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September 2017/*septembre 2017*

Is Arbitration Losing its Appeal?

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In house counsel are increasingly concerned about the suitability of arbitration for the resolution of commercial disputes because of the danger of an aberrant result from which there may be no recourse. Arbitral institutions such as the British Columbia International Commercial Arbitration Centre and the International Centre for Dispute Resolution have attempted to respond to this concern.

In a recent survey reported in "Today's General Counsel", 66% of respondents said they might not choose arbitration because of the difficulty in appealing. Arbitrators not following legal rules was a major problem for 43%.

This reticence may be well founded. Judicially, the right to appeal an arbitration award has all but been eliminated. Legislatively the trend is the same. The Uniform Law Conference of Canada in December 2016 proposed a new Uniform Arbitration Act that prohibits appeals generally but allows parties to opt in to an appeal for an error of law. The appeal would go straight to the Court of Appeal but only if leave to appeal is first granted. Any agreement of the parties to appeal on a question of fact or mixed fact and law is prohibited absolutely no matter how unsupported a finding of fact may be.

For international arbitrations in jurisdictions such as Canadian provinces that have adopted the UNCITRAL Model Law there is no right of appeal. There is less of a need to minimize court intervention in domestic commercial cases where there is less of a concern that a court might favor one of the parties along nationality lines. British Columbia and Alberta, for example, have to this point provided a statutory right of appeal in domestic cases on a question of law.

Those statutory rights of appeal for domestic commercial arbitrations are now judicially limited by the Supreme Court in *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 SCR 633 and subsequent cases. The right to appeal on a question of law is most significantly constrained by applying a reasonableness standard of review instead of correctness for all but the most important questions of law such as constitutional questions. The stated rationale for judicial restraint is said to be deference to the tribunal. The flip side of deference, however, is discretion. Arbitrators are being given an increasing amount of discretion and the issue that arises is whether or not discretionary decision-making is a good thing in a world that demands certainty and predictability in commercial affairs.

The adoption of the reasonableness standard should be very troubling for users of arbitration. When is it reasonable to be wrong? The law has either been correctly applied or it has not. Adopting a reasonableness standard runs counter to the long-held principle that certainty is essential in commercial affairs. What is the point of adopting a choice of law clause if the arbitrator can fail to follow that law with impunity?

It is no wonder that there is growing distrust of arbitration. Disputes involving millions of dollars and that may represent an existential threat to a company simply cannot be trusted to a process where discretionary decision-making is shielded from review. There is a new *lex arbitraria* in Canada that is inconsistent with the needs and expectations of commercial parties.

In response to fears of unrestrained arbitral discretion there is a trend towards extra-judicial appeals. The British Columbia International Commercial Arbitration Centre has just adopted new rules to allow for parties to opt in to a low cost and expedited internal appeal process to three experienced arbitrators. The BCICAC Rules do not specify a correctness test as opposed to a reasonableness test. The standard of review to be applied by the appeal body is not clear. Out of an abundance of caution, parties opting in to the appeal process should specify in the appeal clause or in the choice of law clause that a correctness standard should apply.

The American Arbitration Association and International Centre for Dispute Resolution published new appellate rules to allow parties the option to appeal an arbitration award within the institutional setting. The new rules are designed to provide an economical and expedited appellate review process. The grounds for appeal are that the award contains either an error of law that is material and prejudicial or a determination of fact that is clearly erroneous. The process is meant to be completed within three months. There is no concept of a reasonableness test for review of arbitration awards in American jurisprudence so it is unlikely that the appeal body would apply anything other than a correctness test but, out of abundance of caution, parties opting in to a right of appeal should specify a correctness test for appeals arising out of Canadian arbitration awards.

CPR has also published Arbitration Appeal Procedures. The parties to an arbitration conducted pursuant to CPR Rules may agree to a right of appeal to an Arbitration Appeal Tribunal. The basis for challenge is that the award contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis or is based on factual findings that are clearly unsupported by the record.

The debate over arbitration appeals is often emotional. Some take the view that a right of appeal is anathema to the arbitration process. Others argue that a right of appeal reinforces intellectual rigor and reduces the potential for injustice. The debate really focuses on whether or not the concern for finality should trump the need for intellectual honesty and integrity. The violence done to the reputation of arbitration where a clearly wrong decision is allowed to stand may outweigh the goal of finality.

The bulk of time and costs are taken up with the arbitration process itself. An appeal need not be as time-consuming or expensive. What is critical for commerce is some assurance of certainty and predictability. Such certainty depends upon consistency in the rules of law that are applied. Certainty and predictability are lost if the parties are confined to an arbitrary or discretionary dispute resolution process. Confidence in the process will be enhanced if a reviewing body is available to protect against a fundamentally wrong award.

The answer to the captioned question is yes, arbitration is losing its appeal. Recent court decisions that limit appeals have put a chill on the choice of arbitration as a dispute resolution mechanism. To protect against an aberrant result commercial parties should choose their arbitrators carefully and may want to consider specifying institutional rules that allow an appeal option including an express choice of the correctness standard.

Murray Smith is a full-time arbitrator with extensive experience in cases involving commercial disputes. He has acted as arbitrator in international commercial arbitrations under AAA (ICDR), ICC, BCICAC and UNCITRAL Rules and has served as chairman, party appointed arbitrator and sole arbitrator.