Focus ALTERNATIVE DISPUTE RESOLUTION

Domestic arbitration law gets harmonizing upgrade

Stefan Chripounoff

On Dec. 1, 2016, the Uniform Law Conference of Canada (ULCC) adopted a revised *Uniform Arbitration Act*, which replaces the previous act it adopted in 1990. Not unlike its predecessor, the new act seeks to harmonize arbitral legislation throughout Canada's various provinces and territories. Some of the most significant innovations to the act are reviewed below, catalogued in accordance with the arbitral principles they seek to promote.

Arbitral autonomy

Section 6 of the act sets out a clear and unequivocal prohibition preventing courts from intervening in any matter governed by the act, except where the act specifically provides for such intervention. It replaces a prior provision that listed specific subject matters in which the court could intervene and which sometimes led to a broader interpretation of the court's intervention powers. By removing any potential ambiguity, the new general prohibition reinforces the principle of arbitral autonomy.

Section 7 of the act, requiring that the court stay proceedings regarding matters covered by an arbitration agreement, also promotes arbitral autonomy by removing the possibility of courts issuing partial stays. The act no longer contemplates the dividing of cases into separate issues or matters, where some issues could continue to be litigated before the court and the issues covered by the arbitration agreement would be arbitrated.

Another pillar of arbitral autonomy is the principle of separability, whereby the arbitration agreement is viewed as being distinct from the underlying agreement in which it is contained. This prevents a party from taking the position that a dispute regarding the validity of the underlying agreement cannot be arbitrated because a finding that the underlying agreement is null would entail the annulment of the arbitration clause in which it is contained. Section 10 of the act now codifies the principle of separability.

GORICA / ISTOCKPHOTO.COM

Sections 43 to 52 of the act now deal in great detail with the interim measures that may be issued by the arbitral tribunal, including ex parte measures. The arbitrator's power to grant such interim measures places arbitration on an equal footing with the judicial process. It puts to rest criticism to the effect that not all relief was available to litigants in arbitrations such that recourse to the courts remained necessary.

Procedural fairness

Section 28 of the act requires that each party be afforded a reasonable opportunity to present its case and to answer any case presented against it. The notion of "reasonable opportunity" replaces the more subjective concept of "being treated fairly and equally" while ensuring that the principle of proportionality can also be considered by the arbitral tribunal.

> "Section 42 of the act now allows the arbitrator to act as a mediator during the course of the arbitration and to continue acting as arbitrator, without the possibility of being challenged or removed, if the case does not settle.
>
> **Stefan Chripounoff**
> Langlois Lawyers

Section 20 of the act now provides that an arbitrator must act with independence and impartiality and disclose any circumstance that may give rise to justifiable doubts as to his or her independence or impartiality. The arbitrator's new partial immunity under s. 21 of the act also promotes procedural fairness and independence by specifically excluding immunity in cases of bad faith or intentional wrongdoing.

Flexibility and efficiency

Other than rules concerning privilege, pursuant to s. 35 of the act an arbitrator is no longer required to apply legal rules of evidence. This provides maximum flexibility to arbitrators in admitting or not admitting evidence, whereas they were previously bound to admit all evidence that would be admissible in court.

Section 42 of the act now allows the arbitrator to act as a mediator during the course of the arbitration and to continue acting as arbitrator, without the possibility of being challenged or removed, if the case does not settle. This is commonly referred to as med-arb which is efficient both from a time and monetary perspective given the mediator's in-depth knowledge of the case. Even if no settlement is achieved, the issues in the dispute will usually be narrowed down. Med-arb also promotes flexibility by allowing certain salient issues to be mediated while the arbitration continues.

Finality of arbitration awards

Arbitration is of course often preferred over recourse to the courts because the award rendered by the arbitrator is final and generally without appeal. The new version of the act has completely removed the possibility of appealing an award on a mixed question of law and fact, allowing only for appeals on questions of law on an "opt-in basis." By restricting appeal avenues, the act reinforces the final nature of the arbitration award.

In summary, the ULCC has successfully introduced a number of purposive changes to the act. It will be of great interest to see how Canadian provinces and territories realign their statutory arbitral frameworks to meet the prevailing expectations of litigants. In all likelihood, the act will serve as an important basis for that endeavour.

Stefan Chripounoff has acted in several large scale arbitrations in both Canada and the United States. He has written several articles and given many conferences on arbitration law topics, including on Quebec's extensive arbitration reform that came into effect in January 2016.

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.