The future of Canadian arbitration

Two new acts are an opportunity to fix problems or change standards

William Horton

In this the last issue of *The Lawyers Weekly*, it is appropriate to focus on the future of arbitration legislation in Canada. Any such discussion necessarily begins by acknowledging the tremendous contributions of the Uniform Law Conference of Canada, both historically and in the very recent past, to the development of uniform arbitration legislation.

In the last three years, the ULCC has adopted both a *Uniform International Commercial Arbitration Act* (UICAA) and a domestic *Uniform Arbitration Act* (UAA). The interest these uniform acts have generated is substantial. Ontario is already well on its way to adopting the former and the Toronto Commercial Arbitration Society has recently formed a committee to consider and make recommendations with respect to the latter.

Both acts are actively under consideration in British Columbia with the object of overhauling arbitration legislation in that province.

The UICAA and the UAA differ in a number of important respects. The object of the uniform international act was to implement changes to the UNCITRAL Model Law which had come into effect in 2006. The consensus was that those changes should be implemented with as little deviation as possible so as to remain consistent with the international consensus that caused UNCITRAL to adopt the amendments. The uniform domestic act has a different history and current context.

The previous UAA was adopted by the ULCC in 1990. Its stated objective was to use the UNCITRAL Model Law as a model. However, the drafters found the model law to be somewhat spartan and decided to "amplify" it. If one reads the discussion papers that led to the 1990 UAA, one finds that some members of the task force felt that domestic arbitration represented a "different value proposition." The result is that the 1990 UAA contained a great deal that was not in the model law, and about which various provinces ultimately could not agree when implementing the 1990 UAA. The result is considerable variation among Canadian jurisdictions, particularly on key issues such as appeals on the merits from arbitration awards and stays of court proceedings in the face of an arbitration clause. Only the federal government adopted legislation which actually used the model law as a model for both international and non-international arbitration: see the Canadian *Commercial Arbitration Act*.

The new UAA, which was formally adopted by the ULCC last November, represents a major accomplishment. It brought together almost 30 of the most respected arbitration practitioners across Canada, reviewed the deficiencies in existing legislation over a year and a half, proposed solutions and tested them with the broader arbitration community across Canada and developed a uniform act that documents the resulting consensus.

The new UAA, together with the commentary, serves as an encyclopedia of all of the current dysfunctions, large and small, which serve as recurrent irritants. For the most part, these relate to creative ways in which lower courts use the "amplified" language in existing arbitration legislation to interfere inappropriately with arbitration as an independent form of dispute resolution — and in the process to disregard very progressive directives from the Supreme Court of Canada and many provincial courts of appeal. As Stefan Chripounoff sets out in his article in this issue of *The Lawyers Weekly*, the new UAA, taken as a whole, is a superb reaffirmation of key arbitration values.

Conference, Page 12

Conference: Top practitioners tested solutions across the country

Continued from page 11

However, in my judgment, as with its predecessor, it is highly unlikely that the new UAA will be adopted uniformly across Canada. Key provinces will approach the proposals from the perspective of their existing legal cultures. For British Columbia and Alberta to go all the way from appeal rights (with leave on a point of law) which cannot be contracted out of (in B.C. only after an arbitration has started) to opt in rights of appeal may prove a longer journey than the local bars are prepared to take. Quebec has only recently revised its Civil Code to provide for a unified set of rules for international and non-international arbitration (with a bit of an issue regarding interpretation). Canada has, some time ago, adopted an act that treats both forms of arbitration identically and adheres closely to the model law. It is hard to imagine that either Canada or Quebec would see the new UAA as an improvement on their current statutory regimes. In Ontario, there is much to be said for aligning our arbitration legislation with that of the federal government and Quebec.

As a result, provinces will have to consider three options in relation to the new UAA: 1) adopt it more or less in full, 2) adopt portions of it selectively, or 3) give effect to the principles in the new UAA by following the lead of the federal government and adopting the model law as the basis for both international and non-international commercial arbitration, perhaps with some additions such as an opt in right of appeal.

The new UAA provides a detailed map of the potholes on Arbitration Road — together with worthy proposals on how to fill every one. The question may be: do we fix all the potholes, or do we build a new road to modern standards.

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