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Abolish Appeals In Domestic Arbitration

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Appeals are not permitted in international arbitration, yet appeals are permitted in domestic arbitration. There are compelling reasons why such appeals should not be permitted.

Most Canadian arbitration statutes include strict limits on court interference. However, while there are no appeals permitted in our international commercial arbitration legislation, appeals are permitted in domestic arbitrations. The availability of arbitration appeals is antithetical to several values and tenets of arbitration and there are several reasons that militate in favour of abolishing all such rights of appeal.

Lack of Uniformity: There is no uniformity in the way that our arbitration acts permit and deal with appeals, so that parties' appeal rights will vary depending on where their arbitrations are seated. The default provisions in Nova Scotia, the Yukon, the Northwest Territories and Nunavut, for example, prohibit appeals unless the parties contract for same. In Saskatchewan and Ontario, parties can contract for appeals on questions of law, fact or mixed questions of fact and law, and where their agreements are silent, they have a statutory right to seek leave to appeal on questions of law. In Alberta, Manitoba and New Brunswick, parties can agree to appeal rights on factual and mixed questions, but cannot contract out of their statutory rights to seek leave to appeal on questions of law. In Quebec, PEI and Newfoundland, there are no appeals. Finally, in British Columbia, parties can agree on appeal rights, but cannot contract out of their right to appeal on questions of law prior to the commencement of their arbitration. This lack of uniformity itself militates in favour of abolishing appeals.

Legal Complexity: Appeals in domestic arbitrations have generated a large body of contradictory and confusing case law in two areas. First, given that appeal rights are often limited to questions of law alone, there is an abundance of decided cases that attempt (with a great deal of inconsistency and imprecision) to delineate where questions are questions of law as opposed to questions of mixed fact and law. Second, in provinces where "tests for leave to appeal" are defined, there are many cases (also inconsistent and imprecise) that seek to interpret and apply those tests. This too is unsatisfactory, as it creates opportunity for delay, expense and gamesmanship following the issuance of awards.

Lack of Finality: An essential tenet of arbitration is finality. Parties recognize this in their commercial agreements by often using, as an expression of their intentions in their commercial agreements, "final and binding arbitration". In the context of international arbitration, the authors of Redfern and Hunter wrote that parties should be prepared to accept the decisions of their tribunals even if they consider such decisions to be wrong, so long as proper procedures are observed, lest the arbitration process devolve to nothing more than the first (and additional) step in a litigation process that culminates, after several stages, in appellate decisions in their domestic courts. There is no apparent reason that this tenet should carry less significance in domestic as opposed to international arbitration. Stated otherwise, there is no feature unique to domestic arbitration that compels the need to create a right of recourse to the courts for a "second look" at the merits of arbitral awards.

Choice of Decision Maker: An equally essential tenet of arbitration, one often cited as the reason that parties opt for arbitration over litigation, is the parties' ability to choose their adjudicators. These choices are often made based upon the arbitrators' qualities, including their specialized areas of experience and expertise. Often, parties nominate panels of three where individual arbitrators bring different attributes to the process. This tenet is defeated by appeals that will be determined by single judges of the trial courts, arbitrarily chosen to hear the leave applications and then the substantive

appeals. Finally, after appeals are heard, there is certainly no guarantee that the court's ultimate adjudication is any more likely to fit with what each or both parties view as correct.

Confidentiality: Any recourse to the courts will, of necessity, open the process to the public, a fact antithetical to an important feature of arbitration, confidentiality.

Delays and Costs: Parties who opt for arbitration often do so in order to obtain determinative adjudication faster and cheaper than would be possible in litigation. These goals are defeated where, following adjudication, an unsuccessful party can extend the adjudicative process by months and years. Indeed, it is often the case that the leave and/or substantive appeal processes take longer themselves than did the arbitrations in first instance.

Arbitration as an Equal and Alternative Adjudicative Process: Arbitration is, in essence, a process selected by commercial counterparties to resolve their disputes independent and as an alternative to the state's judicial system. There is no room in this paradigm for the notion that arbitrators' decisions are inferior in quality to decisions made by trial judges. The availability of court appeals is antithetical to this notion. While appeal courts defer to decisions made by trial judges, contractual rights of appeal, especially on questions of fact and questions of mixed fact and law, invite judges to give less deference to arbitrators than they would receive from their own appellate courts. This is not what parties bargain for, and should not be permitted.

While there are certainly arguments that favour appeals, on balance, appeals are unproductive and serve as opportunities for gamesmanship by losing parties. At the contract drafting stage, the parties should often make clear that their awards are to be final and binding, with no appeal rights.

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