COMMENTARY: Low threshold set for court appeals of arbitration awards

By William Horton

A recent decision of the Ontario Superior Court of Justice highlights the importance of specifically addressing the question of appeal rights in arbitration agreements.

Section 45(1) of the *Arbitration Act* provides as follows:

"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,

(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."

In *Aronowicz v. Aronowicz*, [2007] O.J. No. 295 the court held that even if there is no reason to doubt the correctness of an arbitration award, leave to appeal may be granted on either a question of law or a question of mixed fact and law. In the absence of any requirement that there is doubt as to the correctness of an award, all that is necessary according to the court in *Aronowicz* is that the question for the appeal can be stated as a question of law or a question of mixed fact and law. In this respect, *Aronowicz* implements a very low threshold and a very broad scope for granting leave.

Many arbitration practitioners will be surprised by this result. For example, can it be said that there is truly a "question of law" in issue if there is no reason to doubt that the law has been correctly stated by the arbitrator? Equally open to debate is the holding that leave to appeal may be granted not just for questions of law, but also for questions of mixed fact and law (i.e. whether the law was correctly applied to the facts).

The court didn't require a "reason to doubt the correctness" of an award based on the fact that s. 45(1) of the Act does not specifically mention that test, although the test is mentioned in other statutes and rules which provide for leave to appeal.

Yet the court expands the scope of the leave to appeal to "questions of mixed fact and law" even though "questions of mixed fact and law" are not specifically mentioned in s. 45(1), but are mentioned in other subsections of s. 45 which deal with appeals to the court by agreement of the parties. The same principle of statutory interpretation only appears to work to increase the scope of judicial review, but not to limit it.

The possibility that a court may grant leave to appeal an award on an issue of mixed fact and law has the potential to satisfy the test for leave to appeal in s.45 (1)(b) in almost every case.

This would make the only real hurdle the question of whether the matter at stake in the arbitration is a matter of importance to the parties.

That test is easily satisfied in most commercial cases, as *Aronowicz* itself demonstrates. In this sense, the decision in *Aronowicz* appears to provide less deference to an arbitration award than the Act itself and the general trend of jurisprudence on arbitration.

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If leave is granted under s. 45 (1), the appeal is to a single judge of the court. If the arbitration award was granted by a single arbitrator (as was the case in *Aronowicz*), the reversal of the award on appeal if that occurs (as it ultimately did in *Aronowicz*) is simply the substitution of the views of one individual (a single judge) for that of another (who might also have superb legal and judicial qualifications, as was the case in *Aronowicz*).

If the arbitral tribunal consisted of three arbitrators (who would commonly include a mixture of retired judges and senior counsel), the award could be reversed by the decision of a single judge.

Once a matter is back in the judicial system, that is not the end of it. The party who loses before the single judge may apply for leave to appeal to the Court of Appeal (s. 49). No statutory standards are specified in the *Arbitration Act* for that application. If successful, the parties could end up arguing not a question of law, but a question of mixed fact and law before the Court of Appeal, just as if the case had been tried in court.

It is doubtful that anyone would deliberately design a dispute resolution process this way.

If the parties have not specifically allowed or disallowed a right of appeal in the arbitration agreement, in light of *Aronowicz* they have virtually assured themselves, in any serious case, of the added cost of at least one and possibly two applications for leave. These costs, which could be substantial in many commercial cases, would have been avoided if the parties had simply gone to court in the first place.

Unfortunately, even if the parties wanted to provide by agreement for an appeal directly to the Court of Appeal from an arbitral award, that is not a legally available option (see *Brent v. Brent*, [2004] O.J. No. 637).

Most commercial parties will want to choose one system or the other for their dispute. Generally, the situation in *Aronowicz* only arises in cases where the parties forgot, or did not consider or realize they needed to exclude rights of appeal to the court in their agreement.

If parties do choose arbitration, the only way to avoid the potential re-litigation of the case on its merits in the court system is to specifically exclude a right of appeal in their arbitration clause.

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