Judicial Interpretation of the Uniform Arbitration Act 1995

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Civil Section Documents - Judicial Interpretation of the Uniform Arbitration Act

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JUDICIAL INTERPRETATION OF THE UNIFORM ARBITRATION ACT[1]

INTRODUCTION

The purpose of this memo is to evaluate the implementation and interpretation of the Uniform Arbitration Act in four jurisdictions (Alberta, Ontario, Saskatchewan and New Brunswick) with respect to the granting of stays and appeals.

A. Underlying Philosophy of the Uniform Arbitration Act

The underlying philosophy of the Uniform Arbitration Act is as follows:

1) people who enter into valid arbitration agreements should be held to those agreements;

2) the parties should have broad freedom to design the arbitral process as they see fit;

3) that process should nevertheless be fair to both parties; and

4) the award resulting from the arbitration should be readily enforceable, subject only to review for a specific list of fatal flaws of form or procedure.[2]

This memo is concerned only with the court intervention with the arbitration process (specifically, the granting of stays and appeals) and will therefore focus on sections 6,7,45 and 46 of the Uniform Arbitration Act (**see Appendix III**).

B. Corresponding Legislation in Alberta, Ontario, Saskatchewan and New Brunswick

Alberta - Arbitration Act, S.A. 1991, c.A-43.1

Section 6 of Alberta's legislation adds four exceptions for court intervention in the arbitration process, namely:

(a) to assist the arbitration process;

(b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;

(c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;

(d) to enforce awards.

s. 44(3) is also different from the Uniform Arbitration Act:

s.44(3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law which the parties expressly referred to the arbitral tribunal for decision.

Ontario - Arbitration Act, S.O. 1991, c.17.

The only difference in Ontario's legislation is the addition of the phrase "does not deal with" to s.45(1).

s.45(1) If the arbitration agreement **does not deal with** appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the Court shall grant only if it is satisfied that,....

s.3 Allows parties to waive the right to an appeal on a question of law.

Saskatchewan - Arbitration Act, S.S. 1992, c.A-24.1

The only difference between Saskatchewan's legislation and the Uniform Arbitration Act is s.7 (s.6 in Uniform Act):

s.7 No court shall intervene in matters governed by this Act, except for the following purposes, as provided by this Act:

(a) to assist the conducting of arbitrations;

(b) to ensure that arbitrations are conducted in accordance with arbitration agreements;

(c) to prevent unequal or unfair treatment of parties to arbitration agreements;

(d) to enforce awards.

s.4 Allows the parties to waive the right to an appeal on a question of law.

New Brunswick - Arbitration Act, S.N.B. 1992, c.A-10.1

There are no differences between New Brunswick's legislation and the Uniform Arbitration Act.

STAYS (SECTIONS 6 AND 7)

Overall, judicial interpretation tends to be following the intent of the legislation with respect to the granting of stays. That is, judges are taking a "hands-off" approach to granting stays unless they fall within one of the enumerated circumstances in the legislation. For a more detailed analysis of the jurisprudence, see **Appendix I**.

APPEALS AND SETTING ASIDE (SECTIONS 45 AND 46 OF UNIFORM ACT)

Generally, interpretation has been in keeping with the intent of the Model Act. However, there appear to be a few problems with section 45 with respect to when parties may appeal an award of an arbitrator, either in situations where the arbitration agreement specifically addresses appeals or is silent on the issue. In Ontario, the addition of the phrase "does not

deal with" to s.45 has caused problems with interpretation of arbitration agreements. See **Appendix II** for a more detailed analysis of the jurisprudence.

RECOMMENDATIONS FOR CHANGES TO THE UNIFORM ARBITRATION ACT

In general, the underlying philosophy of the Uniform Act seems to be respected by the courts in all four jurisdictions. Judges do not appear to be eager, in most cases, to wade into the arbitration fray in light of the new legislation. If judicial interference does occur, it is often in the context of very unusual facts (ie. ***Deluce Holdings Inc. v. Air Canada*** **(infra)**).

However, some changes to the wording of sections 6,7 and 45 of the Uniform Act may clarify any confusion that presently exists and could result in judicial interpretation which is in keeping with the underlying logic of the Act.

LOGIC STATEMENT RE: JUDICIAL INTERVENTION:

1. Arbitration is intended to provide an alternate means of dispute resolution outside of the courts.

2. Once parties agree to pursue arbitration, judicial intervention in arbitration should be limited to very narrow circumstances.

Changes to Section 6:

Recommendation 1:

Change the wording of s.6 to that used in the Alberta, Ontario and Saskatchewan legislation.

Current Wording of Uniform Act:

6. No Court shall intervene in matters governed by this Act, except as this Act provides.

New Wording Proposed:

6. No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:

(a) to assist the arbitration process;

(b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;

(c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;

(d) to enforce awards.

Hopefully, this expanded wording of section 6 will serve to caution the courts about their role within disputes under private arbitration agreements.

LOGIC STATEMENT RE: GRANTING OF STAYS:

1. Arbitration cannot be used to insulate a dispute from the courts, if the dispute is one which must be settled in court.

Changes to Section 7:

Recommendation 2:

Change the wording of s.7(2)(c) to provide better clarity as to when a refusal to grant a stay is warranted based on the subject matter of the dispute.

Current Wording of Uniform Act:

7(2) However, the court may refuse to stay the proceeding in any of the following cases:

(c) the subject-matter of the dispute is not capable of being the subject of arbitration under (enacting jurisdiction) law;

New Wording Proposed:

Two options are proposed for s.7(2)(c):

i) The subject matter of the dispute is not capable of being the subject of arbitration under the law of [enacting jurisdiction] even if the parties expressly agree to submit the dispute to arbitration.

or,

ii) The parties could not under the law of [enacting jurisdiction] enter into an agreement settling the dispute.

***Note: The same wording will need to be substituted in s.46(1)(e) as well.**

Hopefully, this revision would avoid the use of discretion in granting stays as indicated by Justice Perras in his decision in ***McCulloch v. Peat Marwick Thorne***.

LOGIC STATEMENT RE: APPEALS:

1. Parties may agree to allow appeals from an arbitrator's decision (ie. on questions of law, fact or mixed law and fact).

2. If the arbitration agreement is silent as to appeals, then an appeal on a question of law is allowed, provided certain criteria are met *and the question being appealed is not the very question which was referred to arbitration in the first place. (Alberta addition)*

3. Parties cannot completely bar an appeal on a question of law if the criteria are met.

[Note: Ontario and Saskatchewan Acts allow parties to exclude an appeal on a question of law. The proposed s.45(3) is still appropriate even if the Model Act is amended in that way.]

Changes to Section 45:

Recommendation 3:

Change the order of the wording of s.45(1),(2) and (3) to emphasize that parties can agree what may or may not be appealed.

Current Wording of Uniform Act:

45(1) A party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

(2) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law.

(3) If the arbitration agreement so provides, a party may appeal an award to the court on a question of fact or on a question of mixed fact and law.

New Wording Proposed:

45(1) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, a question of fact or a question of mixed fact and law.

(2) A party may always appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

(3) Subsection (2) does not apply if the question of law on appeal is the question that was expressly referred to arbitration in the first place.

This revision would help to emphasize the fact that parties can agree on what can be appealed, but that it is possible to appeal questions of law with leave, if the criteria are met and providing the question of law is not the express question which was referred to arbitration.

No change is proposed to the Uniform Act concerning the ability of the parties to exclude appeals altogether. Jurisdictions enacting the Uniform Act will have to decide whether to follow Ontario and Saskatchewan in allowing a total ban on appeals, or Alberta and New Brunswick in requiring that some appeals be possible.

Recommendation 4:

Remove the phrase "does not deal with" from s.45(1) of the Ontario legislation and rewrite it to conform with s.45(2) above.

The phrase "does not deal with" has led to the differing lines of authority as to what kind of provisions in an arbitration agreement or clause "deal with" the issue of appeal. It appears this phrase has given judges an opportunity to grant leaves to appeal on questions of law despite the fact that the parties agreed the arbitrator's decision would be "final and binding". The phrase is particularly problematic where the reference to arbitration is drafted before the new legislation is in place.

APPENDIX I - JURISPRUDENCE RE: STAYS

JURISPRUDENCE

Alberta Jurisprudence

McCulloch v. Peat Marwick Thorne (1991) 124 A.R. 267

Case involves a dispute concerning a partnership agreement. The plaintiff filed a statement of claim for breach of agreement, conspiracy by defendants to unlawfully remove the plaintiff from the partnership, removal without cause, an accounting and loss of reputation. The defendants requested a stay of proceedings based on section 7 of the *Arbitration Act*. Perras, J. refused to grant the stay on the basis that the plaintiff's claim fell outside the arbitration clause in the agreement. The arbitration clause read as follows:

"...any dispute...relating to the construction, meaning or effect of anything in this agreement or the rights or liabilities of any party pursuant to this agreement...shall be referred to and settled by arbitration..."

Perras, J. found that while the arbitration clause was "relatively encompassing", it was concerned solely with disputes relating to the "construction, meaning or effect" of the agreement or rights and liabilities pursuant to the agreement. Perras, J. found that the allegations of tortious conspiracy and loss of reputation fell outside the arbitration clause, therefore under s.7(2)(c) was not capable of being the subject of arbitration under Alberta law. Perras, J. appears to rely heavily on the case of ***Heyman v. Darwin*** **(1942) A.C. 356**, which defines a set of criteria to consider when defining an application to stay proceedings:

1) the precise nature of the dispute which has arisen;

2) does the dispute fall within the terms of the arbitration clause;

3) is the arbitration clause still effective;

4) is there any sufficient reason why the matter in dispute should not be referred to arbitration.

Perras, J. believes the criteria above are reflected in s.7 of the *Arbitration Act* (ie. criteria 3 is s.7(2)(b) and criteria 2 and 4 are in s.7(2)(c). Perras, J. concludes by finding that even if the criteria from ***Heyman v. Darwin*** do not apply, the application of s.7(2)(c) operates to deny the stay.

The case is unfortunate for two reasons:

(1) it confuses a finding that the dispute was not covered by the reference with the question of whether a referred dispute should be stayed;

(2) it uses a summary of the stay rules from a decision long before the new legislation significantly revamped those rules (implying that the old discretion remains).

Kaverit Steel and Crane Ltd v. Kone Corp. **(1991) 119 A.R. 194 (Q.B.), 87 D.L.R. (4th) 129 (C.A.)**

Commercial agreement which fell under the jurisdiction of the *International Commercial Arbitration Act*, R.S.A. 1980, c.I-6.6 (ICAA) rather than the Alberta legislation. The Queen's Bench decision refused to grant a stay of proceedings on the basis that parties to the action who were not subject to the arbitration clause raised legitimate causes which all should be decided in the same proceedings. Kerans, J.A. in the Court of Appeal allowed the appeal, stayed the proceedings and referred certain issues (ie. breach of contract and conspiracy) raised in the statement of claim to arbitration. Kerans, J.A. found that the *ICAA* included tort claims such as conspiracy as long as it was related to a commercial undertaking. Kerans, J.A. also found that while referring the additional issues to arbitration might be inconvenient, it would not be inoperative as contemplated by s.3 of the *ICAA*.

Borowski v. Heinrich Fiedler Perforiertechnik **[1994] A.J. No. 617 (QL) (Court of Queen's Bench)**

Murray, J. upholds s.7(2) and stays the plaintiff's claim for damages under a contract until the dispute for damages is dealt with in arbitration. Murray, J. discusses the underlying philosophy of the *Arbitration Act* and the concept of parties staying with the arbitration process if both agree to it.

Crystal Rose Homes Ltd. v. Alberta New Home Warranty Program **(1994) A.J. No. 897 (QL) (Court of Queen's Bench)**

Master Funduk grants a stay of proceedings based on s.7(1) of the *Arbitration Act* and determines that the issue of reasonable notice is one that flows from the contract relationship and therefore is arbitrable under the arbitration clause of the contract. He quotes ***Borowski*** (supra) with favour.

Saskatchewan Jurisprudence

Producers Pipelines Inc. v. Bridges Energy Inc. **[1993] S.J. No. 551 (QL) (Court of Queen's Bench)**

Gerein J. found that the former *Arbitration Act* applied to the dispute, but he offered his opinion on the new legislation, stating that s.8 (equivalent to s.7 in the Uniform Act) has

restricted the court's discretion to refuse a stay and that it is now mandatory for a stay to be granted unless a party can come within one of the situations outlined in s.8(2). Gerein J. also noted that if he was wrong and the new *Arbitration Act* applied, that the stay would be denied because of s.8(2)(d), that is, that there was undue delay in bringing the motion.

Pulvermacher v. Pulvermacher **[1994] S.J. No. 595 (QL) (Court of Queen's Bench)**

This case concerned a dispute between shareholders in a small, family-owned company. The plaintiff filed a claim alleging a conspiracy by the other shareholders which was preventing him from receiving the full value of his shares. The defendants to the action applied for a stay pursuant to s.8 of the *Arbitration Act*. The plaintiff in the case argued that the stay should not be granted based on s.8(2)(c) of the *Arbitration Act* ie. "the subject-matter of the dispute is not capable of being the subject of arbitration under Saskatchewan law". MacLean, J. considered ***McCulloch v. Peat Marwick Thorne*** (supra) and determined that it had no application to the case. MacLean, J. said that although the plaintiff had characterized his claim as a conspiracy, in reality the issue to be resolved was whether the plaintiff should receive fair market value for his shares. That issue was one that fell under the arbitration clause therefore the stay was granted.

Ontario Jurisprudence

Scotia Realty Ltd. v. Olympia and York **[1992] O.J. No. 811 (QL) Ontario Court (General Division).**

Commercial lease between two companies which allowed audits to determine the calculation of participation rent. The lease required any dispute about the audits to be arbitrated. The lease also included a "Scott v. Avery" clause which makes arbitration a condition precedent to any action. The plaintiffs brought a court action for a determination of its rights under the lease. The defendants then applied for a stay of the court proceedings under s.7 of the *Arbitration Act*. The plaintiff argued that the agreement it was seeking to resolve was separate and apart from the lease, therefore the arbitration clause would not apply. Lane, J. granted the stay on the basis that the agreement was an amendment to the lease, therefore it was subject to the arbitration.

Ontario Hydro v. Denison Mines Ltd. **[1992] O.J. No. 2948 (QL) Ontario Court (General Division)**

Ontario Hydro and Denison Mines entered into an agreement for the supply of uranium concentrates. Ontario Hydro terminated the agreement legally and adispute arose regarding the price to be paid for uranium during the winding down period of the agreement. Denison argued the matter should be settled by arbitration, as per the agreement (which includes a broad arbitration clause). Ontario Hydro argued that the dispute involves rectification of the agreement and therefore was not arbitrable. Ontario Hydro commenced an action requesting rectification and declaratory relief. Denison countered with a request to stay Ontario Hydro's action under s.7(1) of the *Arbitration Act*. Blair, J. granted the stay for Denison. Blair, J. found that the rectification request was proper matter for arbitration due to three factors:

(a) the expanded and extended powers given to arbitrators under the *Arbitration Act*;

(b) the broad language of the agreement itself which was to resort to arbitration techniques; and

(c) the broad language of the arbitration clause itself (ie. all disputes in connection with the agreement).

Blair acknowledged that the *Arbitration Act* created a statutory presumption in favour of granting stays with a narrow list of exceptions.

Deluce Holdings Inc. v. Air Canada **[1992] O.J. No. 2382 (QL) Ontario Court (General Division), 12 O.R. (3d) 131.**

Air Canada terminated employment of two members of Deluce Holdings in order to gain 100% control of the shares. Arbitration clause existed in agreement to determine the valuation of shares. Deluce Holdings argues that Air Canada did this to avoid the constraints of the minority shareholders under the unanimous shareholder agreement. Action brought by minority shareholder (Deluce) for oppression remedy under s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 as well as an action to stay the arbitration for valuation of the shares. Air Canada countered with a request for a stay under s.7 of the *Arbitration Act*. Blair, J. denied the request for a stay and allowed the oppression action to commence. Blair, J. denied Air Canada's request for a stay as he felt the triggering of the arbitration mechanism was done solely to effect the wrongful objective of the majority over the minority. This action, in Blair's opinion, destroys the "very underpinning of the arbitration structure, thus taking the subject of the dispute out of the 'matters to be submitted to arbitration under the agreement'." (QL decision, p.15) Blair reasons that the oppression remedy under s.241 of the CBCA gives broad discretion to find a remedy appropriate to the situation at hand. In this situation, he finds that the purpose for which the arbitration mechanism is being used brings it outside the subject matter which the parties agreed to submit to arbitration. In short, Blair is applying an equitable remedy to the situation. Blair also notes that the arbitration clause is not a broad, blanket clause (ie. all matters arising from this agreement) but rather a very narrow one (valuation of shares only). This, Blair contends, means that the parties never intended to send such an issue to arbitration.

New Brunswick Jurisprudence

Condor Construction Ltd. v. Bathurst (City) **[1994] N.B.J. No. 425 (QL) (Court of Queen's Bench)**

Plaintiff (Condor) commenced an action against the City and an engineering consultant (RC Ltd.) involved on a sewer line project. Both the City and RC requested a stay of proceedings under s.7 of the *Arbitration Act*. Deschenes, J. granted the stay requested by the City as the City and Condor had agreed to submit all disputes arising from the agreement to arbitration. Deschenes refused to grant a stay for RC however as they were not a party to that agreement.

AREAS OF CONCERN

Alberta

***McCulloch v. Peat Marwick Thorne* (supra)**

The Court seemed to go into unnecessary territory in this decision by determining that the subject matter under s.7(2)(c) is not arbitrable under Alberta law, when in reality they are saying that the dispute falls outside the arbitration clause.[3]

Ontario

***Deluce Holdings Inc. v. Air Canada* (supra)**

The Court ignores the presumption in legislation for granting stays. Essentially, this case comes down to a conflict between two pieces of legislation and the *CBCA* wins out. The judge wants equity to prevail and refuses to grant the stay. This is done to prevent the majority from bringing about an injustice to the minority shareholders through the *Arbitration Act*.

APPENDIX II - APPEALS AND SETTING ASIDE

JURISPRUDENCE

Alberta Jurisprudence

***Pachanga Energy Inc. v. Mobil Investments Canada Inc.* [1993] A.J. No. 140 (QL) (Court of Queen's Bench)**

Applicant sought leave to appeal an arbitrator's award under s.44(2) of the *Arbitration Act*. Court refused leave on two bases:

1) The question was not a question of law but one of mixed law and fact, therefore s.44(2) does not apply.

2) If question was one of law alone, then leave is denied on the basis of s.44(3) ie. it is the very question of law that was referred to the arbitrator for determination.

***Pachanga Energy Inc. v. Mobil Investments Canada Inc.* [1994] 3 W.W.R. 350 (Alta. C.A.)**

Court of appeal decision from *Pachanga*, supra. Arbitrator reached decision on damage assessment using different criteria than normally used. Appellant challenged on the basis that the arbitrator committed an error of law. Court found that the arbitrator's decision (ie. on the criteria to be used) was one of mixed fact and law and therefore found it unnecessary to look further at s.44(2) or (3).

***Willick v. Willick* [1994] A.J. No. 592 (QL) (Court of Queen's Bench)**

Arbitrator was asked to arbitrate different issues in marriage dissolution including spousal support. Arbitrator awarded wife spousal support for period of 12 months. Wife sought leave

to appeal under s.44(2) on the basis that the arbitrator erred on a question of law. Court finds that the issue of spousal support is a question of law but denies the leave to appeal on the basis that it was the very issue that was sent to the arbitrator to be determined (therefore barred under s.44(3)). Court goes on to say in obiter dictum that s.44(3) of the *Arbitration Act* cannot completely bar judicial review of arbitrators' decisions (ie. a patently unreasonable standard of review still applies to catch gross errors of law by the arbitrator).

Aztec Construction Ltd. v. Frocan Industrial Contractors Ltd. **[1994] A.J. No. 814 (QL) (Court of Queen's Bench)**

Application to have an award set aside under s.45(1)(c) of the *Arbitration Act*. Arbitration agreement between the parties had no provisions to appeal the arbitrator's award on the basis of law, fact or mixed law and fact. The arbitrator found that the contract between the two parties was voided. This decision was based on his interpretation of the law of unilateral mistake. In coming to his conclusion about unilateral mistake, the arbitrator consulted outside legal authorities, some of which were not presented by either party to the arbitration. The applicant challenged the arbitrator's decision on two grounds:

1) The arbitrator should only have relied on the submissions before him and not consulted any outside authorities;

2) The arbitrator exceeded his jurisdiction and ordered the contract void on another principle beside the law of unilateral mistake.

Andrekson, J. ruled that the arbitrator was free to consult outside legal sources to aid in reaching a decision and that the arbitrator had not exceeded his jurisdiction but merely interpreted the law of unilateral mistake. Therefore, issue 2 could not be appealed on the basis of s.44(3).

Canadian Western Natural Gas Co. v. Alberta Energy Co. **[1995] A.J. No. 310, (QL) (Queen's Bench)**

Application for leave to appeal brought under s.44(2) of the *Arbitration Act*. Canadian Western Natural Gas (CWNG) disputed the arbitral tribunals determination of the gas price based on their method of calculating the price. The tribunal followed section 12 of the *Natural Gas Marketing Act* when determining which factors should be taken into account (including prices for Alberta gas outside the Alberta market). CWNG argued that the tribunal misinterpreted s.12 of the *Natural Gas Marketing Act* by including the prices for gas in other markets as a factor. Alberta Energy Co. argues that the question of price is one of mixed fact and law therefore leave to appeal cannot be granted under s.44(2). Mason, J. finds that the issue of the tribunal's interpretation of s.12 of the *Natural Gas Marketing Act* is one of law alone, but that the tribunal has unfettered discretion as long as it considers the factors listed in s.12. Mason, J. also finds that the actual determination of the price of gas is a question of mixed fact and law. Therefore, Mason, J. denies leave to appeal on the basis that the requirements of s.44(2) are not met (ie. not a question of law alone).

Ontario Jurisprudence

Metropolitan Separate School Board v. Daniels Lakeshore Corp. **[1993] O.J. No. 2375 (QL) Ontario Court (General Division)**

Issue of application of s.45(1) of the *Arbitration Act* which says "if the arbitration agreement does not **deal with** appeals on question of law". Parties agreed that the arbitrator's decision should be final and binding, and no mention was made with respect to appeals in law or otherwise. Steele, J. finds that even though parties agreed that the arbitrator's decision would be final and binding, "there is no express or implied provision that the right of appeal granted under s.45 would be excluded". Therefore, Steele, J. grants leave to appeal on the basis the arbitration agreement does not "deal with" appeals on questions of law.

Dascon Investments Ltd. v. 558167 Ontario Ltd. **[1993] O.J. No. 731 (QL) Ontario Court (General Division)**

Determination of market rental price on commercial lease was sent to arbitration. Lease contained no provision for appeals therefore the landlord sought leave to appeal under s.45(1) of the *Arbitration Act*. McNeely, J. grants leave to appeal under s.45(1) on the basis that:

1) there is a question of law (ie. the arbitrator's interpretation of the lease for dealing with "prevailing market rental";

2) the determination of the question will both (a) significantly affect the rights of the parties and (b) its importance justifies an appeal.

Bramalea Ltd. v. T. Eaton Co. **[1994] O.J. No. 38 (QL) Ontario Court (General Division)**

Issue of whether a right to seek leave to appeal was available under s.45(1) of the *Arbitration Act*. Arbitration clause in agreement read:

Bramalea, Eatons and Eatons Realty agree that the award of the arbitrator shall be final and binding upon the parties and there shall be no appeal therefrom and any amounts payable and interest thereon resulting from the arbitrator's decision shall be payable forthwith after the award. The parties reserve the right to proceed on an issue of law should such arise in the context of the proceedings.

The applicant for leave to appeal argued that the last sentence of the clause reserved the right for appeal on issues of law. The respondent argues the last sentence is referring to questions of law which arise in the course of the hearing which the arbitrator might want to refer to a court for guidance. D. Lane, J. found that the clause barred any appeals therefore leave to appeal under s.45(1) is denied as the arbitration agreement "deals with" appeals.

Labourer's International Union of North America, Local 183 v. Carpenter's and Allied Workers Local 27 **[1994] O.J. No. 274 (QL) Ontario Court (General Division)**

Union jurisdiction agreement between two unions. Applicant seeking leave to appeal the arbitrator's award (the Labourers union) argued that the arbitrator had made an error of law

and misinterpreted the jurisdiction agreement. Matlow, J. grants leave to appeal under s.45(1) and in so doing, makes two findings:

1) Common practice, not the *Arbitration Act*, requires the applicant under s.45(1) to show good reason to doubt the correctness of the arbitrator's decision, before s.45(1) can be invoked.

2) A clause in the agreement stating that the arbitrator's decision is "final and binding" does not preclude an appeal under s.45(1).

Environmental Export International of Canada Inc. v. Success International Inc. **[1995] O.J. No. 453 (QL) Ontario Court (General Division)**

Commercial contract between two parties which agreed to submit all disputes through arbitration rather than the courts with arbitration clause as follows:

The arbitration award shall be given in writing and shall be final, binding on the parties, not subject to any appeal, and shall deal with the question of costs of arbitration and all matters related thereto.

Environmental Export Inc. (EEI) wants some of the arbitrator's awards set aside under s.46 of the *Arbitration Act* on the basis that it was treated unfairly or unequally and that the arbitrator should be removed for bias. MacPherson, J. refused to set aside the awards of the arbitrator as he found that EEI essentially abandoned the arbitration process when they received a ruling unfavourable to them, then sought to invoke s.46 to set aside the award. MacPherson, J. found that this was not a sufficient reason to set aside the award.

Petrolon Distribution Inc. v. Petro-Lon Canada Ltd. **[1995] O.J. No. 1142 (QL) Ontario Court (General Division)**

Arbitration regarding interpretation of a commercial contract (ie. whether or not a termination clause was implied). MacDonald, J.'s discussion of s.45 of the *Arbitration Act* is done as a comparison to the old *Arbitration Act*. The arbitration agreement was written when the old Act applied, therefore contained a provision for appeals upon issues of law "in accordance with the *Arbitration Act*, R.S.O. 1990, c.A-24". The respondents argued that the appeal in this case was a question of mixed fact and law, therefore the appeal was barred under the new *Arbitration Act*. MacDonald, J. found that "the appeal should not be defeated by the fact that the language of s.45 of the new Act is more specific than the language of s.16 of the old Act". Instead, MacDonald, J. was willing to interpret the arbitration agreement to include questions of mixed law and fact based on the wording of s.16 of the old Act, which was in the minds of the parties at the time of the agreement.

Saskatchewan and New Brunswick Jurisprudence

No jurisprudence was found relating to s.45 and 46 of the Uniform Act.

AREAS OF CONCERN

Alberta

***Willick v. Willick* (supra)**

A slight problem with the obiter comments about judicial review (ie. the *Arbitration Act* cannot completely bar judicial review).

In general, the courts in Alberta seem to be interpreting the legislation strictly and denying leaves to appeal unless they fall within the exception noted in section 44(2). The courts do not appear to be twisting the definition of what is a question of law in order to review the decisions of arbitrators.

Ontario

The addition of the term "deal with" in the Ontario legislation seems to have triggered some confusion regarding terminology used in arbitration agreements or clauses. There are two differing lines of authority:

1) the phrase "final and binding" does not "deal with" appeals on questions of law, therefore s.45(1) could apply. See:

Metropolitan Separate School Board v. Daniels Lakeshore Corp.

(supra)

LIUNA, Local 183 v. Carpenter's and Allied Workers, Local 27

(supra)

2) the phrase "final and binding" does "deal with" appeals on questions of law (ie. it prohibits them), therefore s.45(1) could not apply. See:

***Bramalea Ltd. v. T. Eaton Co.* (supra)**

APPENDIX III - UNIFORM ARBITRATION ACT

3. The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except the following:

(a) subsection 5(4) ("*Scott v. Avery*" clauses);

(b) section 19 (equality and fairness);

(c) section 39 (extension of time limits);

(d) subsection 45(1) (appeal on question of law);

(e) section 46 (setting aside award);

(f) section 48 (declaration of invalidity of arbitration);

(g) section 50 (enforcement of award).

6. No Court shall intervene in matters governed by this Act, except as this Act provides.

7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

(2) However, the court may refuse to stay the proceeding in any of the following cases:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid;

(c) the subject-matter of the dispute is not capable of being the subject of arbitration under (enacting jurisdiction) law;

(d) the motion was brought with undue delay;

(e) the matter is a proper one for default or summary judgement.

(3) An arbitration of the dispute may be commenced and continued while the motion is before the court.

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the dispute may be commenced; and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.

(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

(6) There is no appeal from the court's decision.

45. (1) A party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

(2) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law.

(3) If the arbitration agreement so provides, a party may appeal an award to the court on a question of fact or on a question of mixed fact and law.

(4) The court may require the arbitral tribunal to explain any matter.

(5) The court may confirm, vary or set aside the award or may remit the award to the arbitral tribunal, with the court's opinion on the question of law, in the case of an appeal on a question of law, and give directions about the conduct of the arbitration.

s.46 (1) On a party's application, the court may set aside an award on any of the following grounds:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid or has ceased to exist;

(c) the award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement;

(d) the composition of the tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with this Act;

(e) the subject-matter of the dispute is not capable of being the subject of arbitration under (enacting jurisdiction) law;

(f) the applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator;

(g) the procedures followed in the arbitration did not comply with this Act;

(h) an arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias;

(i) the award was obtained by fraud.

(2) If clause (1)(c) applies and it is reasonable to separate the decisions on matters covered by the arbitration agreement from the impugned ones, the court shall set aside the impugned decisions and allow the others to stand.

(3) The court shall not set aside an award on grounds referred to in clause (1)(c) if the party has agreed to the inclusion of the dispute or matter, waived the right to object to its inclusion or agreed that the arbitral tribunal has power to decide what disputes have been referred to it.

(4) The court shall not set aside an award on grounds referred to in clause (1)(h) if the party had an opportunity to challenge the arbitrator on those grounds under section 13 before the award was made and did not do so, or if those grounds were the subject of an unsuccessful challenge.

(5) The court shall not set aside an award on a ground to which the applicant is deemed under section 4 to have waived the right to object.

(6) If the ground alleged for setting aside the award could have been raised as an objection to the arbitral tribunal's jurisdiction to conduct the arbitration or as an objection that the arbitral tribunal was exceeding its authority, the court may set the award aside on that ground if it considers the applicant's failure to make an objection in accordance with section 17 justified.

(7) When the court sets aside an award, it may remove the arbitral tribunal or an arbitrator and may give directions about the conduct of the arbitration.

(8) Instead of setting aside an award, the court may remit it to the arbitral tribunal and give directions about the conduct of the arbitration.

FOOTNOTES

1. This memorandum was prepared with the able assistance of Donna Clark, a Research Student with the Alberta Law Reform Institute.

2. Uniform Law Conference of Canada. *Proceedings of the Seventy-Second Annual Meeting.* (Saint John, New Brunswick, August, 1990) at 88.

3. W.H. Hurlburt. "Escape from Arbitration Clauses: Effect of the New Arbitration Act." (1992) Vol. 30, No. 4, Alta. L. Review 1361 at 1366.