ARBITRATION APPEALS AND MOTIONS TO SET ASIDE AWARDS

The practice of the courts has long been supportive of private arbitration. Indeed, with limited exceptions, arbitrators who conduct their arbitrations properly are treated with deference by our motions and appeal courts. What this means is that the standard for arbitrators is not perfection. Provided that arbitrators do not breach a limited number of statutory obligations that are set out in the Arbitration Act of the relevant jurisdiction, parties are not at risk of seeing arbitration awards set aside. Were this to happen, parties would be forced to start all over again which would be a waste of time and legal expense.

For example in Ontario, there are two different paths that are available to a party to attempt to set aside an arbitrator's award. Section 45 of the Ontario Arbitration Act permits appeals from an arbitration award on questions of law with leave of the court where the arbitration agreement is silent regarding such appeals. And where the arbitration agreement specifically permits appeals on questions of fact, law and mixed fact and law, a party has a right of appeal without leave.

More often than not, carefully drawn arbitration agreements eliminate any appeals where the parties are looking for early and final resolution. And the standard of review of any such appeals where the arbitration agreement leaves a right of appeal open requires proof of two elements. The first is proof that the matters at stake are so important that they justify an appeal. The second is that the court's determination of any question of law will significantly affect the rights of the parties. In other words, the courts are not looking to easily overturn arbitrators awards and the threshold for doing so is very high. What is important is that parties who sign arbitration agreements really need to carefully consider what is important to them at the very outset. They either value early resolution and finality so that win or lose they can move on.

Where parties have a relationship, and their interests going forward are more important to them than attacking and responding in a drawn out battle, they will likely provide that there are to be no appeals. The wording of section 45 permits this. On the other hand, if the parties want to leave their options open, they can provide for rights of

appeal on facts, law or mixed fact and law. By doing so they may lengthen the arbitration time frame and expose themselves to higher legal expense. If so, they make arbitration resemble litigation. It is important to understand that the decision to leave appeals open is always the parties' decision. Having said this, arbitration is voluntary and consensual. So parties are always free to amend their arbitration agreement and eliminate any rights of appeal. Those who complain that arbitration sometimes resembles litigation may be the authors of their own misfortune.

One avenue for parties that cannot be eliminated by agreement is the right of a party to move to set aside an arbitrators award under section 46 of the Ontario Arbitrations Act on one or more of ten grounds. The three most significant of these grounds are as follows:

1) the award deals with a matter that is beyond the scope of the agreement;

2) the applicant [party] was not treated fairly, equally and was not given an opportunity to present a case, or to respond to the other side, or was not notified of the arbitrator's appointment, or of the arbitration;

3) the arbitrator committed a corrupt or fraudulent act, or was biased.

While anything is possible, any competent, honest, professional arbitrator would have to ride roughshod over these accepted statutory rules. And conducting an arbitration in this manner would not escape the attention of the parties and counsel at a very early stage leaving them the right to go to court immediately. While this section sets out to protect the rights of the parties to a fair process, fortunately these kinds of aberrations are seldom seen. That is not to say that at times arbitrator's decisions go unchallenged. Once again, the courts show deference to arbitrators except in egregious cases.

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