A NEW BOTTLE FOR RENEWED WINE: THE *ARBITRATION ACT, 1991*

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This article provides a useful overview of the 1991 Arbitration Act *in Alberta and its similar counterparts in Ontario and Saskatchewan including a history of legislation governing arbitrations. The author outlines the purpose and function of the* Arbitration Act *and discusses how the legislation has fared, so far, in the courts. The article then ends with a discussion concerning the significance of the* Arbitration Act *for drafters. The appendix contains a valuable sample of case law concerning the new legislation in Alberta, Ontario and Saskatchewan.*

*Le présent article offre un aperçu utile de l'*Arbitration Act*(1991) de l'Alberta et de lois similaires adotpées en Ontario et en Saskatchewan, et inclut l'historique de la législation régissant l'arbitrage. L'auteur décrit l'objectif et la fonction de cette loi et suit la façon dont elle a été appliquée, jusqu'ici, par les tribunaux. L'article se termine par une discussion portant sur la signification de l'*Arbitration Act *pour les initiateurs d'ententes. L'annexe contient un exemple intéressant de jurisprudence concernant les nouvelles lois en Alberta, Ontario et Saskatchewan.*

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I. INTRODUCTION

Arbitration is the most litigation-like of alternative dispute resolution methods. It is essentially the adjudication of the relative rights of disputants by a neutral adjudicator who has heard the cases put forward by each. However, the disputants can tailor the process to their needs: they can avoid many of the trappings of a lawsuit; they can choose their adjudicator; and they can have their affairs kept confidential.

Arbitration affects legal rights and therefore requires a legal structure. Legislation provides that structure. Legislation governing private arbitrations in Canada has had a long history.

Until 1986, that history was uneventful. The common-law provinces and the two territories simply copied the United Kingdom *Arbitration Act* of 1889.[1] In 1931, the resulting situation commended itself to the Conference of Commissioners on Uniformity of Legislation in Canada,[2] which viewed the *Arbitration Acts* as efficient and substantially uniform.[3] However, times soon changed. By 1934, the United Kingdom itself found it necessary to amend the 1889 *Act*,[4] and by 1950 it became necessary to substitute a new Act.[5] In 1975, that *Act* was amended to give effect to UNCITRAL's *New York Convention On Recognition and Enforcement of Foreign Arbitral Awards* of 1958,[6] and in 1979 further amendments were made.[7] However, until 1986, the law governing private arbitrations in Canada, outside Quebec, remained cast in the comfortable uniformity of the 1889 mold.

In 1985, UNCITRAL followed up the *New York Convention* with its *Model Law on International Commercial Arbitration*.[8] In March 1986, British Columbia adopted an *International Commercial Arbitration Act* based on the *Model Law*. The Uniform Law Conference of Canada then adopted a *Uniform International Commercial Arbitration Act*[9] which attached the *New York Convention* and the *Model Law* as schedules and made some changes in them. The *Uniform Act* was then adopted by the remaining common-law provinces and the two territories. At that point, most of the provinces had one arbitration regime for international commercial arbitrations that was based on the *Model Law* and the *New York Convention* and another regime for other private non-labour arbitrations that was based on the 1889 United Kingdom *Act*.

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1 *Arbitration Act, 1889* (U.K.), c. 49, 52 & 53 Vict.

2 Now, mercifully, known as the Uniform Law Conference of Canada.

3 Only Quebec and Prince Edward Island did not have the 1889 *Act* at that time, and Prince Edward Island subsequently enacted one: see R.S.P.E.I. 1988, c. A-16.

4 *Arbitration Act 1934* (U.K.), 1934, c. 14.

5 *Arbitration Act 1950* (U.K.) 1950, c. 27.

6 *Arbitration Act 1975* (U.K.) 1975, c. 3.

7 *Arbitration Act 1979* (U.K.), 1979, c. 42.

8 See "Excerpts on the Model Law: From the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session" (3-21 June 1985), Supplement, C. Gaz. 1986.I.5152; and also A. Gaz. 1986.I.2915.

9 1986 ULCC Proc. at 54-80. Uniform Law Conference of Canada, *Proceedings of the Sixty-Eighth Annual Meeting* (1986) at 54-80.

When it adopted its *International Commercial Arbitration Act*, British Columbia broke additional new ground by adopting a new *Commercial Arbitration Act* to govern domestic non-labour arbitrations.[10] This act modernized the arbitration process. It implemented the 1982 *Report on Arbitration* of the British Columbia Law Reform Commission, which was the first formal Canadian proposal for modern arbitration legislation.

At the federal level, Parliament, also in 1986, adopted the *United Nations Foreign Arbitral Awards Convention Act*,[11] which enacted the substance of the *New York Convention*, and the *Commercial Arbitration Act*,[12] which enacted the substance of the *Model Law*.

In 1988, the Alberta Law Reform Institute issued its Report 51, *Proposals for a New Alberta Arbitration Act*. The report included a draft Arbitration Act which started with the *UNCITRAL Model Act* but made significant changes to it in order to adapt it to the Alberta legal environment. At that time, the Ontario Ministry of the Attorney General was interested in developing a new Arbitration Act, and ALRI and the Ministry made a cooperative proposal for a Uniform Act to the Uniform Law Conference, which resulted in the adoption of the *Uniform Arbitration Act* in 1990.[13]

In 1991 and 1992, Alberta, Ontario, Saskatchewan and New Brunswick adopted the *Uniform Arbitration Act*.[14] There are a few differences among the four new Acts, and one or two are of some importance, but fundamentally and in most of the details, the four are the same.

II. ARBITRATION LEGISLATION IN FORCE IN ALBERTA

The 1991 *Arbitration Act* applies to all non-labour arbitrations governed by Alberta law[15] unless it is specifically excluded by agreement or statute.[16] The *Act* itself excludes from its scope arbitrations that fall under Part 2 of the *International Commercial Arbitration Act*[17] and arbitrations under a number of statutes that have arbitration provisions for labour relations.[18]

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10 S.B.C. 1986, c. 3.

11 S.C. 1986, c. 21.

12 S.C. 1986, c. 22.

13 1990 ULCC Proc. at 36, 86-122. Uniform Law Conference of Canada, *Proceedings of the Seventy-Second Annual Meeting* (1990) at 36, 86-122.

14 *Arbitration Act*, S.A. 1991, c. A-43.1; *Arbitration Act*, S.O. 1991, c. 17; *Arbitration Act*, S.S. 1992, c. A-24.1; *Arbitration Act*, S.N.B. 1992, c. A-10.1.

15 The question of when Alberta arbitration law applies is an important question but is beyond the scope of this paper.

16 Alberta *Arbitration Act*, *supra* note 14, s. 2(1).

17 *Ibid.*, s. 2(1)(b), referring to the *International Commercial Arbitration Act*, R.S.A. 1980, c. I-6.6 [hereinafter the "ICAA"].

18 *Arbitration Act*, *ibid.*, s. 2(3). The statutes listed are: *Banff Centre Act*; *Cancer Programs Act*; *Colleges Act*; *Labour Relations Code*; *Police Officers Collective Bargaining Act*; *Public Service Employee Relations Act*; *Technical Institutes Act*; and *Universities Act*. Section 2(4) allows other acts to be excluded by regulation. No such regulation has been made.

So, apart from the *Arbitration Act*, the following arbitration regimes apply in Alberta:

1. The *International Commercial Arbitration Act*

Subject to a few special provisions, the ICAA applies the *UNCITRAL Model Law* (Schedule 2) to "international commercial arbitration"[19] in Alberta.[20] Despite basic similarities, the 1991 *Arbitration Act* is different from the *Model Law* as enacted by the ICAA. It is therefore important to determine whether the *Arbitration Act* or the ICAA applies to a specific case. If the parties, the place of performance of the principal agreement or the place of the arbitration have any non-Alberta flavour, or if the parties agree that the ICAA is to apply, the reader should consult article 1 of the *Model Law*, as its description of what is "international" is complex and may bring the case under the ICAA. An additional consideration is that the arbitration must be "commercial" as well as international in order to come under the ICAA, and it may not always be easy to decide whether the specific case falls within that category.[21]

2. Federal *Arbitration Act*

An arbitration under federal law is subject to the *Commercial Arbitration Act* (Canada)[22] rather than the *Arbitration Act* (Alberta). While the federal *Act* is also based on the *Model Law*, it is significantly different from the 1991 Alberta *Act*.

3. Labour-relations arbitration regimes

Labour-relations arbitrations perform very different functions from ordinary private arbitrations and are based on different premises. It is highly unsafe to apply the law and practice under the *Arbitration Act* to the labour-relations arbitrations that are excluded from it.

III. PURPOSE AND FUNCTION OF THE 1991 *ARBITRATION ACT*

A. REASONS FOR REFORM

The old *Arbitration Act*[23] left many questions unanswered and many practical problems unresolved. That was one reason for calls to modernize it. A second reason was that the relationship between arbitration and the courts reflected in the old *Act* was no longer seen as appropriate.

What relationship between arbitration and the courts *is* appropriate?

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19 ICAA Schedule 2, art. 1.

20 The ICAA also applies the New York Convention to the enforcement of foreign arbitral awards in Alberta, but that is not relevant to this discussion.

21 In *Borowski* v. *Heinrich Fiedler Perforiertechnik GmbH* (1994), 22 Alta L.R. (3d) 366, [1994] 10 W.W.R. 623, 158 A.R. 213 (Q.B.), Justice Murray held that a contract of employment is not commercial although the activities for which the employee is employed are commercial.

22 S.C. 1986, c. 22.

23 *Arbitration Act*, R.S.A. 1980, c. A-43 and its predecessors.

Arbitration is adjudication. Disputing parties have agreed to have their dispute adjudicated by a private arbitrator rather than by a court. Having made an agreement, they should be able to hold each other to it. Court intervention in an arbitration derogates from that agreement.

But some court intervention is essential, or at least highly desirable. Courts must establish the jurisdictional boundaries of arbitrators. Courts must protect arbitrations against pre-emption by court proceedings. Courts should have the power to fill lacunae in arbitration agreements, such as the lack of adequate provision for the appointment of arbitrators. Courts should have the power to assist arbitrations by interim injunctions, by preservation orders and by assisting in obtaining evidence. Courts should provide recourse against an unfair, biased or dishonest arbitration. Some recourse against arbitrators' errors in law may also be desirable. The machinery for the enforcement of court judgments should be made available for the enforcement of arbitrators' awards.

There is tension between the notion of arbitration as a process that the parties have chosen to the exclusion of court processes, on the one hand, and the need for or desirability of court supervision and assistance, on the other. The Acts based on the *Arbitration Act 1889* (U.K.) struck one balance between them. The *Arbitration Act* 1991 and its counterparts have struck a different balance.

The old Acts gave the courts a great deal of discretionary supervisory powers. For example,

- a court could allow a dispute to be litigated despite an arbitration agreement if there was a "good reason" for not proceeding with the arbitration;
- a court could remove an arbitrator or quash an award if the arbitrator "misconducted himself," words which came to be interpreted to include committing almost any error of procedure or law;
- a court could permit the revocation of a submission to arbitration;
- a court, in its discretion, could decline to enforce an arbitrator's award;
- a court could order an arbitrator to "state in the form of a special case any question of law arising in the course of the reference."

The new *Arbitration Act*, although it continues to give the Court of Queen's Bench substantial powers to assist and correct the arbitration process, structures those powers and reduces the discretionary elements in them.

B. PRINCIPLES OF THE 1991 *ACT*

The 1991 *Act* is based on the following principles:

a) Party autonomy and control.

The *Act* promotes party autonomy and control by giving the parties power to vary or exclude anything in the *Act* with specific exceptions (or even to opt out of the

whole *Act*). The consequence is that the parties to an arbitration can determine how the arbitration is to be conducted.

b) Efficiency.

The *Act* promotes efficiency:

- by providing a structure and process for arbitrations;
- by providing for court assistance where necessary;
- by permitting the parties to vary the statutory structure and process to meet their specific needs;
- by requiring parties who have objections to the process to bring them forward in a timely way;
- by conferring ancillary powers on arbitral tribunals that they may or may not have had under the old Acts;
- by restricting court intervention in the arbitration to cases in which it is needed for efficiency or to ensure fairness and equal treatment or basic legality; and
- by requiring the Court of Queen's Bench to enforce arbitrators' awards.

c) Fairness and equal treatment.

The *Act* promotes fairness and equal treatment by imposing on arbitrators a duty to provide it and by providing for court intervention to ensure that arbitrators carry out that duty.

Those principles will now be discussed in greater detail.

1. Party Autonomy and Control

> An arbitration occurs because the parties to it have agreed to have a dispute decided by an arbitrator or arbitrators rather than by a court. By agreeing to arbitration the parties have expressly, or, more often, by implication, agreed to participate in the arbitration and to honour the arbitrator's award. The foundation of an arbitration is a contract, and for that reason, arbitration is based upon contract law.
>
> The underlying agreement to arbitrate is governed entirely by the law of contract. The Arbitration Act does not say anything about it.... The courts will interpret it on the same principles as they interpret other legally binding contracts and will apply all the rules of contract law to it.[24]

The basic consensual nature of arbitration must not be overlooked. Disputing parties choose to have their dispute decided by arbitration. Their agreement establishes the arbitration. They should be able to control the arbitration. The 1991 *Act* gives effect to this principle.

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[24] Institute of Law Research and Reform (now the Alberta Law Reform Institute), Report 51, *Proposals for a New Alberta Arbitration Act* (Edmonton: ALRI, 1988) at 7.

First, parties can opt out of the *Act* entirely. Section 2(1) says, in effect, that the *Act* will not apply if it "is excluded by an agreement of the parties or by law." Opting out, without more, would leave the arbitration to the common law, the content of which would be difficult to determine after a century of arbitration legislation, so that it is likely to prove unwise to opt out of the *Act* without opting into some other arbitration regime. However, the right to opt out is there.

Second, s. 3 says that the parties "may agree, expressly or by implication, to vary or exclude any provision of this Act," with 7 listed exceptions. These exceptions put beyond parties' control:

a) the requirement that the parties be treated fairly and equally;
b) the supervisory powers of the Court of Queen's Bench, which are designed to ensure legality, fairness and equal treatment; and
c) the power of the Court of Queen's Bench to enforce an award.[25]

These exceptions are important, but for all practical purposes they leave the parties free to tailor the arbitration to suit their needs.

There is another side to the party autonomy coin. An arbitration can be forced only on a party who has agreed to it in accordance with the usual principles of contract.[26] So s. 45 gives the Court of Queen's Bench the power to set aside an award if there is a fundamental legal flaw in the agreement or in the establishment of the arbitration[27] and s. 47 provides that a party who has not participated in an arbitration can get an advance declaration that the arbitration is invalid on similar grounds. The parties cannot vary or exclude these Court of Queen's Bench powers, though, under other parts of s. 45, failure to raise a timely complaint about some of these matters will effectively waive the right to raise them later.

2. Fairness and Equal Treatment

No one, the 1991 *Act* assumes, would agree to an adjudication that is unfair or biased — or at least one that is biased or unfair as against oneself. So s. 19 requires an arbitral tribunal to treat the parties equally and fairly and to allow them to present a case and to respond to the other parties' cases, and s. 19 cannot be varied or excluded. Then, to ensure that arbitral tribunals do give fair and equal treatment, s. 45(1)(c) gives the Court of Queen's Bench the power to set aside an award on the grounds of unfair

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25 There are also two minor exceptions, s. 5(2) (*Scott* v. *Avery* clauses) and s. 39 (power of the Court of Queen's Bench to extend the time for the delivery of an award).

26 There is an exception. A statute can legislate for an arbitration.

27 *E.g.*, legal incapacity of a party to the arbitration agreement; invalidity or termination of the arbitration agreement; inclusion in an award of something not covered by the arbitration agreement; composition of the arbitral tribunal at variance with the arbitration agreement or with the *Act*; or the subject-matter of the arbitration is not capable of being the subject of arbitration under Alberta law.

process,[28] procedure that did not comply with the arbitration agreement or the *Act*, corruption or fraud on the part of the arbitrator, and fraud in the obtaining of the award. The requirement of arbitrators' independence and impartiality under s. 11 and requirements of notice and disclosure of information under s. 26 are also fairness provisions.

3. Efficiency

a. Arbitration process and structure

i. *General discussion*

The old *Arbitration Act* gave little guidance to arbitrators, parties and counsel about procedure. The 1991 *Act* is intended to provide a relatively complete procedural framework which, with a valid arbitration agreement and nothing more, will enable arbitrators, parties and counsel to conduct an arbitration. That is to say, an arbitration agreement could simply provide that disputes answering to a certain description shall be submitted to arbitration, and the *Act* would do the rest.

That is not to say that anyone should enter into such an arbitration agreement. Default provisions in the *Act* cannot be satisfactory for all arbitrations, as arbitrations may cover anything from a dispute over a defective toaster to a dispute over the loss caused by a defective bridge and to the division of matrimonial property. For example, the *Act*'s default provision for the appointment of an arbitrator by the Court of Queen's Bench is a necessary backstop, but it involves a court application which should be made unnecessary by a more efficient provision; and an arbitration agreement may prove unsuitable if it does not provide for bringing into the arbitration and binding all parties who are necessary for the disposition of all disputes arising out of one fact situation. The drafter of an arbitration agreement either should be satisfied that the *Act* provides for a matter in a way that is suitable for the arbitrations that may arise under the agreement, or if not so satisfied, should put into the arbitration agreement something that will be suitable.

ii. *Commencement of arbitration*

Sections 23 and 24 make efficient provision for the commencement of an arbitration. An arbitration may be commenced "in any way recognized by law," including the service of a notice of one of a number of kinds. If the arbitration is commenced without identifying the matters in dispute, all matters in dispute under the agreement are referred to arbitration.

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[28] Note that s. 45(1)(f) applies only if the applicant for a setting aside order was treated *manifestly* unfairly. What is needed to make unfairness manifest is not yet clear.

iii. *Arbitral tribunal*

Sections 9 to 16 are grouped under the heading "Arbitral Tribunal." They provide machinery for constituting and reconstituting an arbitral tribunal. They contain the following provisions:

1) In default of agreement there will be one arbitrator who will be appointed by the Court of Queen's Bench, which also has a default power to appoint a substitute arbitrator in case of need.[29]
2) Section 11 provides that an arbitrator—and this includes a party-appointed arbitrator—shall be independent of the parties and impartial as between them, and imposes a consequential duty of disclosure on arbitrators.
3) Section 13 requires challenges to an arbitrator to be made to the arbitral tribunal and then to the Court of Queen's Bench, which has the power under s. 15 to remove an arbitrator for inability to act, corruption, fraud, undue delay or failure to treat the parties fairly and equally.[30]

iv. *Jurisdiction of arbitral tribunal*

The *Act* provides a framework for the consideration of jurisdictional questions under the heading "Jurisdiction of Arbitral Tribunal." Section 17(1) gives an arbitral tribunal power to rule on its own jurisdiction, including objections as to the existence or validity of the arbitration agreement (which is to be treated as an independent agreement that may survive a principal agreement within which it is contained). Section 17(2) gives an arbitral tribunal power to determine questions of law that arise during the arbitration. Both of these powers are subject to recourse to the Court of Queen's Bench, which has the ultimate control over jurisdictional boundary questions.

In the interests of efficiency, s. 18 confers on a tribunal incidental powers to order the detention, preservation or inspection of property and documents that are the subject of the arbitration and to order security, and it confers the power on the Court of Queen's Bench to enforce such orders.

v. *Conduct of arbitration*

Sections 19 to 30 are gathered under the heading "Conduct of Arbitration" and are intended to provide an efficient framework for that process.

Subject to the overriding duties of fairness and equal treatment under s. 19, the fasciculus provides an efficient structure for the arbitration:

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29 Sections 9, 10, 16. There is no appeal from an appointment under s. 10 or a decision about appointment of a substitute under s. 16. No substitute can be appointed if the agreement provides that the arbitration is to be conducted *only* by a named arbitrator.

30 Note that if the Court of Queen's Bench removes an arbitrator for corruption, fraud or undue delay it may deprive the arbitrator of compensation and impose liability to pay costs: s. 15(4).

- Section 20(1) confers on the arbitral tribunal power to determine the procedure to be followed, and s. 22 confers on the tribunal supplementary powers to determine times, dates and places.

- Section 26(1) gives the tribunal the power to conduct an arbitration on the basis of documents unless a hearing is demanded, in which event there must be a hearing.

- Section 25 gives the tribunal the power to require the parties to submit "statements," which amount to pleadings, and s. 27 gives it the power to dismiss the claim of a claimant who does not submit a timely statement or to proceed without a statement in the case of another party.

- Section 27(4) gives the tribunal the power to terminate an arbitration for unreasonable delay by the party who commenced the arbitration, or to give directions for speedy determination.

- Section 25(6) gives the tribunal a general power to give directions with which the parties must comply, including directions to the parties to submit to examination on oath or affirmation and to produce records and documents.[31]

- Section 21 provides that the tribunal is not bound by the rules of evidence and has the power to determine admissibility, relevance and weight, and the manner in which evidence is to be admitted.[32]

Under s. 29(1) and s. 29(2), a person served with a notice to attend to give evidence and produce records must do so, subject to privileges, and under s. 29(5) the Court of Queen's Bench may make orders and give directions with respect to the taking of evidence as if the arbitration were a court proceeding.

vi. *"Award and Termination of Arbitration"*

Some important provisions appear in ss. 31 to 43 under the heading "Award and Termination of Arbitration":

- Section 31 requires an arbitral tribunal to decide a dispute in accordance with law, and s. 33 requires it to decide in accordance with the arbitration agreement and the principal contract and to take applicable usages of trade into consideration.

- Section 31 gives a tribunal the power to order equitable remedies.

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31 The Court of Queen's Bench has power to enforce any such direction as if it were a direction made by it in an action: s. 25(7).

32 However, under s. 29(4), the tribunal must require witnesses to testify under oath, affirmation or declaration.

- Section 38 provides that an award must observe specified formalities, one of which is the giving of reasons; and, under s. 40 the tribunal can be requested by a party and required by the Court of Queen's Bench to give a further explanation.

- Section 41 gives a tribunal the power to make interim awards and more than one final award.

- Section 43 gives a tribunal the power to:

  — correct typographical, calculation and similar errors in an award;
  — correct an injustice caused by tribunal oversight; and
  — make an additional award to deal with a matter that was omitted from the earlier award.

The tribunal must exercise its corrective powers under section 43 within rigid thirty day time lines, though the starting point of the thirty days varies.

b. Timely objection

Included in the efficiency principle of the 1991 *Act* is a minor principle, that a party who has an objection to an arbitration or to anything done in the course of an arbitration must raise it in a timely manner.[33] Parties may not wait to see how the arbitration wind is blowing or has blown before taking an objection. The following provisions give effect to that principle:

- Section 4 provides that a party waives a right to object to a non-compliance with the Act or with the agreement unless they raise it within a limited time provided for it or within a reasonable time. Since the parties cannot exclude or vary any of the provisions entrenched by s. 3, the waiver principle does not apply to any rights conferred by those provisions.

- Section 13(2) provides that a party who appointed an arbitrator or participated in an appointment may challenge the arbitrator only on grounds of which the party was unaware at the time of the appointment.

- Section 13(3) provides that a party must send the tribunal a statement of the grounds for the a challenge to an arbitrator within fifteen days of becoming aware of them, and must apply to the court within ten days if the tribunal rejects the challenge.

- Section 17(4) provides that a party who objects to jurisdiction must do so no later than the beginning of the hearing or, if there is no hearing, no later than the first occasion on which the party submits to the tribunal a statement under s. 25.

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[33] This is a fairness principle as well as an efficiency principle.

- Section 17(6) provides that a party who objects to the tribunal exceeding its jurisdiction must do so as soon as the matter alleged to be beyond the tribunal's jurisdiction is raised during the arbitration, and must apply to the court within thirty days of an adverse ruling by the tribunal.

- Sections 45(4) to 45(6) prohibit the Court of Queen's Bench from setting aside an award on grounds that should have been raised earlier under the provisions listed above.[34] Section 45(3) adds to the list of prohibitions the case in which a party has waived the right to object to the inclusion of a dispute in the arbitration or in the award or has agreed to the inclusion.[35]

c. No-appeal provisions

Appeals from the Court of Queen's Bench to the Court of Appeal on procedural matters will delay an arbitration and add to its cost. They may be used as a means of obstruction and delay. The 1991 *Act* therefore prohibits appeals in a number of situations in which the question is merely one of choice of forum, that is, a choice between court and arbitrator or between arbitrators. The Court of Queen's Bench orders that cannot be appealed are as follows:

- the grant or refusal of a stay of a competing court action under s. 7;
- the appointment or refusal to appoint an arbitrator under s. 10 or a substitute arbitrator under s. 16;
- an order under s. 15(1) removing or refusing to remove an arbitrator and an order under s. 15(3) giving directions on the conduct of the arbitration when an arbitrator is removed;[36]
- an order under s. 17(9) disposing of an objection to jurisdiction.

Section 8(3), on the other hand, provides for an appeal, with leave of the Court of Appeal, from the Court of Queen's Bench's determination of a question of law. However, under s. 8(2), the question of law will not get to the Court of Queen's Bench in the first place without the consent of either the arbitral tribunal or all parties. This is a safeguard that differentiates the question-of-law provision from the stated case that could be ordered by the court under the old *Arbitration Act* on the application of a

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34 One exception is that the court may set aside an award if satisfied that a failure to raise an objection to jurisdiction was justified. Note also that, under s. 47, a party who has not participated in an arbitration is entitled at any stage to a declaration that an arbitration agreement does not apply to a dispute.

35 The waiver provisions do not apply to the court's power to set aside an award on the grounds that a party to the arbitration agreement was under a legal incapacity or on the grounds that the arbitration agreement is invalid or has ceased to exist. In such a case, the party attacking the award would no doubt say that *expressio unius est exclusio alterius* so that waiver does not apply. A party supporting an award may argue estoppel.

36 Either the arbitrator or a party does have an appeal from an order under s. 15(4). Under that subsection, the Court of Queen's Bench, if it removes an arbitrator for corruption, fraud or undue delay, may deny compensation to the arbitrator and require the arbitrator to pay costs.

single party. It is hoped that the new provision will make the court's assistance available where it is needed without providing an opportunity for obstruction and delay.

The no-appeal provisions make individual judges of the Court of Queen's Bench the final arbiters in choice-of-forum matters. The hope is that, without imposing injustice on the parties, this device will avoid the use of appeals that would obstruct and delay arbitrations.

C. COURT INTERVENTION

1. General Discussion

The 1991 *Act* gives extensive powers to the Court of Queen's Bench.[37] A number of these powers enable the court to facilitate arbitrations. These are based on the principle of efficiency. Others enable the court to *supervise* arbitrations. These give effect to the principles of party autonomy and fairness.

Section 6 makes the intention of the *Act* clear. It reads as follows:

> 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.

This section tells the courts very clearly that their powers are to be used only to give effect to the principles of party autonomy, fairness and efficiency. It should be the starting point of every judicial action under the *Act*.

2. Court Powers of Assistance

The efficient conduct of an arbitration often requires the exercise of powers that a party or an arbitral tribunal does not have. Under the efficiency principle, the 1991 *Act* therefore gives the Court of Queen's Bench[38] substantial powers to assist the arbitration process. References have already been made to several of them, but they will be listed together here for overview purposes:

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37 Section 7 of the *Act* gives the Provincial Court the power (and in most cases imposes the duty) to stay an action in Provincial Court where the subject matter is subject to an arbitration agreement. Otherwise, the *Act* gives powers only to the Court of Queen's Bench.

38 The only power given to another court (other than on appeal) is the power of the Provincial Court to stay an action in that court if s. 7 applies.

- Section 7(1) gives the Court of Queen's Bench and the Provincial Court power (and imposes a duty) to stay a court action brought in respect of a matter that is to be submitted to arbitration under an arbitration agreement. Section 7(2) limits the court's power to refuse a stay to a specific list of cases. If the court refuses a stay, the matter in dispute cannot be arbitrated.

- Section 8(1) gives the Court of Queen's Bench the same powers with respect to the detention, preservation and inspection of property, interim injunctions and the appointment of receivers as it has in court actions.

- Section 8(2) gives the Court of Queen's Bench the power to determine any question of law that arises during an arbitration, but only with the consent of all parties or of the arbitral tribunal.

- Section 8(4) gives the Court of Queen's Bench the power to consolidate arbitrations, but only on the application of all parties.

- Section 10(1) and s. 16(2) give the Court of Queen's Bench default powers to appoint an arbitrator.

- Section 25(7) gives the Court of Queen's Bench the power to enforce a direction of an arbitral tribunal with respect to an arbitration, including a direction to a party to submit to examination or produce records and documents.

- Section 29(5) gives the Court of Queen's Bench the power to make orders and give directions with respect to the taking of evidence for an arbitration as if the arbitration were a court proceeding.

- Section 39 gives the Court of Queen's Bench the power to extend the time within which an arbitral tribunal is required to make an award.

- Section 49 requires the Court of Queen's Bench to give a judgment enforcing an Alberta award if the time for appeal or setting aside has expired without proceedings being taken to have the award set aside or declared invalid.[39] The court has the same powers with respect to the enforcement of arbitral awards as it has with respect to the enforcement of its own judgments.

[39] There is a discretion to enforce if the time for appeal and setting aside has not elapsed or if an appeal, an application to set aside or an application for a declaration of invalidity is pending. Section 49 also extends to awards made in Canada outside Alberta, with a slightly longer list of exceptions.

3. Court Supervision

a. Court supervision during an arbitration

While an arbitration is in process, the Court of Queen's Bench has two supervisory powers:

1) the power under s. 13(6) and s. 15(1) to remove an arbitrator for bias, lack of agreed qualification, corruption, fraud, undue delay or failure to give the fair and equal treatment or the opportunity to present and rebut cases that are mandated by s. 19.
2) the power under s. 17(9) to rule on an objection to an arbitral tribunal's jurisdiction.

The Court of Queen's Bench's power to rule on an objection to jurisdiction gives effect to the principle of party autonomy—an arbitration must stay within the agreed boundaries—and so does the power of removal of an arbitrator for lack of agreed qualification. Removal on the grounds of undue delay is primarily based on the efficiency principle. Removal on the other grounds listed above is based on the principle of fairness and equal treatment.

b. Court supervision of awards

i. *Setting aside*

Under the old *Arbitration Act*, an award could be set aside on the grounds that the arbitrator had "misconducted himself." Under judicial interpretation,

> the word "misconduct" is given a very wide meaning going beyond any sense of moral culpability and including an error in law on the face of the award. That which would be mere regrettable error, if done by a judge, earns for the arbitrator the opprobrium of "misconduct" with whatever double standard that may involve.[40]

Thus, the old *Act* conferred a broad discretionary power to set aside an award on grounds that included procedural error and bias, as well as morally culpable conduct such as fraud.

The 1991 *Act* substitutes for the former broad discretion an itemized list of grounds for setting aside an award. Of the nine paragraphs of s. 45(1), five[41] have to do with specific fundamental flaws in the arbitration agreement or in the establishment of the arbitration which would make the enforcement of an award an invasion of party

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[40] Per Laycraft J.A., *Mijon Holdings* v. *Edmonton* (1980), 12 Alta. L.R. (2d) 88 at 94 (C.A.).

[41] Section 45(1)(a) (legal incapacity of party to agreement); (b) (invalidity or termination of the arbitration agreement); (c) (inclusion of dispute not covered by the arbitration agreement); (d) (composition of the tribunal was not in accordance with the arbitration agreement or the *Act*); and (e) (the subject matter of the award is not capable of arbitration under Alberta law).

autonomy, and three[42] have to do with departures from fairness and equal treatment. Section 45(1)(g) (failure of procedures to comply with the *Act* or the arbitration agreement) has to do with either or both of party autonomy and fairness and equal treatment. Upon setting aside an award, the Court of Queen's Bench may remit the award to the arbitral tribunal with directions, or may remove an arbitrator or the tribunal and give directions for the future conduct of the arbitration.[43]

These are extensive powers. They are, however, directed with some precision to specific evils. There are also some restrictions on their exercise. Under s. 45(1)(f), the power to set aside arises only if the applicant was treated *manifestly* unfairly or unequally; whatever this means, it suggests that there is a fairly heavy onus on the applicant to show that they have suffered from unfairness or inequality of treatment. Then ss. 45(3) to 45(6) say that awards are not to be set aside on a number of grounds if timely objection was not taken; this restriction does not prevent an award being set aside for a fundamental flaw in the arbitration agreement or for a fundamental failure of fair and equal treatment.

In summary, the Court of Queen's Bench can set aside an award if there is a fundamental flaw in the arbitration agreement or the arbitration, or if there was a serious flaw or strong element of unfairness or illegality in the arbitration. But, if the complaint has to do with the conduct of the arbitration, it must be raised in a timely way unless it goes to a basic lack of fairness and equal treatment.

ii. *Appeals to the Court of Queen's Bench*

Section 44 of the *Act* makes two separate provisions for appeals to the Court of Queen's Bench from arbitration awards:

1) Under s. 44(1), a party may appeal on any issue[44] "if the arbitration agreement so provides."

2) Under s. 44(2), a party may appeal on a question of law, but only with leave of the Court of Queen's Bench, and the leave is not to be granted unless the court is satisfied that the importance of the question to the parties justifies an appeal and that the determination of the question will significantly affect the parties' rights.

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42 Section 45(1)(f) (manifest unfair or unequal treatment, denial of opportunity to present or rebut a case, or lack of proper notice of arbitration or appointment of arbitrator); (h) (corruption, fraud or bias on the part of an arbitrator); (i) (obtaining of the award by fraud).

43 Section 45(7),(8).

44 The wording of s. 44(1) is actually "on a question of law, on a question of fact or on a question of mixed law and fact."

Section 44(2) is one of the provisions which, under s. 3, cannot be varied or excluded. The guarantee of an appeal on law appears to be an expression of the principle of fairness and equality: an arbitration must give a party its legal rights.[45]

The parties thus have two alternatives to choose from. One is to agree on a right of appeal, which is under their control and which they may frame as broadly or as narrowly as they wish, with or without safeguards. The other is the statutory appeal for which leave is required and which is restricted to an appeal on a question of law. The subject is one that a drafter of an arbitration clause or agreement might usefully consider in light of the kinds of disputes that may arise and what it is that the parties want out of arbitration.

The parties to an arbitration agreement could, if they wish, exclude s. 31, which requires an arbitral tribunal to decide a matter in dispute in accordance with law. While such an exclusion would not necessarily preclude an appeal on a question of law, it would make it more difficult to find an appealable question of law.

It seems likely that the standard of review of an appeal on a question of law will be the "correctness" or "judicial standard"; that is, the court will allow the appeal unless the arbitral tribunal got its law right. A passage in *Willick* v. *Willick*[46] suggests that, where the arbitration agreement provides for an appeal on fact or on mixed fact and law, the same standard of review will apply. In the past, the courts have not substituted their own view of the facts for arbitrators' views, and it would be prudent to wait for further judicial interpretation before accepting that proposition.[47]

iii. *Questions of law expressly referred*

Section 44(3) makes an exception to both s. 44(1) and s. 44(2): it says that there is no appeal "on a question of law which the parties expressly referred to the arbitral tribunal for decision." Section 44(3) was a late addition to the 1991 *Act* and is not included in the 1991 and 1992 Acts of the three other provinces. It was intended to provide a narrow exclusion similar to that which the courts had developed under the old Acts.

Two Court of Queen's Bench decisions suggest a broader construction of s. 44(3), that is, that a question of law which arises in the course of deciding a referred dispute

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45 There is a significant difference between the Alberta and Ontario Acts on this point: Ontario's s. 45(1) provides for an appeal on law "if the arbitration agreement does not deal with appeals on questions of law." Under the Ontario provision, the parties can agree that there is to be no appeal on law; under the Alberta provision they cannot.

46 (1994), 158 A.R. 52 (Q.B.).

47 For a discussion of standards of review of awards agreeing with the application of the "judicial" or "correctness" standard to an arbitrator's findings of law and disagreeing with the application of the standard to arbitrator's findings of fact, see Hurlburt, *infra* note 48 at 181-85.

is "expressly referred" even though the question is not mentioned in the reference.[48] Until the interpretation of the words is clarified, drafters should be particularly careful to say what questions of law are "expressly referred," so as to be sure of getting the benefit of the exclusion, if that is what they want, or of getting the benefit of an appeal on law, if that is what they want.

A third Court of Queen's Bench decision, *Aztec Construction Ltd.* v. *Frocan Industrial Contractors Ltd. et al.*[49] has taken s. 44(3) farther in another direction. In that case, one of the questions referred to the arbitrator was: "Did Frocan make a unilateral mistake which would void the subcontract?" The arbitrator held that:

> Frocan made a unilateral mistake as to motive, but not as to the term of the Contract. Aztec's failure to identify a mistake which should have been plainly evident, is cause to void the Contract."[50]

On appeal to the Court of Queen's Bench, Aztec argued that this decision was based on a principle other than that of unilateral mistake. The Court of Queen's Bench held that what Aztec was disputing on the appeal was the arbitrator's interpretation of the law of unilateral mistake and went on to say that

> it is clear that by s. 44(3) of the Arbitration Act 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.[51]

The referred question includes two questions: (1) What mistake, if any, did Frocan make? and (2) If Frocan made a mistake, was that mistake a unilateral mistake that would void the contract? The first question is one of fact. The second is probably one of law. The result of the decision is thus that s. 44(3) precludes an appeal on a question of law is expressly referred for decision, even though the question referred also includes a question of fact.

Aztec also appealed the arbitrator's award of solicitor and client costs to Frocan. According to the judgment,

> The parties explicitly agreed to grant to the arbitrator "complete discretion with respect to the award of costs including ... [f]ees and expenses of counsels for the disputants."[52]

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48 *Pachanga Energy Inc.* v. *Mobil Investments Canada Inc.* (1993), 8 Alta. L.R. (3d) 284 (Q.B.); affirmed without dealing with this point (1994), 15 Alta. L.R. (3d) 1 (C.A.); and *Willick* v. *Willick* (1994), 158 A.R. 52 (Q.B.). In *Willick*, for example, the court held that a referral of "spousal support" and "such other issues that arise out of the above" constituted an express referral of the duration of the support and thus precluded an appeal from the legal basis on which the arbitrator had determined the duration of the support. For a statement of reasons for disagreeing with these applications of s. 44(3), see W.H. Hurlburt, "Case Comment: *Willick* v. *Willick*: Appeals from Awards under the Arbitration Act" (1994) 33 Alta L. Rev. 178 at 185-88.

49 (1994), 161 A.R. 314 (Q.B.).

50 *Ibid.* at 317.

51 *Ibid.* at 320.

52 *Ibid.*

The court said "[a]s the arbitrator's Award of Costs was completely within his jurisdiction, that matter cannot be appealed on the basis of the arbitrator committing an error in principle"[53] and cited the *Pachanga* case. While the court did not refer specifically to s. 44(3) on this point, the reference to *Pachanga* suggests that the decision was based on the subsection. Further, an award that commits an error in principle is appealable under s. 44(1) and s. 44(2), so that s. 44(3) must be the basis of the decision. Here again, the effect of s. 44(3), as interpreted, is to preclude an appeal on a question that includes the facts as well as the law on which a costs award is based.

So a "question of law" may include a question that has elements of fact in it and a "question of law expressly referred" may include a question that is not mentioned in the reference. Section 44(3) was intended to protect awards against appeal in very restricted circumstances, but it seems to be developing a life of its own and to be trenching on the rights of appeal under s. 44(1) and s. 44(2).

iv. *Declarations of invalidity of arbitration*

Section 47 permits a party to apply at any stage during or after an arbitration for a declaration that the arbitration is invalid because of one of a specified list of fundamental flaws. These flaws are: that a party to the arbitration agreement was under a legal incapacity; that the arbitration agreement is invalid or has ceased to exist; that the subject-matter is not capable of arbitration under Alberta law; and that the arbitration does not apply to the matter in dispute. However, the application may be made only if the applicant has not participated in the arbitration.

Section 47 is in part based on fairness: if the arbitration process is non-existent, an alleged party should not have to wait until arbitrators are appointed without lawful authority and then go to those arbitrators for a decision on the point. But it also recognizes that, in the event of disagreement, it is for the courts to deal with matters of fundamental or boundary jurisdiction. If s. 47 did not exist, a court would probably entertain an application under its inherent jurisdiction for a declaration that an arbitration which threatens a person's interests is legally non-existent or invalid, so that s. 47 may do little more than declare the law that would exist without it.

v. *Other judicial review powers*

In *Willick*,[54] the court said that s. 44(3) (which precludes an appeal on a question of law expressly referred to the arbitrator) does not completely oust the court: the court can still interfere if there is a "gross error of law apparent on the face of the record," the applicable standard of review being the "patently unreasonable" standard. In my submission, there is no such power.

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53 *Ibid.*

54 *Supra* note 46.

Even under the old *Act* there was no such power. As Justice Laycraft said in *Mijon Holdings*:[55]

> The result of *Snider* v. *Miller*, followed in Alberta for more than 50 years, is that "unless a contrary intention is expressed therein" any submission to arbitration becomes an order of the court and thereby comes under the ambit of the statute. In my view whether or not it becomes an order of the court, a submission is governed by the statute.... In my view the legislature in the Arbitration Act has set forth provisions applicable to all arbitrations. It is therefore not open to a party to an arbitration to contend that he is proceeding under the common law jurisdiction rather than under the Arbitration Act. Each submission comes under the Act so that all subsequent proceedings relate to that statutory jurisdiction.

And later:

> In my view, *Snider* v. *Miller*, establishes that the Alberta legislature did attempt "to define comprehensively the scope of the jurisdiction to set aside awards."[56]

What of the new *Act*? Section 6 says that the court is not to intervene except for specified purposes which are not relevant to this discussion, and except "as provided by this Act." But the *Act* does not go on to provide for judicial review. Indeed, s. 37 says that an award "binds the parties unless it is set aside or varied under ss. 44 or 45" and is therefore adverse to any inherent power in the court to set aside an award. Sections 37, 44, 45 and 47, in my submission, constitute a complete statutory scheme which excludes any residual court powers more emphatically than did the old *Act*.[57] The court's powers to interfere with a consensual process must be found in the *Act* itself.[58]

vi. *Functions of the Court of Appeal*

As I have noted above,[59] the 1991 *Act* provides that there is no appeal from the Court of Queen's Bench to the Court of Appeal where all that is involved in the Court of Queen's Bench decision is one of a number of orders providing for a choice of forum. This is to avoid the use of appeals to delay and obstruct arbitrations. Otherwise, the *Act* does not specifically deal with appeals on procedural matters, which would be left to usual principles, except for s. 8(3), which provides for an appeal to the Court of Appeal, with leave of that court, of the determination by the Court of Queen's Bench of a question of law that arises during the arbitration.

Section 48 of the 1991 *Act* provides for appeals to the Court of Appeal from Court of Queen's Bench decisions on setting aside applications, appeals and applications for declarations of invalidity. All such appeals require the leave of the Court of Appeal.

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55 *Supra* note 40 at 91.

56 *Ibid.* at 93.

57 An Ontario decision leaves open the question whether there can be judicial review under the Ontario Arbitrations Act: *Superior Propane Inc.* v. *Valley Propane (Ottawa) Ltd.* (1993), O.J. 442 (QL). In my submission, there is no room for judicial review.

58 This subject is also discussed in Hurlburt, *supra* note 48, at 188-90.

59 See III(B)(3)(c) above.

Section 48 has been said to be ambiguous in its assignment of jurisdiction as between the Court of Queen's Bench and the Court of Appeal.[60] Section 48 reads as follows:

> An appeal from the court's decision in an appeal of an award, an application to set aside an award or an application for a declaration of invalidity may be made to the Court of Appeal of Alberta with leave of that Court.

Grammatically speaking, the section could be read as saying that "an application to set aside an award or an application for a declaration of invalidity ... may be made to the Court of Appeal ...." What it is intended to mean is that "an appeal from the [Court of Queen's Bench's] decision in ... an application to set aside an award ... may be made to the Court of Appeal" and "an appeal from the [Court of Queen's Bench's] decision in ... an application for a declaration of invalidity may be made to the Court of Appeal." While it is unlikely that the section will be construed as requiring that setting aside applications and declaration applications go to the Court of Appeal without going to the Court of Queen's Bench first, this is a point that could usefully be clarified if the *Act* is amended at any time.

In summary, the 1991 *Act* is intended to strengthen the arbitration process and restrict supervisory judicial intervention to cases in which intervention is clearly necessary in order to protect a party against unfairness or illegality. That is the reason for the no-appeal provisions of the *Act* and for the requirement of leave for appeals to the Court of Appeal from Court of Queen's Bench decisions dealing with awards.

IV. JUDICIAL TREATMENT OF THE NEW ARBITRATION ACTS

A. GENERAL DISCUSSION

The 1991 and 1992 Arbitration Acts of Alberta, Ontario, New Brunswick and Saskatchewan are based on the *Uniform Arbitration Act* and are very similar. While the few differences have to be borne in mind, the similarity is so great that the judicial decisions of each of the four provinces are in most cases applicable to all four. This is a great convenience and is indeed one of the great benefits of having uniform legislation.

The 1991 and 1992 Acts are still very new. Three to four years of history is not very much. The Acts have, however, been considered and applied in a significant number of cases. The Appendix to this paper contains brief summaries of a number of reported and unreported decisions located by a simple computer search, and thus gives an overview of what has happened.

When the 1991 and 1992 Acts were adopted in the four provinces, one great question was whether the courts would accept and apply the policies behind the new Acts,

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[60] See *Bruneau* v. *Bruneau* (18 March 1993), Edmonton 930221 (Alta. Q.B.). The point was raised in the Court of Queen's Bench judgment and was not definitively settled by the Court of Appeal.

particularly the policy of strengthening the arbitration process and limiting judicial supervisory intervention to cases in which it is necessary to protect a party against unfairness or illegality. So far, the actual decisions appear to fit quite well within the structures of the new Acts and the expectations with which they were enacted. While there have been a few dicta suggesting that the ghosts of the old discretions are still with us, there have been more that recognize the primacy of the intention to arbitrate.

Cases under the new Acts which use language that appears to recognize the old discretions are as follows:

1) *McCullough* v. *Peat Marwick Thorne-T.*[61] The decision was that actions based on conspiracy and defamation fell outside the arbitration clause in the case so that a stay would not be granted. On the first argument, the court appeared to rely on authorities which dealt with the old discretions. On rehearing, however, the court emphasized that the grounds for decision was the interpretation of the arbitration clause, so that it is unlikely that the case will have any precedential effect outside the area of interpretation. This is particularly so in view of the later decision of the Alberta Court of Appeal in *Kaverit Steel and Crane Ltd.* v. *Kone Corporation.*[62] While that case was decided under the *International Commercial Arbitration Act*, it established that the possible inconvenience of a proposed arbitration did not render the arbitration agreement "null and void, inoperative or incapable of being performed" within the meaning of the latter *Act* and suggests that the courts will recognize the primacy of arbitration where an arbitration agreement exists.

2) *Willick* v. *Willick.*[63] In this case, the court said that it continued to have jurisdiction to set aside an award for gross error of law on the face of the record. I have already given reasons for saying that this jurisdiction does not exist in Alberta.

3) *Fitz-Andrews* v. *Meisner.*[64] A party argued that a conflicting action should not be stayed because there was a substantial question of law involved and the court should exercise its discretion in favour of allowing the action to proceed. The court granted the stay, holding correctly that, in considering the authorities, "regard must be had to the fact that they pre-dated the enactment of the current Arbitrations Act." However, the court said that "the onus is upon the person opposing the stay of proceedings to satisfy the Court that, on the whole, the Court proceeding is a better course than arbitration." This is the language of discretion. Section 7(1) of the Ontario (and Alberta) *Act* uses the language of legal entitlement: it requires that the court grant a stay unless the

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61 (1992), 1 Alta. L.R. (3d) 53 (Q.B.); rehearing 4 Alta. L.R. (3d) 185 (Q.B.). See the discussion of this case and the *Kaverit* case in Hurlburt, W.H., "Escape from Arbitration Clauses" (1992) 30 Alta. L. Rev. 1361.

62 (1992), 120 A.R. 346.

63 *Supra* note 46.

64 [1993] O.J. 191 (Gen. Div.) (QL).

case falls within one of a specified list of exceptions. The *Fitz-Andrews* language has not been picked up in later decisions and is not likely to be persuasive in view of the mandatory language of s. 7(1) and statements in later decisions that are inconsistent with it.

Cases that have recognized the change in policy of the 1991 and 1992 Acts include the following:

1) In *Bakorp Management Ltd.* v. *Pepsi-Cola Canada Ltd.*,[65] Farley J. quoted s. 6, as well as some other provisions, and said "Clearly the Courts should act with great caution before interfering with an arbitration...."

2) In *Borowski* v. *Heinrich Fiedler Perforiertechnik GmbH*, Murray J. said that "the theory behind the 1991 *Arbitration Act* is that if the parties agree to submit their disputes to arbitration then one party should be able to hold the other to it,"[66] and pointed out that s. 6 prohibits the court from intervening in matters governed by the *Act*, with certain exceptions.

It will be useful to refer to two decisions of Blair J. of the Ontario Court of Justice, General Division, as these seem persuasive in themselves and as they have been picked up by later decisions. These are *Ontario Hydro* v. *Denison Mines Ltd.*[67] and *Deluce Holdings Inc.* v. *Air Canada.*[68] In the *Ontario Hydro* case, Blair J. said this at pages 5-6:

> [The regime enacted by the new Act] is designed, in my view, to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters, and to require them to hold to that course once they have agreed to do so.
>
> In this latter respect, the new Act entrenches the primacy of arbitration proceedings over judicial proceedings, once the parties have entered into an arbitration agreement, by directing the court, generally not to intervene, and by establishing a "presumptive" stay of court proceedings in favour of arbitration.

This passage epitomizes the intention of the framers of the new Acts. Later, at pages 6 and 7, Blair J. quoted s. 6 and s. 7(1) of the 1991 *Act* and said that now, "the court is only entitled to refuse the stay in certain limited circumstances as enumerated in s. 7(2)," as compared with the discretionary words of the old *Act*.

A comparison of the results of the *Ontario Hydro* and *Air Canada* cases is useful in the determination of the boundary within which an arbitration should be allowed to proceed without interference.

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65 [1994] O.J. No. 873 (Gen. Div.) (QL).
66 (1994), 22 Alta. L.R. (3d) 366 at 380 (Q.B.).
67 [1992] O.J. No. 2948 (Gen. Div.) (Q.L.).
68 (1992), 98 D.L.R. (4th) 509, 12 O.R. (3d) 131.

In *Ontario Hydro*, Blair J. held that a dispute over a claim for rectification of an agreement fell within an arbitration clause saying that "all disputes arising in connection with this agreement shall be finally settled [by arbitration] ...." This allows the parties to give an arbitrator power over the very agreement that created their jurisdiction.[69] It also allows the parties to give the arbitrator power to give an equitable remedy that has been regarded peculiar to the superior courts.[70] Under traditional thinking, this would be very strong medicine indeed.

Air Canada was on the other side of the line. The arbitration clause provided for the arbitration of the purchase price under an option to purchase an employee's shares in a corporation. The share owner-optionor alleged that the optionee had procured the optionor's dismissal in order to activate the option and that doing so, in the circumstances, constituted oppression under the *Canada Business Corporations Act*. Blair J. refused to stay the oppression action and instead made an interim order staying the arbitration pending the disposition of the action, holding that the real subject matter of the dispute was not the share price which the parties had agreed to arbitrate "but rather one which strikes at the very underpinning of the contractual mechanism itself" and which therefore lay beyond the scope of s. 7(1) of the *Arbitration Act 1991*.

In *Hyundai Auto Canada Inc.* v. *Dayhu Investments Ltd.*[71] Rosenberg J. of the same court drew a similar distinction. Where an arbitration clause provided for the arbitration of the fair market value of leased land for the purpose of an option to purchase, Rosenberg J. held that substantial doubts as to whether the option had been exercised were grounds for staying the arbitration.

In the *Air Canada* case, an oppression cause of action conferred by the *Canada Business Corporations Act*, if it existed, might mean that the basic right on which the arbitration was founded, but which was not referred to arbitration, did not exist. In the *Hyundai* case, the basis of the claim upon which the proposed arbitration was founded, and which was not referred to arbitration, was in doubt. These decisions do not appear to be inconsistent with either the spirit or letter of the new Acts. Section 7(1), which mandates a stay of conflicting court actions, applies only if the court action is "in respect of a matter in dispute to be submitted to arbitration under the agreement." It would be going a long way to say that submission of the purchase price of shares or land to arbitration gives the arbitrator power to determine whether there has been CBCA oppression or whether an option has been validly accepted. These are questions far removed from what was submitted.

The trend of the decisions is towards recognizing the "primacy" of arbitration once there is an agreement to arbitrate.

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69 This is consistent with the Alberta *Act*, s. 17(1), which gives an arbitral tribunal power to rule on its own jurisdiction.

70 This is consistent with the Alberta *Act*, s. 31 which specifically confers power to give equitable remedies.

71 [1993] O.J. No. 1178 (Gen. Div.) (QL).

B. INTERPRETATION OF ARBITRATION CLAUSES

The interpretation of arbitration clauses by the courts since the introduction of the new Acts does not suggest that narrow interpretation is being used with a view to excluding arbitration; the principles of interpretation applied seem to be consistent with ordinary contract interpretation and to be, if anything, rather favourable to arbitration.

McCulloch v. *Peat Marwich Thorne-T*,[72] it is true, gave a fairly narrow interpretation to the arbitration clause involved in the case, which covered "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." The plaintiff claimed that the defendants had not only breached the agreement but had committed other wrongs. It is arguable that on the precise wording of the clause, claims for wrongs other than breach of the contract are outside it, so that the decision need not be taken to establish a principle of narrow construction. On the other hand, it is not clear why the court did not stay the action insofar as it was based on rights and liabilities under the contract and allow it to proceed insofar as the other claims are concerned, which is what s. 7(5) contemplates. If an arbitration can be stopped by adding claims that are outside the arbitration agreement, ingenious plaintiffs who want to avoid arbitration will add them.[73] It does not so far appear that there is a judicial trend towards permitting that to happen.

In other cases, the courts have interpreted clauses more broadly:

- In *Kaverit Steel and Crane Ltd.* v. *Kone Corp.*, Kerans J.A. held that a clause providing for the arbitration of disputes "arising out of or in connection with" the contract included a dispute "if either claimant or defendant relies on the existence of a contractual obligation as a necessary element to create the claim, or to defeat it."[74] (This was an ICAA case but the reasoning applies equally to an *Arbitration Act* case.)

- In *Kvaerner Enviropower Inc.* v. *Tanar Industries Ltd.*,[75] the arbitration clause provided that "any controversy between the parties" (who were contractor and subcontractor) "shall be decided by arbitration." The Court of Queen's Bench held that, among other things, "slander of title/wrongful lien and breach of contract ... in filing liens which lacked any basis in law or fact"[76] were "controversies" that fell within the clause, being "differences arising out of commercial, legal relationships and in the context of the contract

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72 *Supra* note 61 at 55.

73 As Kerans J.A. put it in *Kaverit Steel & Crane Ltd.* v. *Kone Corp.*, *supra* note 62 at 353 "the agreement to arbitrate should be honoured and enforced whether or not the plaintiff displayed great imagination in the pleadings."

74 *Ibid.* at 351.

75 (1994), 21 Alta. L.R. (3d) 182 (Q.B.); (1994), 24 Alta. L.R. (3d) 365 (C.A.).

76 *Ibid.* at 187 (Q.B.).

at bar."[77] The Court of Appeal dismissed the appeal. (This was an ICAA case, but the reasoning applies equally to an *Arbitration Act* case.)

- In *Pulvermacher* v. *Pulvermacher*,[78] although the plaintiff's action was based on what he characterized as a conspiracy by the other shareholders to prevent him from getting full value for his shares, the Saskatchewan Court of Queen's Bench held that the real issue was whether the plaintiff should receive full market value, which was within the arbitration clause, and granted a stay.

- In *Bakorp Management Ltd.*, a party brought an action alleging wrongdoing in connection with matters which would affect the purchase price which the arbitrator was to determine. The action was stayed, and the court drew particular attention to s. 6 of the *Arbitration Act* (court intervention limited) as well as to s. 7(1) (stay) and s. 17(1) (which gives an arbitral tribunal power to rule on its own jurisdiction).

- In *Scotia Realty Ltd.* v. *Olympia and York*,[79] the court held that the arbitration clause (actually a *Scott* v. *Avery* clause) included disputes about the effect of an amendment to the lease in which the clause appeared, and the court stayed an action based on the amendment.

On the whole, the decisions reviewed suggest that the courts have given full scope to arbitration clauses under the usual contract-interpretation process and are likely to continue to do so.

C. RELATIONSHIP OF ARBITRATION TO MECHANICS' AND BUILDERS' LIEN LEGISLATION

Provincial lien legislation typically confers a lien on those who provide services and materials for improvements on real property and states how the validity and amount of liens is to be determined and how liens are to be secured and enforced. This legislation has not been well articulated with the Arbitration Acts, and the relationship between them is not clear from a reading of the respective acts.

Section 3 of the Alberta *Builders' Lien Act*, for example, provides that "an agreement by any person that ... the remedies provided by [this Act] are not to be available for his benefit is against public policy and void."[80] In *Bird Construction Co.* v. *Tri-City Interiors Ltd.*,[81] the Alberta Court of Appeal, however, held that bringing a proceeding under the BLA does not waive a right to arbitration and proceeded to stay the lien

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77 *Ibid.* at 188-89.

78 [1994] S.J. No. 595 (Q.B.) (QL).

79 [1992] O.J. No. 811 (Gen. Div.) (QL).

80 R.S.A. 1980, c. B-12, s. 3.

81 (2 May 1994), Edmonton 9303-0250-AC/9303-0249-AC (Alta. C.A.). Because Tri-City commenced the lien action it could not apply for a stay of the action under s. 7(1) of the *Arbitration Act*, but the Court of Appeal was willing to exercise its inherent powers to grant the stay.

proceeding pending the arbitration, thus reading the two Acts together. In a later case, Kerans J.A., speaking for the Court, said:

> Similarly, we are of the view that s. 3 of the *Builders' Lien Act* should not be interpreted to prohibit arbitration of disputes involving lien claims. *While the words might reasonably bear that interpretation,* we are all of the view that it was not the purpose of the Act and that it would work considerable mischief were we to put that interpretation on s. 3.[82]

The special significance of this decision and the *Bird Construction* decision is that, as the emphasized words indicate, the Court of Appeal made a policy choice in favour of supporting arbitration.

The Saskatchewan Court of Appeal came to a similar conclusion in *BWV Investments Ltd.* v. *Saskferco Products Inc.*[83] That was a case under the Saskatchewan ICAA, but the court referred to the "Canadian position" under the *Arbitration Act* as being that "matters in dispute between the parties to arbitration are stayed pending the outcome of the arbitration."[84]

In this instance, the courts, where the wording of the legislation left a policy choice open, have opted to support arbitration.

D. COURT SUPERVISION OF AWARDS

1. Setting aside

Under s. 45 of the Alberta *Act* (s. 46 of the Ontario *Act*), the trial court of general jurisdiction has power to set aside an award on any of a number of different grounds. The only case in the Appendix that deals with this subject is *Environmental Export International of Canada Inc.* v. *Success International Inc.*[85] In that case the court held that holding a hearing in the absence of a party did not amount to unfair or unequal treatment or bias, in circumstances in which it appeared that the applicant had advised the arbitrator that it would not attend and appeared to have abandoned the arbitration, and in which the arbitrator had tried to notify the applicant that the hearing would proceed (though the notice went to the wrong fax number). At its lowest, this case does not suggest that the courts will use the setting aside power without significant grounds.

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82 *Kvaerner Enviropower Inc.* v. *Tanar Industries Ltd.*, *supra* note 75 at 366 (Alta. C.A.) [emphasis added]. This case was decided under the *International Commercial Arbitration Act* but there is no observable reason why it would not apply equally where the *Arbitration Act* applies, and, indeed, the *Bird Construction* case was an *Arbitration Act* case.

83 [1994] S.J. No. 629 (C.A.) (QL), rev'g [1993] 4 W.W.R. 553 (Q.B.).

84 The Ontario Court of Appeal held in *Automatic Systems Inc.* v. *Bracknell Corp.* (1994), 18 O.R. (3d) 257 that the Ontario *Construction Liens Act* did not preclude arbitration under the Ontario ICAA. This may signify a court attitude but is not otherwise of assistance in other provinces, as the Ontario CLA *did* provide for arbitration under the *Arbitration Act*, thus providing a different legal context for the decision.

85 (1995) O.J. No. 453 (Gen. Div.) (QL).

2. Appeal

It is not clear what the courts will require in order to grant leave to appeal from an award on a question of law. The factors[86] set out in Alberta's s. 44(2) (Ontario's s. 45(1)) have not been discussed. In three cases, the Ontario courts have held that the factors have been satisfied, but without giving reasons for saying so.[87] This may indicate that the factors will not have a significant screening effect, but it is too early to discern a trend.

Once leave has been granted, the courts have considered themselves free to substitute their own views about the question of law involved for those of the arbitrator: the "correctness" or "judicial" standard of review is being applied. This is explicit in *Willick* v. *Willick* and in *Petrolon Distribution Inc.* v. *Petro-Lon Canada Ltd.*,[88] and it is implicit in other decisions. It is consistent with the Acts. Several of the judgments, however, take the arbitrator's reasoning very seriously and are influenced by it.

The cases do not disclose any tendency to use the appeal power to undercut arbitration. Indeed, *Pachanga Energy Inc.* v. *Mobil Investments Canada Inc.*, *Willick* v. *Willick*, and *Aztec Construction Ltd.* v. *Frocan Industrial Contractors Ltd. et al.* have extended s. 44(3) of the Alberta *Act* and thus reduced the area of appeals on law. The courts have performed their function of supervising the law applied in the cases that have been appealed and, in the process, have given due regard to the reasoning of the arbitrators.

E. CONCLUSION

As has been noted, the 1991 *Act* and its counterparts in other provinces struck a new balance between courts and arbitrators. Broad court discretions are out. Court powers of assistance and supervision in specified circumstances are in.

The courts have recognized and accepted the policy change. They have given primacy to the agreement of the parties to arbitrate their differences. With remarkably few aberrations, they have applied the spirit and the letter of the Acts.

With one or two exceptions, this paper has not referred to decisions on the International Commercial Arbitration Acts. Many of them are relevant, sometimes directly and sometimes by analogy, to a discussion of the judicial treatment of the Arbitration Acts, but an examination of those decisions is beyond the scope of this paper. It is enough to say here that the courts have also, in general, accepted the ICAAs

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86 The court must be "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."

87 *Metropolitan School Board* v. *Daniels Lakeshore Corp.* (1993), O.J. No. 2375 (Gen. Div.) (QL); *Charles* v. *Saveway Gas & Fuels Ltd.* (1993), O.J. No. 833 (Gen. Div.) (QL); *Labourers International Union of North America, Local 183* v. *Carpenters' and Allied Workers Local 27* (1994), O.J. No. 274 (Gen. Div.) (QL).

88 (1995), O.J. No. 1142 (QL) (Gen. Div.).

and the policies behind them and that the ICAA cases tend to support the conclusion drawn here.

V. SIGNIFICANCE OF THE 1991 *ACT* FOR DRAFTERS

A. INTRODUCTION

The 1991 *Act* makes it more difficult to escape from arbitration into litigation.[89] That is salutary, but it makes it more desirable than ever to take steps to ensure that arbitration clauses and agreements promote the interests of the parties who enter into them. The courts are less likely to bail out an incautious drafter than they were under the old Acts.

That is one reason why drafters should take a fresh look at the clauses they use. Another is that the 1991 *Act* sets out much more procedure than the old Acts did. It thus fills in a good many blanks. However, it is incautious to accept even the most well-designed pig without looking inside the poke.

Arbitration clauses look like legal boilerplate. Parties do not negotiate contracts with a view to having disputes. Parties who have negotiated a significant contract are not likely to want to jeopardize it by opening up a new topic for negotiation. But when a dispute arises, an arbitration clause can become very important to the parties, so that it behooves drafters to understand its effect.

The Alberta Law Reform Institute is in the late stages of preparing a Reference Guide for drafters of arbitration clauses and agreements. This paper cannot replicate the function of the Reference Guide, but will ask some questions that drafters may want to consider.

B. SCOPE OF AN ARBITRATION CLAUSE

What disputes do the parties want settled by arbitration? Do they want to arbitrate the rent to be paid under a renewal of lease? Do they want to arbitrate any dispute under a principal contract? Do they want to arbitrate any and all disputes that may arise from their relationship, whether a claim is made under the contract or in tort? Should steps be taken to ensure that all parties necessary to a complete solution of a problem (*e.g.*, the owner, architect and contractor, or owner, contractor and subcontractor) will be brought into the arbitration? Drafters should consider questions such as these.

The question of scope is crucial. It is entirely within the parties' control. The *Act* has nothing to say about it.

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[89] For a further discussion of this subject, see W.H. Hurlburt, "A Note on Escape from Arbitration Clauses: Effect of the New Arbitration Act" (1992) 30 Alta L. Rev. 1361.

C. NUMBER AND QUALIFICATIONS OF ARBITRATORS

Section 9 of the *Act* provides for one arbitrator in the absence of agreement. A single-member tribunal is cheap. It is efficient in the sense that it makes it easier to convene meetings and make decisions. Is it right for disputes under the agreement being drafted? Or should there be three? The only qualifications stipulated by the *Act* are independence and impartiality. Are other qualifications needed for the adjudication of disputes under the clause being drafted?

How should the arbitrator or arbitrators be appointed? Appointment by agreement is best. But what if there is no agreement? Section 10 of the *Act* gives the Court of Queen's Bench a power to appoint arbitrators in default of agreement or other effective machinery. Is that suitable? Should consideration be given to appointment by an independent functionary?

D. PROCEDURE

The *Act* has a good many specific provisions about procedure, and it clothes the arbitrator with power to determine pretty well everything else. The parties can, however, vary or exclude all procedures laid down by the *Act* and can give any directions they want to the arbitrator, subject always to the statutory duty of fairness and equal treatment. So two questions arise. First, are the procedural provisions of the Act suitable for the case in hand? For example, should the arbitrator be bound by the rules of evidence (s. 21(1) of the *Act* says no)? Should there be examinations for discovery either as of right or as a discretionary power of the arbitrator (s. 25(6) gives a discretionary power)? Second, are there any directions that should be given to the arbitrator, such as time limits or a requirement of an early prehearing conference?

A drafter may accept the *Act* in its entirety. They may accept it in general but vary or exclude some specific provision. Or they may substitute a whole set of provisions or rules to govern arbitrations under the arbitration clause. The appropriateness of any of these approaches is determined by the whole of the circumstances, including the kinds and magnitude of disputes that are likely to arise under the arbitration clause or agreement under consideration.

E. APPEALS

What court intervention in awards do the parties want? They cannot contract out of the Court of Queen's Bench's power to set aside awards under s. 45 and they cannot contract out of an appeal to the Court of Queen's Bench under s. 44(2), with leave, on a question of law. Do the parties want an appeal as of right on a question of law? Do they want an appeal on fact or mixed law and fact? If so, they can have them under s. 44(1), but they must say so. Or, under s. 44(3) they can avoid an appeal on law by expressly referring a question of law to the arbitrator. If they want to eschew law entirely, they can override s. 31 by providing that the arbitrator is *not* bound by law, thus undercutting, or at least minimizing, the scope of an appeal on law, but this would be an heroic measure that should not be undertaken lightly.

F. CONCLUSION

Arbitration can be a good thing. But it would be prudent for drafters to review arbitration clauses and agreements to see that the interaction of the *Act* with a clause or agreement will make it a good thing for their clients.

VI. GENERAL CONCLUSION

The 1991 *Arbitration Act* has articulated clear policies of party control, fairness and efficiency. It has provided a more extensive procedural framework, though this is under the control of the parties. It has taken steps to minimize tactics of obstruction and delay. It has strengthened the autonomy of the arbitration process by doing away with the general discretionary controls previously exercised by the courts, while leaving the courts a major role in ensuring the integrity and legality of the process. Its policies have, by and large, been recognized and applied by the courts.

The 1991 *Act* will not change the essential nature of arbitration. However, after a time, the change of bottle should have an effect on the wine. Perhaps someone will undertake an investigation to see whether it does.

VII. APPENDIX

An extensive sample of Alberta, Ontario and Saskatchewan decisions on the 1991 and 1992 *Arbitration Acts*:

ONTARIO DECISIONS

Subject	Case	Decision
Stay	*Scotia Realty Ltd.* v. *Olympia & York SP Corp.* (1992), 9 O.R. (3d) 414 (Gen. Div.).	Held that under the old Act a *Scott* v. *Avery* clause contemplated that all disputes as to participation rent, including a dispute about an alleged amendment to the lease, would be arbitrated, and the landlord's application for interpretation of rights was stayed. The court said that, since the landlord's application in effect sought to preempt arbitration for the following year, which would have been conducted under the 1991 *Act*, it was useful to note that s. 7(1) of that *Act* provides that litigation "shall" be stayed and enumerates in s. 7(2) very narrow grounds of exception, none of which would apply in the instant case. The court referred to s. 8(2) (determination of questions of law) and said "This enactment gives effect to the view of Laskin J. in *Deuterium* that there should be no return to the jealous guarding of the court's jurisdiction against encroachment by arbitration." *Comment: The dicta suggest that the courts will recognize and apply the policy of the new Acts.*
Stay	*Fitz-Andrews* v. *Meisner*, [1993] O.J. No. 191 (Gen. Div.) (QL)	Stay of conflicting action granted. Authorities before new *Act* do not apply. But: case says the onus is on respondent to show Court proceedings more favourable. *Comment: Result is appropriate, but the "court proceedings more appropriate" criterion does not recognize the effect of s. 7.*
Stay	*Ontario Hydro* v. *Denison Mines Ltd.*, [1992] O.J. No. 2948 (Gen. Div.) (QL)	Stay granted. New *Act* "entrenches the primacy of arbitration proceedings over judicial proceedings" once there is an arbitration agreement. Claim for rectification of main agreement, in view of expanded and extended powers under new *Act*, is a "dispute in connection with the agreement." *Comment: This is an important case, recognizing, in general terms and by including rectification, the policy of the new Acts in favour of strengthening the arbitration process.*

Subject	Case	Decision
Stay	*Deluce Holdings Inc.* v. *Air Canada* (1992), 12 O.R. (3d) 131 (Gen. Div.).	Stay of action refused. Arbitration clause was for valuation of shares in purchase under option. Plaintiff claimed that defendant had engaged in oppressive conduct under *CBCA* in bringing about the event triggering the option. Held that the real subject matter is not one the parties have agreed to submit to arbitration but one which strikes at underpinning of the contractual mechanism and is beyond s. 7 of the *Arbitration Act.* There is equitable jurisdiction to restrain arbitration where foundation of the arbitration agreement is under attack, so injunction *against* arbitration granted. *Comment: This case establishes a limit to the operation of the new* Acts *but is not inconsistent with them. Note that it was decided by Blair J., who also decided the* Ontario Hydro *case.*
Stay	*Dimarino* v. *United Imaging Inc.*, [1992] O.J. No. 2494 (Gen. Div.) (QL)	All disputes were within the arbitration agreement. Bare allegation of invalidity of the principal agreement not enough to justify a stay. *Comment: This case gives appropriate recognition to the status of arbitration as the chosen forum.*
Stay	*Campbell* v. *Murphy* 15 (1993), O.R. (3d) 444 (Gen. Div.).	Decision refers both to the *ICAA* and the 1991 *Arbitration Act.* 1) Party "may" give notice and dispute "shall" be referred is mandatory if notice is given. 2) Stay resisted on grounds that court had to determine whether there was a contract. Court said that whether defendant was in breach should not be the subject matter of a motion and intent to arbitrate continued in face of allegation of breach of contract. Stay of competing action granted. *Comment: The case appears reasonably supportive of arbitration but is not particularly significant.*

Subject	Case	Decision
Stay	*ABN Amro Bank Canada* v. *Krupp MaK Maschinenbau GMBH* (1994), 21 O.R. (3d) 511 (Gen. Div.).	This is an *ICAA* case. A dictum p. 16 notes that s. 7(1) of 1991 *Arbitration Act* says "shall stay" instead of "may," and it can be argued use of "may" in s. 7(2) has narrowed the court's discretion by specification of grounds on which stay may be refused. *Comment: The dictum referred to recognizes the change in policy of the new* Act *with respect to stays.*
Stay	*Bakorp Management Ltd.* v. *Pepsi-Cola Canada Ltd.*, [1994] O.J. No. 873 (Gen. Div.) (QL)	Application for stay. Arbitration of purchase price. Everything inconsistent with the arbitration clause, including allegations of conspiracy affecting what went into determining the price, stayed. References to s. 6 and others and to *Ontario Hydro*. "The Courts should act with great caution before interfering with an arbitration ..." "Where matters in dispute in litigation are inextricably bound up with matters which the parties have agreed to arbitration, the Courts will refuse to permit such multiplicity of proceedings and will stay the litigation ...." *Comment: This is another significant case. It picks up on* Ontario Hydro *and adopts similar reasoning.*

Subject	Case	Decision
Stay	*Benner and Associates Ltd.* v. *Northern Lights Distribution Inc.*, [1995] O.J. No. 626 (Gen. Div.) (QL).	Application for stay of competing action. Refused. 1) The decision quotes Blair J. in the *Hydro* case about the primacy of arbitration with approval. 2) Arbitration clause appeared to provide only for arbitration of *dealer's* breaches which were not involved. Court ultimately holds it vague and fails for uncertainty. 3) As additional grounds, court refers to defendant's conduct as showing scant regard for the provisions of the clause, and "totality of the defendant's conduct" constituted undue delay under Ontario Act, s. 7(2) 4. *Comment:* *1) The case recognizes the "primacy of arbitration" where there is an agreement.* *2) The arbitration clause could hardly be read as covering an alleged breach by the defendant, which was the issue in the lawsuit, so that the second point does not appear to be of general significance.* *3) The court appears to treat defendant's pre-action lack of activity as all or part of defendant's "undue delay" in bringing the stay motion. It is difficult to see how this can be, as defendant cannot apply to stay an action that has not been started.*
Entitlement	*Jevco Insurance Co.* v. *Canadian General Insurance Co.* (1993), 14 O.R. (3d) 545 (Gen. Div.).	Application for appointment by arbitrator. Jevco paid no-fault benefits to its insured motorcyclist and claimed indemnity from CG, insurer of the other vehicle. Jevco's insured sued CG's insured. This was not an "unsettled claim against the insurer" which would have made arbitration premature. Appeal from dismissal of application allowed. *Comment: This case is probably not significant but at least shows a willingness to let an arbitration proceed over opposition.*

Subject	Case	Decision
Entitlement	*Buck Bros. Ltd.* v. *Frontenac Builders Ltd.* (1994), 19 O.R. (3d) 97 (C.A.).	Application below was for a declaration that applicant was entitled to arbitration. The General Division order was that jurisdictional facts be determined by arbitrator. Application in C.A. was to quash appeal. C.A. merely held that the order was a final order for appeal purposes and refused to quash. *Comment: This decision is not significant, although the result of the appeal may be.*
Entitlement	*Hyundai Auto Canada Inc.* v. *Dayhu Investments Ltd.*, [1993] O.J. No. 1178 (Gen. Div.) (QL).	Application for appointment of arbitrator. Stayed. The arbitration agreement was for determination of market value of land for purchase option. But there was a strong *prima facie* case option was not properly exercised. Balance of convenience favoured not going ahead with the arbitration until preliminary matters settled. Quotes *Ontario Hydro* case as to primacy of arbitration where parties have agreed. *Comment: Like the* Air Canada *case, this case establishes a limit to the operation of the new* Acts *but is not inconsistent with them. It pays close attention to the* Ontario Hydro *and* Air Canada *cases.*

Subject	Case	Decision
Leave to appeal	*Metropolitan School Board* v. *Daniels Lakeshore Corp*, [1993] O.J. No. 2375 (Gen. Div.) (QL).	Leave to appeal granted. 1) 1991 *Act* applied to an arbitration started in 1992. 2) An agreement that award is final and binding does not exclude s. 45(1) appeal (Ontario s. 45(1) is a counterpart of Alberta s. 44(2), but differences between them make this point irrelevant to Alberta). 3) Whether arbitrator could consider a factor not mentioned in the agreement is a question of law. 4) The leave criteria were met. (No reasons.) *Comment: This case is a straightforward application of the 1991 Act. Reasons for holding that the leave criteria were met would have been useful.*
Leave to appeal	*Charles* v. *Saveway Gas & Fuels Ltd.*, [1993] O.J. No. 833 (Gen. Div.) (QL).	Leave granted. The decision sets out some questions that look like questions of law. It holds that the leave criteria are satisfied without giving reasons. *Comment: The case is not significant. Reasons for holding that the leave criteria were met would have been useful.*
Waiver of appeal	*Superior Propane Inc.* v. *Valley Propane (Ottawa) Ltd.*, [1992] O.J. No. 2773 (Gen. Div.) (QL).	Leave to appeal refused. Parties had a right to agree that decision was final and binding. *Comment: This decision is not relevant to Alberta, as Alberta's appeal on a question of law, though subject to leave, is otherwise as of right and contained in a section that cannot be excluded or varied.*

Subject	Case	Decision
1) Appeal from refusal of leave to appeal. 2) Availability of Judicial Review.	*Superior Propane Inc.* v. *Valley Propane (Ottawa) Ltd.*, [1993] O.J. No. 442 (QL). (This is said to be General Division, but it includes appeal from the General Division decision above.)	1) There is no specific finding that agreement that the arbitrator's decision will be final and binding waives an appeal, but tenor and finding concerning judicial review strongly suggest that it does. (This is not relevant to Alberta for reasons given above.) 2) There is no appeal from a refusal to grant leave to appeal. 3) Commercial arbitration is for expediency, reduction of cost, avoidance of protracted litigation. Where parties agree decision will be final and binding, not open to judicial review unless arbitrator has acted improperly. (Did not deal with issue as to whether there is a right to judicial review when there is a right to appeal.) *Comment: Much of the decision is about whether an agreement that an arbitrator's decision is final and binding waives an appeal, which is irrelevant to Alberta. The decision that there is no appeal from a refusal of leave to appeal is useful in limiting the extent to which court proceedings can add to the cost and delay of arbitrations. The reference to the possibility of judicial review apart from the appeal processes provided by the Acts is unfortunate.*
Right of appeal	*Bramalea* v. *T. Eaton Co.*, [1994] O.J. No. 38 (Gen. Div.) (QL).	1) Agreement provided that the arbitrator's award would be final and binding. This prohibited an appeal. (For reasons given above, this decision is not relevant to Alberta.) 2) The arbitration agreement permitted a party to "proceed on an issue of law should such arise in the context of the proceedings." This applied only to issues of law arising during the hearings. *Comment: The first point of decision is of little significance to Alberta. The second point of decision might indicate a willingness to interpret language so as to support the parties' agreement to arbitrate.*

Subject	Case	Decision
Right of appeal Scope and standard of appeal	*Labourer's International Union of North America, Local 183* v. *Carpenter's and Allied Workers Local 27*, [1994] O.J. No. 274, (Gen. Div.) (QL).	1) Held that agreement that award is "final and binding" applies only while the award is unchallenged and does not preclude an appeal. Refuses to follow *Superior Propane*. (This is not relevant to Alberta, for reasons given above.) 2) Misinterpretation of a word is an error of law. 3) The leave-to-appeal factors were satisfied. (No reasons.) *Comment: The first point is not relevant to Alberta. The second appears to be usual doctrine. Reasons for holding that the factors were satisfied would have been useful. The case does not appear to have much general significance.*
Appeal	*Jevco Insurance Co.* v. *Halifax Insurance Co.*, [1994] O.J. No. 3024 (Gen. Div.) (QL).	Arbitration between insurers as to whether Insurer A was entitled to indemnification by Insurer B for no-fault benefits paid by A, which depended on relative liabilities of A's and B's insureds. Arbitrator applied rule saying that going through red light meant 100% liability and ignored rule saying that left turn in face of oncoming vehicle meant 100% liability. Another rule would have made it 50/50 in such circumstances. Appeal allowed. *Comment: This case appears to be an appropriate exercise of the appeal function.*
Appeal	*Jevco Insurance Co.* v. *Prudential Insurance Co.*, [1995] O.J. No. 919 (Gen. Div.) (QL).	The question on appeal was whether the right of a motorcyclist's insurer to be indemnified "in relation to" no-fault benefits included indemnification for costs of a medical examination. The whole discussion is about the construction of those words. There is some deference to the particular arbitrator, but this does not seem to be determinative. *Comment: This case appears to be an appropriate exercise of the appeal function.*

Subject	Case	Decision
Setting aside award	*Environmental Export International of Canada Inc.* v. *Success International Inc.*, [1995] O.J. No. 453 (Gen. Div.) (QL).	Application to set aside awards and remove arbitrator on grounds of bias. 1) On merits, allegations in detail were groundless. Major one: hearing was scheduled; EEI launched court application against arbitrator's evidence direction and advised arbitrator that it would not attend 28 November hearing and was cancelling subpoenas. Arbitrator's reply that he was proceeding was faxed to wrong number. EEI did not appear at November 28 hearing. Court found that it had abandoned proceeding. Holding the hearing and making award in EEI's absence was not unfair and unequal treatment or bias. 2) One "award" was disposition of EEI's request that Success answer questions. Held that there is no provision for appeal from evidence direction and that it would be a "serious reproach" to the system to make one. *Comment: Case shows unwillingness to interfere with an award and arbitrator on trivial grounds. It also shows unwillingness to envisage an elaborate system of procedural appeals.*
Agreement to arbitrate	*Breukelman* v. *Heida*, [1992] O.J. No. 2604 (QL).	1) 1991 *Act* applies if arbitration commenced after coming into force. 2) There was no agreement to arbitrate. *Comment: This case is not of general significance.*
Confidentiality	*887574 Ontario Inc.* v. *Pizza Pizza Ltd.*, [1994] O.J. No. 3112 (Gen. Div.) (QL) (Same proceeding as below).	Application for direction that court file on appeal from arbitration be sealed. Denied. Judgment recognizes entitlement to privacy and confidentiality during arbitration and quotes authority. Suggests that even witnesses and experts may be accorded benefit of privacy. But once the dispute goes back into the public sector the usual rules of openness apply. *Comment: The decision recognizes privacy and confidentiality as characteristics of alternative dispute resolution but says that the openness principle prevails once the matter comes into the courts.*

Subject	Case	Decision
Standard of Review	*Petrolon Distribution Inc.* v. *Petro-Lon Canada Ltd.*, [1995] O.J. No. 1142 (Gen. Div.) (QL).	1) The agreement (which was entered into under the old Act) said that the parties were entitled to appeal on issues of law. Court said this meant an appeal as provided for in the old *Act* and allowed appeals on mixed questions. 2) Court said that correctness is the correct standard of review on appeal on law, referring to administrative law authorities. 3) Appeal was on grounds that arbitrator was wrong in refusing to imply in the principal contract a term providing for termination on reasonable notice. Court agreed with the arbitrator and dismissed the appeal. *Comment: The holding that the correctness standard applies on appeal is in accordance with the new Acts. The case is not otherwise significant, though the careful treatment of the arbitrator's reasoning is encouraging.*
Enforcement	*887574 Ontario Inc.* v. *Pizza Pizza Ltd.* (same proceeding as above).	Application to enforce award while appeal and cross-appeal on foot. Held discretionary under Ont. s. 50(5) (Alberta s. 49(5)). Granted, subject to providing letters of credit covering refund if franchisor was successful on appeal, because of franchisees' financial condition. *Comment: The court considered the enforcement of the award in much the same way as it might consider the enforcement of a judgment pending appeal.*

Subject	Case	Decision
Enforcement	*Success International Inc.* v. *Environmental Export International of Canada Inc.*, [1995] O.J. No. 969 (Gen. Div.) (QL).	1) Application to enforce award dismissed on ground that applicant was carrying on business in Ontario without being registered. Application dismissed on this ground. 2) There was no estoppel. The question of registration was outside arbitrator's jurisdiction and the bringing of the application was the first occasion when non-registration could be raised. 3) EEI argued that the award was not a final award and that it was an injunction for which an undertaking to be responsible for damages was required. The award directed EEI to speed up its shipping schedules under the contract. The court rejected these arguments. Under Ontario s. 42 (Alberta s. 41(2)) a tribunal may make more than one award, and there was nothing to show that arbitrator regarded the relief as injunctive. *Comment: Items 1 and 2 are not of general significance to arbitration. The third item gives effect to the provision of the Act about multiple awards.*

ALBERTA DECISIONS

Subject	Case	Decision
Stay	*McCulloch* v. *Peat Marwick Thorne-T* (1992), 1 Alta. L.R. (3d) 53 (Q.B.), 124 A.R. 267. Rehearing 4 Alta. L.R. (3d) 185 (Q.B.).	Stay of action refused on the grounds that the conspiracy and defamation allegations fell outside the arbitration clause and were therefore not capable of arbitration under Alberta law. *Comment:* *1) References in the first reasons for judgment appear to rely on authorities under the previous broad discretions, but the* ratio decidendi *appears to be confined to the non-inclusion of disputes in the arbitration clause.* *2) The decision does not deal with s. 7(5), which permits the court to sever an action and stay those parts relating to disputes that fall under the agreement.* *3) If a dispute is not within the agreement, it would seem preferable to hold either that the* Act *or s. 7(1) does not apply rather than say that the dispute is not capable of arbitration.*
Stay	*Pembina Resources Ltd.* v. *Saskenergy Incorporated et al.* (1993), 7 Alta. L.R. (3d) 153, [1993] 3 W.W.R. 549, 135 A.R. 246 (C.A.).	Application for stay of *arbitration* on grounds notice not given on time and assignee not entitled to arbitrate. Held neither ground valid. Applicant also argued that the court was the more appropriate forum to determine whether a question is arbitrable or whether a call for arbitration is too late or by wrong party and referred to s. 47. The Court said that the grounds in s. 47 simply barred an arbitration and did not have to do with choice of forum. Court did not purport to say what should be done if there is a factual dispute, *e.g.*, over whether arbitration agreement is forged. *Comment: The statements made in the decision are on the whole supportive, but the decision is not of general significance for arbitration.*

Subject	Case	Decision
Stay Right to arbitration	*Crystal Rose Home Ltd.* v. *Alberta New Home Warranty Program* (1994), 27 Alta. L.R. (3d) 122 (Q.B. Master)	1) Parties can agree to arbitrate a tort claim under the *Arbitration Act.* 2) A dispute over whether a party acted in good faith and in a commercially reasonable manner as required by PPSA is included in "any dispute with respect to any matter in relation to this Agreement." So are the other matters raised. 3) Plaintiff claimed that defendant was under a duty to give notice before exercising its remedies and that breach did not come within clause. Held that to escape a stay this would have to be a common law duty, but if there is such a duty it is not an independent tort duty but depends on the contract and is within the clause. *Comment: This judgment gives full effect to the wording the parties have included in the arbitration clause.*
Right to arbitration	*Bichel* v. *Alberta (Public Trustee et al.* (1993), 7 Alta. L.R. (3d) 262, 136 A.R. 354 (Q.B.).	One ground for granting an application to sever a tort action over an automobile accident from an action by plaintiff against her own insurer under an SEF 44 enforcement was that the court *may not* have jurisdiction to deal with the SEF action because of an arbitration provision in SEF 44 that said that entitlement and amount shall be determined by arbitration. *Comment: Although the decision appears to be in some doubt as to whether the arbitration provision was effective, it is not of general significance for arbitration.*

Subject	Case	Decision
Right to arbitration Application of Act	*Borowski* v. *Heinrich Fiedler Perforiertechnik GmbH* (1994), 22 Alta. L.R. (3d) 366, [1994] 10 W.W.R. 623, 158 A.R. 213 (Q.B.).	1) Employment relationship is not "commercial" relationship, so *ICAA* did not displace the *Arbitration Act.* 2) A *Scott* v. *Avery* clause did not oust jurisdiction of Alberta court. 3) *Arbitration Act* applies except as waived or excluded. Direction that arbitration be held in Georgia in accordance with clause. (Question of choice of procedural law not specifically addressed.) 4) Claim that contract had been amended did not take the dispute out of the arbitration clause. 5) Unpaid wages, etc., were not within the clause and action was not stayed for these claims. *Comment: This decision emphasizes that arbitration should proceed where agreed on and that Act applies except where varied or excluded.*
Right to arbitration	*AltaSteel Ltd.* v. *Inverness Petroleum Ltd.* (1994), 24 Alta. L.R. (3d) 212, 161 A.R. 138 (Q.B.).	There were two arbitration provisions in the agreement, one mandatory, the other requiring the agreement of both parties. The court held that the issue of price fell under the voluntary arbitration clause. *Comment: The issue on this point was one of interpretation of contracts. The decision is not significant with regard to arbitration generally.*

Subject	Case	Decision
Right to arbitration Relation to lien	*Bird Construction* v. *Tri-City Interiors Ltd.* (2 May 1994), Edmonton 9303-0250-AC/9303-0249-AC (Alta. C.A.).	1) As a matter of interpretation, arbitration was mandatory and the clause was broad enough to cover all of the claims involved. 2) Commencing proceedings under the Builders' Lien Act did not waive the plaintiff's right to arbitration under an arbitration clause. 3) The *Builders' Lien Act* does not prohibit arbitration. 4) While s. 7 of the *Arbitration Act* did not permit a plaintiff to apply to stay its own proceedings, the Court of Appeal exercised its inherent powers to stay the *Builders' Lien Act* proceedings pending arbitration of the merits. *Comment: This case is significant. The BLA could be interpreted as prohibiting arbitration in a builders' lien case. The Court of Appeal declined to interpret it that way. Arbitration of the merits of a dispute between the parties can live with the BLA and proceedings under the BLA.*
Right to arbitration Relation to lien	*Kvaerner Enviropower Inc.* v. *Tanar Industries Ltd.* (1994), 21 Alta. L.R. (3d) 182, [1994] 9 W.W.R. 228, 157 A.R. 366 (Q.B.); 24 Alta. L.R. (3d) 365, [1995] 2 W.W.R. 433 (C.A.).	1) All controversies between Kvaerner and Tanar were controversies which arose out of the commercial legal relationship and in the context of the contract and were capable of being arbitrated. Kvaerner's application for stay granted. 2) Arbitration agreement did not impair Tanar's rights under *Builders' Lien Act.* 3) Claims of Sovereign (bonding company) as assignee of claims paid under bond could not be determined until arbitration between Kvaerner and Tanar, so Sovereign's action is stayed, with Sovereign (though not a party to arbitration agreement) to be given notice and entitled to participate in arbitration. *Comment: This is an ICAA case but is included because of its significance for* Arbitration Act *cases. It points out that s. 3 of the BLA could be interpreted as prohibiting arbitration but declares the policy of the law to be to permit arbitration.*

Subject	Case	Decision
Right of appeal	*Pachanga Energy* v. *Mobil Investments Canada Inc. et al.* (1993), 8 Alta. L.R. (3d) 284, [1993] 4 W.W.R. 176, 138 A.R. 309 (Q.B.), (1994) 15 Alta. L.R. (3d) 1, [1994] 3 W.W.R. 350, 149 A.R. 73 (C.A.).	1) Method of assessment used by arbitrator to value equipment in fixing amount of award was a mixed question of fact and law and there was therefore no right to appeal under *Arbitration Act* s. 44(2). Appeal dismissed. 2) Held by QB, not dealt with by CA, that if there was a question of law it was expressly referred so that s. 44(3) precluded appeal. The question referred was one of valuation. *Comment: The decision construes the right of appeal under s. 44(2) correctly. The QB decision that the question was "expressly referred" extends s. 44(3), as the question was not mentioned in the reference.*

Subject	Case	Decision
Right of appeal Agreement for appeal Standard of appeal Question referred Gross error	*Willick* v. *Willick* (1994), 158 A.R. 52 (Q.B.).	1) Provision that an award is to be final and binding "subject ... to the rights of appeal in s. 44" meant that the arbitration agreement provided for an appeal under s. 44(1) without leave. 2) The standard of appeal on a question of law or mixed fact and law under s. 44(1) is the "judicial" or "correctness" standard. 3) An agreement to arbitrate the amount of spousal support expressly refers the question of law as to duration so that s. 44(3) precludes an appeal. 4) The court still has jurisdiction to quash a patently unreasonable award for error of law on the face of the record. *Comment:* *1) The court construed the provision in the agreement liberally in favour of an appeal.* *2) The "correctness" standard of review is appropriate.* *3) s. 44(3) is extended to cover a question of law that is not mentioned in the reference but arises in the arbitration.* *4) The law does not support court jurisdiction to grant judicial review in the face of the* Arbitration Act.

Subject	Case	Decision
Right of appeal	*Aztec Construction Ltd.* v. *Frocan Industrial Contractors Ltd.* (1994), 24 Alta. L.R. (3d) 440, 161 A.R. 314 (Q.B.).	1) Agreement referred the question whether Frocan made a unilateral mistake that would void the contract. Arbitrator said yes. Held that the question was "expressly referred" and s. 44(3) precluded appeal. 2) Parties explicitly agreed to grant to the arbitrator "complete discretion with respect to the award of costs ...." Held that arbitrator's award of solicitor and client costs could not be appealed, apparently because of s. 44(3). *Comment: The decision appears to extend s. 44(3) to cases in which a question referred is partly a question of law and partly a question of fact, thus removing such cases from the ambit of an appeal under s. 44(2) on a question of law.*
Right of Appeal	*Canadian Western Natural Gas Co.* v. *Alberta Energy Co.*, [1995] A.J. 310 (QB) (Q.L.).	Application for leave to appeal. Refused. 1) Interpretation of s. 12 of the *Natural Gas Marketing Act* is one of law alone, but the tribunal has unfettered discretion so long as it considers the factors listed in s. 12. 2) Determination of gas price is a question of mixed fact and law, so that appeal does not come within s. 44(2), question of law. *Comment: The decision restricts the right of appeal in s. 44(2) to a question of law alone and therefore does not favour the right. It is not of general significance for arbitration.*
Appeal practice	*Aztec Construction Limited* v. *Frocan Industrial Contractors and Wheeler* (1993), 14 Alta. L.R. (3d) 26, 144 A.R. 276 (Q.B.).	1) Filing of an application for leave to appeal within 30 days is sufficient under s. 46 without service in that time. 2) Where there has been a correction, explanation or change of reasons, the whole award may be appealed within thirty days of receiving same. *Comment: This decision appears to be a reasonable interpretation of the requirements of the* Arbitration Act *with respect to the time for appeal.*

Subject	Case	Decision
Enforcement	*Bruneau* v. *Bruneau* (18 March 1993), A.C.L. No. 930221 (Alta. Q.B.).	1) Wife had appealed consent order to arbitrate, appointment of arbitrator and refusal to stay arbitration proceedings. Her application for stay of enforcement pending appeal was allowed on grounds that she would suffer irreparable harm from sale of the matrimonial home and balance of convenience favoured stay. 2) s. 48 is ambiguous as to whether appeal of award can be brought before Court of Appeal with leave rather than Court of Queen's Bench. *Comment: Although a court would probably hold that s. 48 applies only to appeals from the Court of Queen's Bench, it should be clarified. The case is not of general significance for arbitration.*

SASKATCHEWAN DECISIONS

Subject	Case	Decision	Rating
Stay	*Pulvermacher* v. *Pulvermacher*, [1994] S.J. No. 595 (QL).	Plaintiff obliged to sell his shares to other shareholders because his employment with company was terminated. Sued, alleging conspiracy to obtain shares at less than market value and consequent unjust enrichment. Held that whether plaintiff is entitled to fair market value or some other market value is a dispute between the parties which they have agreed to have resolved by arbitration. Distinguishes *McCulloch* v. *Peat Marwick* on the grounds no tortious conspiracy is alleged. No reference to Deluce, but no oppression claim. *Comment: The case shows a disposition to hold parties to arbitration.*	Confirms agreement to arbitrate.