Appeals in Commercial Arbitration in Canada

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The question: should parties who have agreed to submit their commercial disputes to arbitration provide in their arbitration agreements for a right to appeal the awards made by their chosen arbitrators? To frame this discussion, it should be noted that here are three types of appeals that may be pursued; appeals on questions of law, mixed questions of fact and law, and questions of fact. Also, it must be understood that appeals are to be distinguished from judicial review. On an appeal, an appellant seeks to overturn substantive findings made by an arbitrator. On a judicial review, an applicant seeks to set aside an award because of procedural defects in the arbitration (e.g., lack of jurisdiction, bias or unfairness in the conduct of the arbitration).

The context: In Canada, for international arbitrations (i.e., arbitrations between parties from different countries) provincial arbitration acts, which are modeled upon or which incorporate the UNCITRAL Model Law, permit no appeals. By contrast, in domestic arbitration, while parties are free to provide for court appeals in their arbitration agreements, there are differences between the provinces on appeals on questions of law. In Ontario, for example, unless parties specifically otherwise agree, a losing party can appeal to a superior court judge on questions of law, with leave (i.e., permission) of that court. In Alberta, parties are not allowed to contract out of that same right of appeal. In British Columbia, parties can only contract out of such an appeal right after an arbitration commences.

My own view: parties who agree to arbitrate commercial disputes should not agree to court appeals. To the extent that they want to preserve some form of appellate review, they should do so by providing in their arbitration agreements for an appeal arbitration tribunal.

From the perspective of the arbitrating party (as opposed to its lawyers), the main reason for preserving rights of appeal is to provide for a "second look" by a second decision-maker at findings or rulings made by the initial tribunal. Particularly in construction cases, disputes raise a number of very complex issues, the monetary stakes are high, and reputational concerns are

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significant. Ergo, parties are loathe to "bet their farms" on the decisions of a single arbitrator or a single panel of three arbitrators. From their lawyers' perspective, it is often argued that where a case is determined on a question of law, there must be some assurance that any legal error made by an arbitral tribunal can be corrected. In other words, there must be some oversight, or threat of oversight, over a tribunal that can "get it wrong".

These arguments are, in fact, antithetical to the fundamental conception of what commercial arbitration is. One highly-regarded scholar of arbitration 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".*[2] Closely related to this observation is that arbitration, by its very nature, is a process that is modelled upon the exclusion of the public courts from the decision-making process that is designed to finally determine commercial disputes. Both the Model Law and the several provincial arbitration acts expressly strive to minimize court interference in arbitration and at the same time, strive to provide for court support of commercial arbitrations.

The stated objectives of parties that choose arbitration are also antithetical to rights of appeal. Based upon multiple surveys of users of commercial arbitration, it is clear that arbitration is chosen because it: (i) offers privacy and confidentiality; (ii) allows parties to choose their adjudicators based upon experience and subject-matter expertise; (iii) often is cheaper than court litigation; (iv) very often is quicker than court litigation; and (v) provides for final result. It cannot be denied that each one of these objectives is negated by the availability of court appeals. Court files are rarely sealed. Appeals from experienced arbitrators are heard by randomly-selected judges of the trial courts. Appeals add cost and, very often, years to arbitration. Providing for appeals replaces arbitration as an alternative to the courts with arbitration as the very first step in a lengthy court process. To this last point, there are several recent cases in which completed arbitrations have then proceeded through trial courts, appeal courts and then to the Supreme Court of Canada. In some cases, awards have been remitted back to arbitration following appeal decisions.

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[2] Paulsson, Jan, "The Idea of Arbitration" (2013, Oxford University Press), section 1.1

Further, if the allure of appeals to commercial parties is that they will offer a substantial "second look", that allure is most assuredly false. In reality, on appeals from arbitral awards, the courts have increasingly given great deference to findings made by arbitrators. The standard of review has been defined to permit reversals only where the findings are said to be "unreasonable" (as opposed to "incorrect"). And, perhaps most significant, it has been held that issues of contract interpretation (the most typical of all alleged errors in commercial disputes) are questions of mixed fact and law as opposed to questions of law, meaning that leave applications, which take time, cost money, and delay enforcement of arbitral awards, will almost invariably be dismissed.[3]

Finally, it should be noted that there is now a trend to, by statute, narrowing or eliminating appeals in Canadian domestic commercial arbitration. As examples, there are now no appeals permitted in Quebec or in arbitrations that are conducted under the federal *Commercial Arbitration Act*. As well, the recent *Uniform Arbitration Act (2016)* proposed by the Uniform Law Conference as the basis for reformed domestic arbitration legislation provides for appeals on questions of law only, with leave, and only where parties specifically "opt-in" to such a right. Also, the test for leave in the *Uniform Act* is now more stringent than the test that prevails in existing acts.

All the foregoing is not to say, however, that appeals in arbitrations should be fully eliminated. It is appeals to the courts that are problematic. The foundation of all arbitration is party autonomy and freedom of contract. Parties may well have fully-reasoned and justified preferences that arbitral awards be subject to appeal, whether on legal or factual questions. Those objectives can be accommodated within the arbitration regime itself, without recourse to the courts. Parties can agree to refer arbitral awards to appellate arbitration tribunals, with tribunal members either appointed by the parties or by recognized arbitration institutions. Such appeals can be conducted *ad hoc* or under the administration of an institution. As only one example, the International Centre for Dispute Resolution has an optional set of appellate arbitration rules that, if fully-implemented by the parties, allows for appeals based upon material and prejudicial errors of law and/or factual findings that are clearly wrong. These rules contemplate that appeals will be

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[3] See, for example, *Sattva Capital Corporation v. Creston Moly Corporation*, [2014] S.C.R. 633

conducted on the basis of documents, with no oral hearings and that the appeal process will be completed within three months.

In summary, for several important reasons, parties should not provide for appeals to the courts in their arbitration agreements. Court appeals are antithetical to the typical objectives that parties have when they agree to arbitrate. To the extent that appeals are required, they can be accommodated consistent with arbitration principles and benefits by using appeal arbitral processes provided by arbitration institutions or by creating *ad hoc* appeal arbitration tribunals.