appeals only where the parties have provided for appeals in their arbitration agreement.[19]

THE NEW *UAA*

The relevant provisions in the new *UAA*,[20] for the purpose of the present discussion, are the following:

> **Court intervention limited**
>
> **64** No decision, order or award of an arbitral tribunal may be appealed to or be reviewed or set aside by a court, except as provided in this Act.
>
> **Appeals on questions of law**
>
> **65** (1) If an arbitration agreement provides that an appeal may be brought on a question of law, an appeal may be brought to [*enacting jurisdiction to insert name of appellate court*] on a question of law arising out of an award, with leave of that court.
>
> (2) A provision of an arbitration agreement purporting to allow
>
> (a) an appeal on a question of law to a court other than [*enacting jurisdiction to insert name of appellate court*], or
>
> (b) an appeal on a question of mixed fact and law,
>
> is an agreement providing that an appeal may be brought to [*enacting jurisdiction to insert name of appellate court*] on a question of law.
>
> (3) The [*enacting jurisdiction to insert name of appellate court*] may decide whether an arbitration agreement provides that an appeal may be brought on a question of law.
>
> (4) A provision of an arbitration agreement purporting to allow an appeal on a question of fact has no effect.

Appended to these provisions in the new *UAA* is the following commentary:

> It is of the utmost importance, to achieve the objectives of the *Act*, that court recourse from arbitral awards be strictly limited.

> The previous uniform *Act* allowed parties to appeal to a court of first instance on questions of law, with leave of that court, or without leave if the arbitration agreement expressly authorized such appeals or all parties consent.
>
> The previous uniform *Act* also permitted parties to appeal to a court of first instance on questions of fact or mixed questions of law and fact, without leave, if such appeals are authorized by the arbitration agreement. A party could not appeal to the court, however, on a question of law "which the parties expressly referred to the arbitral tribunal for decision." The decision of the court of first instance could then be further appealed to the court of appeal, with leave of that court.

These comments by the working group must be understood in the context that most provinces did not adopt the previous *UAA* in the precise combination of recommendations it contained. For example, as noted above, Alberta does not allow any opting out of appeals (with leave) on points of law and Alberta is the only province to adopt the exception relating to questions of law "which the parties expressly referred to the arbitral tribunal".

The commentary attached to the appeal-related provisions of the new *UAA* continues as follows:

> There is a broad consensus that appeals on questions of fact or mixed fact and law should not be allowed. Section 65 (subject to a transitional provision) prohibits appeals on questions of fact or on questions of mixed fact and law, even if the parties have agreed to allow such appeals.
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> Among the members of the ULCC Working Group and survey respondents more than half supported also barring appeals on questions of law. There was also substantial support for preserving such a right of appeal. If such appeal rights are to be available, the preponderant view was that it should be on an "opt-in" rather than an "opt out" basis.
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> Subsection 65(1) of the new *Act* assumes that appeals on questions of law will be permitted, on an "opt-in" basis. Because this is a significant change from the previous regime in many jurisdictions, a transitional provision is recommended (see Section 74) to preserve the previous regime for arbitration agreements made before the new *Act* is enacted.
>
> The new *Act* implements a more streamlined appeal process, to the Court of Appeal (with leave of that court) rather than to a court of first instance. This should reduce unduly protracted post-award litigation.

ARBITRATION AWARDS AND COURT APPEALS: WHAT IS THE PROBLEM?

Any discussion of appeals to the court from arbitration awards raises fundamental questions as to the nature and purpose of arbitration. It also raises questions about how arbitration relates to the power/responsibility of state courts to adjudicate disputes between private parties. By implication, it raises questions as well as to the role, responsibility and interests of the legal profession with respect to all forms of dispute resolution. These questions are as old as the idea of arbitration itself.

However, before turning to a more conceptual discussion of the issue, it may be useful to describe, with reference to a few actual cases, the practical results of providing for a combination of arbitration and a right of appeal to the courts.

In reviewing these examples, it should be borne in mind that appeals of arbitration awards involve a considerably higher degree of complexity than appeals from trial decisions within the court system. Appeals from trial decisions are generally as of right. In order to give some effect to the notion that arbitration and litigation are meant to be alternatives to each other, rights to appeal from arbitration awards are always restricted in some manner, even in provinces where there is no ability to contract out of a limited right to appeal. Such restrictions on the right to appeal from an arbitration award create issues that require additional analysis, argument and adjudication. Often, as with leave to appeal, a separate process of adjudication may take place with respect to the admissibility of the appeal. In addition, questions regarding classification of grounds for appeal and the standard of review will raise complications not present in appeals from a trial court. Furthermore, as the cases illustrate, the appeal process may take considerably longer than the original arbitration process and either simply confirm the original award or substitute a new decision that is as open to question and differences of opinion as the arbitration award itself. These points can be made without any consideration of the actual merits of any given case. Here are a few B.C. examples.[21]

Boxer Capital Corp. v. JEL Investments Ltd.

The first arbitration award was made on March 23, 2009. JEL Investments Ltd. ("JEL") did not comply with the award so Boxer Capital Corp. ("Boxer") commenced an action and was granted an order for specific performance by Justice Dickson on September 22, 2009.[22]

JEL sought leave to appeal the arbitration award to the British Columbia Supreme Court. The leave to appeal application was dismissed on June 1, 2010.[23] That order was appealed and, on March 25, 2011 the British Columbia Court of Appeal allowed the appeal and granted JEL leave to appeal to the Supreme Court of British Columbia.[24]

The appeal was heard on August 31, 2011 and on November 10, 2011 the award was set aside in part.[25] The decision did not actually resolve the dispute or refer the matter back for further arbitration.

JEL then commenced a second arbitration. The second arbitrator made two arbitration awards, dated August 20, 2012 and December 21, 2012.

Boxer sought leave to appeal the second arbitrator's awards to the British Columbia Supreme Court. On April 19, 2013 Justice Leask granted leave to appeal.[26] JEL then appealed Justice Leask's decision granting leave to

appeal to the British Columbia Court of Appeal. On June 14, 2013 the appeal regarding leave to appeal was dismissed.[27]

The appeal on the merits was heard on September 27, 2013. On December 27, 2013 the appeal was allowed.[28]

That decision was appealed to the British Columbia Court of Appeal. On January 20, 2015 the British Columbia Court of Appeal allowed the appeal and reinstated the second award.[29] Leave to appeal to the Supreme Court of Canada was never sought. It therefore appears that this case was finally concluded on January 20, 2015.

In summary, an arbitration that resulted in an award in March 2009 was subjected to a further six years of proceedings, of which one year involved a second arbitration, with the remaining five years being consumed by leave to appeal and appeal proceedings.

Anyone who believes the last result in any proceeding must be the "right result" will perhaps argue that all of the additional expense and delay are presumptively worthwhile. But even leaving aside any issues regarding proportionality and cost/benefit, consider the disparity of the opinions of all the judges and arbitrators who served as cooks in the making of this broth. Can anyone believe that the results would necessarily have been the same had the order and combination of the judges and two arbitrators been shuffled? Unless one is prepared to make that argument, it is clear that the result was not the result of the application of principles of correctness or deference (although no doubt all of the judges believed they were operating under these principles) but of the random selection and ordering of decision makers with markedly different opinions.

Creston Moly Corp. v. Sattva Capital Corp.

The notice to arbitrate was filed in 2008. The award was rendered on December 23, 2008.

The application by Creston Moly Corp. ("Creston") for leave to appeal was denied.[30] The British Columbia Court of Appeal allowed an appeal from that decision and granted leave to appeal.[31]

The appeal was heard on November 29, 2010 and dismissed on May 6, 2011.[32]

That decision was appealed to the British Columbia Court of Appeal. On August 7, 2012 the British Columbia Court of Appeal allowed the appeal after concluding that the award was "absurd".[33]

Leave to appeal was granted by the Supreme Court of Canada on March 7, 2013.[34]

In a decision released on August 1, 2014[35] the Supreme Court of Canada concluded that the British Columbia Court of Appeal erred in granting leave

to appeal and found that the arbitrator's award was not unreasonable. The Supreme Court of Canada reinstated the arbitrator's award. Thus, this matter was finally concluded on August 1, 2014.

In summary, the arbitration process was completed within a single calendar year. Including the appeal to the Supreme Court of Canada the appeal process took five and a half years.

The Court of Appeal found to be absurd a decision that at least two other judges of the British Columbia Supreme Court would have affirmed and that the Supreme Court of Canada subsequently found not to be unreasonable. Therefore, looking at the case as an objective lesson in correctness, we now know that, had leave to appeal to the Supreme Court of Canada not been granted, the British Columbia Court of Appeal would have imposed the wrong result on the parties. Unless, of course, one accepts the theory that the last result in any process must be taken as the correct result. However, this conflates the notions of correctness and finality. Following this line of reasoning, the question then becomes this: At what point in the dispute resolution process should the last result be taken as the correct result?

Although it is not explicitly stated in the case, the *Sattva* decision fits within a long trend of Supreme Court of Canada decisions that were clearly designed to recognize arbitration as an independent form of dispute resolution and make arbitration a more viable method of dispute resolution by freeing it from a court-centric vision.[36]

Urban Communications Inc. v. BCNET Networking Society

The arbitration award was issued on January 3, 2013, a little over four months after the notice to arbitrate was delivered.[37]

On March 25, 2014[38] the British Columbia Supreme Court granted leave to appeal. On June 11, 2014[39] the British Columbia Supreme Court allowed the appeal in part.

On June 29, 2015[40] the British Columbia Court of Appeal allowed an appeal of the British Columbia Supreme Court's decision and reinstated the arbitrator's award. Applying the principles in *Sattva*, the Court of Appeal found the threshold for leave to appeal had not been met and leave to appeal should not have been granted.

An application for leave to appeal to the Supreme Court of Canada was filed and later granted on February 18, 2016.[41]

The appeal was argued before the Supreme Court of Canada on November 1, 2016[42] and the appeal was summarily dismissed by the court without calling on the respondent.

Thus the appeal process took about 46 months, approximately 11 times longer than the entire arbitration process.

British Columbia (Ministry of Forests) v. Teal Cedar Products Ltd.

This case is unusual in a number of respects. The arbitration itself took over five years. Unlike most commercial arbitrations, the parties were directed by statute to submit the dispute in question (valuation of assets used in timber operations) to arbitration. One aspect of the dispute involved interpretation of a statute. The other aspect involved the interpretation of a contract.

The arbitration award was made on April 27, 2011.

Both parties brought an application for leave to appeal the arbitration award. On April 16, 2012[43] Chief Justice Bauman (then of the British Columbia Supreme Court) granted leave to appeal and set aside a portion of the award, remitting that portion back to the arbitrator for reconsideration. That decision was appealed to the British Columbia Court of Appeal. On July 10, 2013[44] the Court of Appeal allowed the appeal with respect to the portions of the award not set aside by Chief Justice Bauman. Chief Justice Finch dissented. Based on the majority's decision, the whole award was now set aside.

An application for leave to appeal to the Supreme Court of Canada was filed on October 30, 2013.[45] After the Supreme Court of Canada released the *Sattva* decision it remanded the matter back to the Court of Appeal for reconsideration in accordance with *Sattva*.

A reconsideration hearing was held by the British Columbia Court of Appeal on May 19, 2015. The Court of Appeal's reconsideration decision was released on June 9, 2015 confirming the Court of Appeal's previous decision allowing the appeal.[46]

Leave to appeal to the Supreme Court of Canada was granted on November 30, 2015.[47]

The appeal was argued before the Supreme Court of Canada on November 1, 2016. The decision was reserved.

Unlike the Court of Appeal's decision in *BCNET*, which applied the principles laid down by the Supreme Court of Canada in *Sattva*, the Court of Appeal's decision in *Teal* appears to seek to distinguish *Sattva* in a way that would appear to eviscerate its obvious policy objectives with respect to arbitration appeals.[48]

Whereas *Sattva* creates the impression that a reviewable arbitration award would be a rare occurrence, especially on a point of contract interpretation, the Court of Appeal in *Teal* strongly suggested that the application of legal principles in the interpretation of contracts is generally a question of law *of central importance to the legal system as a whole* and suggests that the restriction of appeals from arbitration awards "would be at the expense of the certainty which lies at the heart of the common law of contract".[49]

It might be observed that it is an odd sort of certainty that can only be achieved *at the end* of a process lasting multiple years and involving multiple levels of appeal and several jurists, likely with contrasting views—a process that has to be repeated every time a question of contract interpretation arises.

It might fairly be asked, what is the value of a form of "certainty" that has no existence apart from the expensive and time-consuming process by which it is revealed—on a case-by-case basis—only when the case finally rolls to a halt?

THE IDEA OF ARBITRATION AND THE EFFECT OF APPEALS TO THE COURT

A distinctive feature of arbitration is that it provides an alternative to resolution of a dispute by the courts. This basic conception of arbitration exists in both civil law and common law contexts and is of long standing. In ancient Greece, Demosthenes wrote:

> If any parties are in dispute concerning private contracts, and wish to choose any arbitrator, it shall be lawful for them to choose whomever they wish. But when they have chosen by mutual agreement, they shall abide by his decisions and *shall not transfer the same charges from him to another court, but the judgments of the arbitrator shall be final*.[50]

In more recent times, Lord Mustill in the Privy Council in 1995 said:

> Arbitration is a contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, *to the exclusion of the Courts*, and they bind themselves to accept that decision, once made, whether or not they think it right.[51]

Each of the following well-established reasons for why parties choose arbitration as an alternative to court litigation is compromised by an appeal from an arbitration award to the courts:

- **Choice of Decision Maker**. Professor Jan Paulsson, the renowned international arbitrator, stated: "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."[52]

  An appeal substitutes the decision of a judge or judges assigned by the court for that of the chosen decision makers. The parties are free to choose decision makers who are as well or better qualified in relation to the facts and/or the law specific to the dispute than many or most judges. Or they are free to choose other decision makers if those qualities are not important to them.

- **Confidentiality**. An appeal to our open court system will certainly reveal the existence of the dispute and the outcome and may reveal much about the contentions and evidence advanced by the parties. Mitigation of this downside of the appeal process is a complicated and uncertain undertaking. Unlike arbitration, in which specific confidentiality concerns can be addressed by agreement, the court process is presumptively open and the public interest must be addressed in seeking closure.
- **Expedition**. An appeal will certainly extend the time before which a decision is final and may do so by a multiple of many times the period of time taken by the arbitral process itself. This is dramatically demonstrated in the cases cited above.
- **Cost**. An appeal will certainly add, perhaps substantially, to the cost of the dispute resolution process. Even if no appeal is ultimately brought, the possibility of an appeal adds costs to the process in that the proceedings must be conducted and the award issued with a view to the possibility of an appeal. The notions of procedural practicality and "writing for the parties" may be compromised, resulting in legal maneuverings by counsel in the arbitration with appeal in mind, over-lawyered submissions and added arbitrator fees.
- **Neutral Forum**. If the parties have selected arbitration in order to avoid the home courts of either party—a factor that may apply at either the international or interprovincial level—an appeal requires the parties either to select one of those courts as the court to deal with appeals or to select a jurisdiction that has no connection to either party and that is then likely to be a questionable choice to review any decision of the chosen arbitrator(s) on the merits.
- **Flexible Procedure**. Giving the parties the choice to add rights of appeal does increase flexibility in the sense that it gives the parties another option but, for the reasons already mentioned, at the cost of defeating virtually all of the other features that make arbitration a desirable alternative to the courts. An appeal is not an adaptation of procedure within the arbitration to suit the needs of a particular case; rather, it is the adoption of an inflexible procedure outside the arbitration that will be conducted, in most cases, by rules that take no account of the particular dispute. Indeed, as we have seen from the cases cited above as examples, the appeal process can be extended and complicated by issues that would never arise in an

appeal from a trial decision. When a right of appeal is imposed upon parties by statute, the result is not flexibility but inflexibility, extra cost, delay and a concatenation of disparate judicial views resulting in an outcome that only those judges pronouncing the final decision can be reliably assumed to think is correct.

Parties who wish to choose arbitration but preserve rights of appeal can do so by providing an appeal process within the arbitration—an option that would preserve rather than defeat most of the other benefits of arbitration.

OTHER CONSIDERATIONS

- **The International Example**. Since the adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958, the adoption of the UNCITRAL Model Law in 1985 and the adoption of the Model Law in statutes across all Canadian jurisdictions in the 1990s, Canadian lawyers have developed considerable first-hand experience with a full range of commercial disputes being determined in arbitration, with complete finality and no right to appeal to any court on the merits. In addition, the federal *Commercial Arbitration Act*, which is based on the UNCITRAL Model Law, applies equally to both international and non-international arbitrations and provides no right of appeal.
- **The Reputation of the Courts**. Even if one accepts that most judges are conscientious in carrying out the clear principles of law in favour of arbitration, a procedural and jurisprudential quagmire is created by the convoluted statutory provisions that are necessary in order to give effect to some right of appeal on the one hand while limiting it in some way through a leave process on the other. The resulting confusion does little to enhance the reputation of either litigation or arbitration as a form of dispute resolution. Arbitration appeals perpetuate an unhealthy notion that the courts and arbitrators are in competition with each other. There appears to be a strong temptation for some judges (no doubt a distinct minority) to demonstrate in any appeal process that arbitration is a subordinate form of dispute resolution and that a correct result cannot be reached until a "real judge" has put the matter right. Such decisions do not put the court in a favourable light.
- **Increased Complexity**. Any attempt to limit the scope of the court decision that will be substituted for the award on any appeal is fraught with legal and behavioural complexity, as is amply demonstrated by the

jurisprudence on leave applications and appeals from arbitral awards cited above. Although a losing party in either litigation or arbitration may always wish it had another chance to change the result, there is no assurance that the substituted decision of the court will be "better" than the original award from any objective standpoint. If one did actually believe that the substituted decision of judges assigned by the courts is likely to be better, one should have the entire dispute resolved in the court system so as to avoid the added complications, costs and delay that arise from any interrelationship between the two systems.[53]

- **Judicial Resources**. One of the societal benefits of arbitration is the lessening of the burden on publicly financed courts so that they can deal with issues that affect the public more broadly than individual commercial disputes.
- **Development of the Law**. The courts have an important role in serving the public at large, in part through the development of the law. Arbitrators are appointed only to serve the parties by resolving their dispute. The law, as perceived by the arbitrators whom the parties have chosen to entrust with the resolution of their dispute, is a tool in that process. Particularly in business disputes, parties should not be prevented from choosing dispute resolution processes (be it mediation, arbitration, med/arb or neutral evaluation) that they find more efficient and effective because the public interest would be better served by the development of the law.[54] In arbitration, the parties have the ability to choose a tribunal comprised of members whose judgment they trust on both issues of fact and law. That is where the real choice in arbitration lies. There is no reason to believe that a loser in court is any more satisfied with the fairness or correctness of the decision than a loser in arbitration. Nor is there any reason to believe that the substituted decision will necessarily be more fair or correct, as the *Sattva* decision dramatically illustrates.
- **User Expectations**. It is sometimes difficult to differentiate between the expectations of users and the preferences of the lawyers to whom they entrust the resolution of their disputes. The elimination of rights of appeal will give users a clearer choice and require lawyers to better explain the differences between two clearly delineated alternatives to their clients. In turn, that will allow the parties to make a more meaningful choice. At the moment, consumers of dispute resolution services often do not have a clear choice to have an appeal-free process, or to make the selection of an arbitral tribunal with that difference in mind. When the benefits of arbitration are swamped by the appeal process,

lawyers can simply blame the legislation, the "system", the courts or the arbitration process itself for the fact that the promise of an efficient and effective dispute resolution process was not achieved by opting for arbitration. Unmet expectations are endemic to our legal system for the resolution of disputes. What is needed to fulfill those expectations are clear alternatives that maximize the utility to parties with disputes while minimizing the extent, duration and cost of legal services provided in the process.

THE "OPT IN" OPTION

The "opt in" option adopted by the new *UAA* recognizes the foregoing objections to and difficulties arising from the combination of arbitration and court appeals, but preserves party autonomy to the extent that the parties can agree to an appeal on a question of law. This option responds to the argument that allowing for a right to appeal on a question of law will better meet user expectations for non-international arbitration in Canada. In situations in which parties are operating commercially, it places the onus on the party that is seeking an appeal right to justify it and bargain for it, or to provide some other mechanism for addressing its specific concern—for example, by specifying particular qualifications for the tribunal or allowing for an internal appeal process within the arbitration. [*See as to the latter, "A View from the Centre" at p. 79 of this issue – Asst. Ed.*]

Given the fundamental incongruity between the concept of arbitration and merits-based appeals to the courts, as well as the substantial undermining of the benefits of arbitration that can occur when appeals are undertaken, it is important that appeals occur only when parties have made an express choice to so provide. This allows parties the freedom to make that choice when it is important to them, but does not taint the concept of arbitration itself as a dispute resolution process when appeal processes go wrong, as they often do.

ENDNOTES

1. The Uniform Law Conference of Canada was founded in 1918 to harmonize the laws of the provinces and territories of Canada and, where appropriate, the federal laws as well.
2. The author was a member of the steering committee and chair of the sub-committee tasked with considering and reporting to the working group of the DALP on appeals-related issues.
3. See *R v Chisholm*, 2012 NBCA 79 at para 6, *HL v Canada (Attorney General)*, 2005 SCC 25 at paras 180–181, *R v W(G)*, [1999] 3 SCR 597 at para 8; *R v Smith*, 2004 SCC 14 at para 21.
4. [1993] 2 SCR 53.
5. *Ibid* at 69–70.
6. RSC 1985, c 17 (2nd Supp).
7. SQ 2014, c 1.
8. We are not here discussing judicial review of arbitration awards on issues such as jurisdiction, due process and other such grounds. It should be noted that, even with reference to judicial review, only grounds of judicial review that are found within the applicable arbitration Act are available: see J Kenneth McEwan, Q.C., & Ludmila B Herbst, Q.C., *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (Toronto: Canada Law Book) (loose-leaf).

9. *Arbitration Act*, RSBC 1996, c 55, s 35 (formerly the *Commercial Arbitration Act*, RSBC 1996, c 55).
10. *Arbitration Act*, RSA 2000, c A-43, s 44.
11. In adopting this exception, Alberta is the only province to have adopted that provision of the previous *UAA*.
12. *Arbitration Act*, CCSM c A120, s 44.
13. *Arbitration Act, 1991*, SO 1991, c 17, ss 3, 45–46.
14. *Arbitration Act, 1992*, SS 1992, c A-24.1, ss 4, 45–46.
15. *Arbitration Act*, RSNL 1990, c A-14, s 36.
16. *Commercial Arbitration Act*, SNS 1999, c 5, s 48.
17. *Arbitration Act*, RSPEI 1988, c A-16, s 21.
18. *Arbitration Act*, RSNWT 1988, c A-5, ss 26–28; *Arbitration Act*, RSY 2002, c 8, ss 25–27; *Arbitration Act*, RSNWT (Nu) 1998, c A-5, ss 26–28.
19. It is interesting to note that, on the question of appeals, the approach adopted by Nova Scotia and PEI is closest to the approach recommended in the new *UAA*. That approach also happens to represent the approach that applied in Ontario prior to the adoption by Ontario of the previous *UAA* in 1991. See legislative history described in *LIUNA, Local 183 v Carpenters & Allied Workers, Local 27* (1997), 101 OAC 230 at paras 12–13.
20. The text is subject to some further non-substantive, editorial revision by the ULCC before it is published on the ULCC website.
21. All of the following examples are taken from British Columbia. The reason for this is that the number and regularity of such cases from that province provide an excellent source of examples, with all examples sharing a common legislative foundation and many examples forming the basis of the most significant Supreme Court of Canada jurisprudence on the subject.
22. *Boxer Capital Corp v JEL Investments Ltd*, 2009 BCSC 1294.
23. *JEL Investments Ltd v Boxer Capital Corp*, 2010 BCSC 947.
24. *JEL Investments Ltd v Boxer Capital Corp*, 2011 BCCA 142.
25. *JEL Investments Ltd v Boxer Capital Corp*, 2011 BCSC 1526.
26. *Boxer Capital Corp v JEL Investments Ltd*, 2013 BCSC 678.
27. *Boxer Capital Corp v JEL Investments Ltd*, 2013 BCCA 297.
28. *Boxer Capital Corp v JEL Investments Ltd*, 2013 BCSC 2366.
29. *Boxer Capital Corp v JEL Investments Ltd*, 2015 BCCA 24.
30. *Creston Moly Corp v Sattva Capital Corp*, 2009 BCSC 1079.
31. *Creston Moly Corp v Sattva Capital Corp*, 2010 BCCA 239.
32. *Creston Moly Corp v Sattva Capital Corp*, 2011 BCSC 597.
33. *Creston Moly Corp v Sattva Capital Corp*, 2012 BCCA 329.
34. *Creston Moly Corp v Sattva Capital Corp*, 2013 CarswellBC 558 (WL Can) (SCC).
35. *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53.
36. See *Desputeaux v Éditions Chouette (1987) inc*, 2003 SCC 17.
37. See *Urban Communications Inc v BCNET Networking Society*, 2014 BCSC 485 at paras 21, 26.
38. *Ibid*.
39. *Urban Communications Inc v BCNET Networking Society*, 2014 BCSC 1045.
40. *Urban Communications Inc v BCNET Networking Society*, 2015 BCCA 297.
41. *Urban Communications Inc v BCNET Networking Society*, 2016 CarswellBC 385 (WL Can) (SCC).
42. *Urban Communications Inc v BCNET Networking Society*, 2016 SCC 45.
43. *British Columbia (Ministry of Forests) v Teal Cedar Products Ltd*, 2012 BCSC 543.
44. *British Columbia (Ministry of Forests) v Teal Cedar Products Ltd*, 2013 BCCA 326.
45. *British Columbia v Teal Cedar Products Ltd*, 2013 CarswellBC 3274 (SCC).
46. *British Columbia v Teal Cedar Products Ltd*, 2015 BCCA 263.
47. *British Columbia v Teal Cedar Products Ltd*, 2015 CarswellBC 4074 (SCC).
48. For a fuller explanation see William G Horton, "Arbitration at the Crossroads: The Supreme Court of Canada Will Choose the Way", *The Lawyers Weekly* (28 October 2016).
49. *Supra* note 46 at para 59.
50. Demosthenes, "Against Meidias" in Demosthenes, *Against Meidias, Androtion, Aristocrates, Timocrates, Aristogeiton* (1935) 69 at 94 [emphasis added], quoted in Gary B Born, *International Commercial Arbitration*, 2nd ed (Kluwer Law International, 2014) at 10–11.
51. *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd*, [2000] 3 NZLR 338 at para 1 (PC).
52. Jan Paulsson, *The Idea of Arbitration* (Oxford: Oxford University Press, 2013) at 1.
53. For an excellent exposition of the additional issues that must be dealt with on an arbitration appeal that do not arise in an appeal from a trial judgment see John Hunter, "Appellate Review of Commercial Arbitration Awards: Should Appellate Review Override Party Autonomy?" in Todd L Archibald & Randall Scott Echlin, eds, *Annual Review of Civil Litigation* 2016 (Toronto: Carswell).
54. It can be, and has been, argued that this is an important aspect of commercial freedom. Where different considerations apply (as in family, labour or consumer disputes) restrictions on the right to arbitrate and the binding effect of arbitration may be appropriate.

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