Section 2: The Law and Practice of Arbitration

The following section of my report provides an overview of the *Arbitration Act* itself. It was very clear during the consultations that, although many of the participants had made an effort to read the Act, many had misconceptions about how it would apply in practice. This Section attempts to lay out the legal context within which the *Arbitration Act* operates. As well, it will explain specific sections of the *Arbitration Act* in order to clarify what rights and obligations exist under it.

Private and public dispute resolution

As with any law, it is important to understand how the law of arbitration is engaged. Arbitration disputes are like all legal disputes, in that arbitration is triggered only by the parties who wish to use the law to resolve a dispute. Similarly, if the arbitration process has contravened the Act or has infringed on the rights of the parties, the person who has the problem must go to the court to seek a remedy. People with complaints about other people's behaviour generally must bring a claim to the courts (or tribunals) and ask for help. The state does not have agents going throughout society looking for wrongs to set right, except in the case of crimes and health and safety inspections and, arguably, in child welfare matters. People are expected to look out for themselves, and at the same time are allowed to resolve disputes privately if they so choose. The state provides dispute resolution mechanisms (courts and specialized tribunals), but it does not know who needs or who wants those services unless people come forward and make use of them.

People who live together in any kind of society inevitably find themselves in disputes with other people: with family, friends, neighbours, employers, businesses or governments. They also find a wide range of methods of dealing with these disputes. They may ignore them or walk away from them. They may resolve them directly between parties, by informal discussion or by formal negotiation or by arbitrary measures, like flipping a coin. They may involve other people not personally involved in their dispute, such as professional advisors for each disputant. The parties may get independent help in resolving the dispute, by asking advice of a neutral third party. They may ask a third party to be more or less actively and more or less formally involved in helping them come to an agreement, a process known as mediation.

The disputants may also give up on the quest for an agreed resolution to the dispute, and choose instead to have a neutral third party decide the dispute. When this is done by agreement of the parties to the dispute, it is known as arbitration. The parties agree to abide by the decision of the arbitrator, even if they do not agree with the decision itself. In short, they agree on a process, not on a result. These techniques, and others such as mini-trials, mock trials, early neutral evaluation and others are often referred to as "alternative dispute resolution" or ADR. "Alternative" means an alternative to the court system. The key way to classify them is whether the parties to the dispute agree on a resolution or whether someone else decides the dispute for them.

All of these methods are private; they do not depend on "the law" to make them work, and they do not involve any governmental or state action. If they work, they work because the disputants have agreed on a resolution or on a process for arriving at one. The government never hears about them (unless it is a disputant) and is not called upon to do anything about them, unless a further dispute brings the matter before the courts. Civil society functions independently of government.

Government – the state – has a number of interests in having civil society function independently. It has a principled interest in the peaceful resolution of disputes and in having the adult population take responsibility for its actions. It has a practical interest in seeing disputes resolved outside the official state institutions for resolving disputes. Private resolution reduces the workload of the court system and may tend to reserve the courts, with their highly trained judges, for the hardest cases, those that private dispute resolution fails to resolve.

Individuals also have a number of interests in resolving their disputes outside the civil court system. Private resolutions are likely to be more satisfactory to the disputants and thus more durable, because the parties have made them themselves and been able to tailor them to their needs more than a court is able to do. In addition, private methods are usually also private in the sense of avoiding publicity. The fact or the details of disputes can be embarrassing to both parties. Private methods are also less rigid than court processes, being more flexible as to time, procedure, and possible outcomes. They may be considerably cheaper and faster than court.

For all these reasons, the government has taken steps to encourage private resolution of disputes. As a result of the Civil Justice Review process which took place in the mid-1990's in Ontario, most civil disputes are required to go for mandatory mediation prior to going to court; the only exception is in the case of family law, where mediation continues to encouraged, but not required. The best-established sign that the government encourages private dispute resolution is the statutory help it gives to the conduct of arbitrations. It offers procedural rules for arbitrations, it directs the courts to help choose an arbitrator if the disputants cannot agree on one, and it allows the decisions of private arbitrators to be enforced by the civil courts.

The History of Arbitration in Ontario

In 1990 the Uniform Law Conference of Canada, a federal-provincial-territorial law reform and harmonization body, adopted a Uniform Arbitration Act and recommended its adoption by the provinces and territories.[8] Ontario was among the first to adopt the

[8] The principles of the reform are reported in the Law Reform Commission of Canada *Proceedings of the Seventy-First Annual Meeting* (Law Reform Commission of Canada, 1989), online: <http://www.bcli.org/ulcc/proceedings/1989.pdf> and in the Law Reform Commission of Canada *Uniform Arbitration Act* (Law Reform Commission of Canada, 1990), online: <http://www.ulcc.ca/en/us/arbitrat.pdf.>.

Uniform Act; seven provinces in all have now adopted it.[9] Since 1992, the law is the *Arbitration Act,* 1991.[10] The basic principle is that parties who have agreed to resolve their dispute by following the decision of a voluntarily chosen third party are held to the agreement.

The Uniform Arbitration Act was inspired by an evolution in attitudes to arbitration. Essentially the changes reflected an increased perception of the legitimacy of arbitration as a method of dispute resolution and greater trust in the ability of arbitrators to make a range of decisions. The new legislation reduced the discretion of the court in supervising (or, as some people saw it, interfering with) arbitrations. Court discretion was reduced both in the area of stopping litigation when parties had agreed to arbitrate, and in enforcing awards.

The Uniform Arbitration Act is not limited to commercial arbitrations, nor is Ontario's version of it, the *Arbitration Act*. Ontario's old *Arbitrations Act*, dating from the nineteenth century, also applied to all arbitrations, not merely to commercial disputes.[11] In particular, the old and the new statutes apply to arbitration of family law and inheritance disputes. Disputes among family members are often matters of personal sensitivity that the disputants make an effort to resolve privately. The law does not prevent them from making private arrangements to do so.[12]

The law of arbitration

The Review was witness to the way people may disagree about whether it is better social or justice policy to compel people to use the courts to resolve some kinds of civil disputes, rather than allowing them to use a private mechanism such as arbitration. A tension between protection of the vulnerable and a degree of paternalism that involves controversial assumptions about vulnerability is inherent in this discussion.

As with all methods of private dispute resolution, disputants use arbitration because they want to. If the parties do not agree to arbitrate, the arbitration does not happen. The government provides a dispute resolution system for those who do not want to use another (or any) method, namely the court system.[13]

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[9] The seven are Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Prince Edward Island and Nova Scotia.
[10] S.O. 1991 c.17, online: < http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/91a17_e.htm>.
[11] British Columbia adopted its *Commercial Arbitration Act,* 1986, c. 43, now R.S.B.C. 1996, c. 55 in 1986. Despite its name it too applies to all arbitrations, but it gives the courts more discretion to refuse to enforce an arbitration agreement or an award than does the Uniform Act.
[12] There are some limits to what family matters can be resolved privately. Limitations are discussed below. There is more on arbitrating family disputes in the family law discussion later in this report, as well.
[13] The court system is mandatory in the sense that one party can compel another party to respond to a claim brought in court. At least one of the disputants has to choose to go to court. Generally speaking, nothing requires disputants to go to court if none of them wants to.

Arbitration is based on a contract. The law refers to it as an arbitration agreement.[14] That contract is itself enforceable. In other words, once a party does truly agree to arbitrate, the law enforces the contract even if the party changes his or her mind and the other party still wants to follow it. As with any contract, if both parties change their minds, then the contract can be changed, ignored or terminated.[15] The Arbitration Act enforces the agreement by stopping ("staying") any court action brought on a dispute that the parties have agreed to arbitrate.[16] The arbitration can continue even if one party refuses to participate, and it can result in a decision ("award") enforceable like a judgment.

The Act applies to all arbitrations except those that it excludes, which are those with special statutes to govern them such as labour arbitrations or international commercial arbitrations. It provides rules of procedure in case the parties have not done so. Generally speaking, the parties are free to set up any procedure they like, and their agreement will prevail over the Act. There are some limits to this, which are discussed in the section on limits to arbitration, below. This flexibility makes arbitration more attractive to many parties.

One area of flexibility is the choice of arbitrator. The Act does not state any qualifications for a person to be an arbitrator – the disputants may choose anyone with whom they are comfortable. The parties can decide if training or experience as an arbitrator is important to them. The only rule in the Act is that the arbitrator should be neutral as between the parties,[17] and the parties can agree to change that. (The usual time they would change that is if each party were appointing his or her own arbitrator, and the two party appointees appoint a neutral chair – resembling what happens in labour arbitrations.)

The court can appoint an arbitrator if the parties cannot agree, or if one party refuses to participate. Awards of the arbitrator are to be in writing and to state reasons for the award.[18] The arbitrator must decide according to the law, unless the parties agree otherwise.[19] The Act expressly allows the parties to choose what rules of law may apply, and if they do not specify what law applies, the arbitrator can choose the appropriate law.[20] For parties based in Ontario, that would normally be Ontario law.

The drafters of the *Arbitration Act* had in mind a choice of law of some other place than Ontario. However, the language of the Act is consistent with a choice of a different type of law, such as a religious law or even a set of rules made up by a private organization or by the parties themselves to govern their relationship. Since the arbitration happens

[14] *Arbitration Act,* 1991, s. 2.
[15] *Arbitration Act*, 1991, s. 5(5): "An arbitration agreement may be revoked only in accordance with the ordinary rules of contract law."
[16] *Arbitration Act*, 1991, s. 7.
[17] *Arbitration Act,* 1991, s. 11(1). S. 46(1) gives as a ground for setting aside an award that there was a reasonable apprehension of bias on the part of the arbitrator.
[18] *Arbitration Act,* 1991, s. 38.
[19] *Arbitration Act,* 1991, s. 31.
[20] *Arbitration Act,* 1991, s. 32(1).

only because the parties want it to happen, they can design this part of the process along with the others. They can choose an arbitrator based on his or her experience with the law they have chosen, if they wish.

The decision of an arbitrator is called an arbitral award. Once the award is made, if a party who is ordered to do something does not do it, the other party may apply to the court for an order enforcing the award because the parties contracted to be bound by the results of the arbitration.[21] This is true of awards made elsewhere in Canada as well. (Foreign arbitral awards have a similar but not identical regime under a different statute.[22]) The court is required to give such an order unless there is an appeal or an application to set aside an award, or still time to appeal, or unless an appeal has succeeded and the award has been overturned. The arbitrator can award costs to the winning party, as in a lawsuit,[23] and the court can enforce this part of the award along with the rest of it. If there is no order about costs, the parties split the cost of the arbitration equally.[24]

Limits to arbitration

Although the policy of the *Arbitration Act* is to favour arbitrations and generally to trust the arbitral process, the law does not blindly assume that private decisions are as good as decisions of the public court system. It imposes a number of limits and safeguards on the process that can prevent a dispute from being arbitrated or an award from being enforced. These constraints are legal, procedural and substantive.

(i) legal limits

The main legal limit is that the arbitration must be voluntary. Private dispute resolution occurs only because the parties have agreed to it. The arbitrator gets his or her powers from the parties, with the statute playing a supplementary – and sometimes protective - role. An arbitrator has no power to order the parties to do something that the parties could not have agreed to do on their own. Likewise the arbitrator cannot order the parties to do something illegal under Canadian law (since the parties cannot lawfully agree to break the law). So, for example, the arbitrator could not allow the parties to engage in conduct prohibited by the *Criminal Code*, or any other statute.

The arbitration agreement is a contract between the parties, and it is enforceable at law to no greater extent than any other contract. This is clear from the grounds on which a court can refuse to stay litigation, or can set an award aside: that a party entered into the agreement while under a legal incapacity (such as being under age,

[21] *Arbitration Act,* 1991, s. 50.
[22] *International Commercial Arbitration Act,* R.S.O. 1990, c. I.9.
[23] *Arbitration Act,* 1991, s. 54.
[24] *Arbitration Act,* 1991, s. 54(4).

or subject to duress, or mentally incompetent), or that the agreement is invalid for another reason of law.[25]

For this reason, an arbitration agreement cannot bind children; they are not capable of contracting, i.e. agreeing to arbitrate. It may bind parents in matters concerning their children, but as noted below, the courts will always maintain their right to ensure the best interests of the child, whatever the parents have agreed to directly or through an arbitration.

Likewise, an arbitrator can decide only the questions that the parties have agreed to refer to arbitration. The contract fixes the scope of the arbitrator's power. A court may refuse to let an arbitration proceed if the arbitrator purports to deal with matters that the parties have not agreed to arbitrate, and the court may set aside an award made in excess of the agreement.[26]

Another legal limit, one that makes an arbitration agreement less enforceable than other contracts, is that the subject matter of the agreement must be "capable of being the subject of arbitration under Ontario law". Most civil (i.e. between private parties) disputes may be arbitrated. However, criminal offences are not disputes between parties but matters between the state (the Crown) and the offender. They cannot be arbitrated. Likewise matters that involve a public recognition of civil status cannot be altered by a private arrangement. The parties can decide through an arbitrator only their own private affairs. For example, the registration of a patent, the recognition of parenthood (affiliation), or the status of marriage cannot be arbitrated. Therefore, arbitrators cannot grant a civil divorce. Only a public body, a court, can make an order affecting this public status. This does not affect the authority to grant a religious divorce. This power may be exercised as religious authorities determine. Civil divorce occurs only under the *Divorce Act (Canada)* and is not arbitrable. An award purporting to have such an effect can be set aside, or simply ignored.

(ii) procedural limits

The parties cannot waive the power of a court to enforce awards.[27] However, they may waive or vary section 37, which says that an award binds the parties. In other words, the parties can make the arbitration advisory only. If they do this, then the appeal rights (which are separately waivable, as noted below) and the enforcement rights of the *Arbitration Act* would logically not apply to any award. The other substantive and procedural protections would still benefit the parties, however.

[25] *Arbitration Act,* 1991, ss. 7, 46(1).
[26] *Arbitration Act,* 1991, s. 48. See also s. 6, which gives as one reason a court may intervene in an arbitration "to ensure that arbitrations are conducted in accordance with arbitration agreements."
[27] *Arbitration Act,* 1991, s. 3.

The arbitration must be conducted fairly and the parties must be treated equally.[28] The parties cannot opt out of this obligation.[29] As a result, each party must be given a fair opportunity to present a case and to respond to the case of the other party. Likewise the parties must both be given proper notice of the arbitration and any significant steps in it. Otherwise the courts can set aside any award made by the arbitrator.

The time limits prescribed in the *Arbitration Act* for rendering an award can be extended by the court, to ensure that the arbitration proceeding has a meaningful conclusion.[30] The parties cannot deny the court this power to extend the time.[31]

The courts may also set aside an award that was obtained by fraud or if the arbitrator is or reasonably appears to be biased.[32] The grounds on which an award may be set aside – essentially the contractual grounds mentioned above and the procedural grounds mentioned here – may not be contracted out of by the parties.[33]

The *Arbitration Act* allows a party who claims not to have agreed to arbitrate to invalidate any purported arbitration without participating in it first.[34] This rule too cannot be eliminated by agreement.[35]

The *Arbitration Act* also allows the parties to agree to appeals to the court on questions of law or on questions of fact. If the agreement does not provide for appeals, a party may still appeal on questions of law, but only with permission of the court.[36] The party seeking to appeal must persuade the court of the importance of the appeal. The arbitration agreement may rule out any appeals at all.[37] It may be difficult for an Ontario court to decide an appeal where the arbitrator has decided under a law other than Ontario's. The usual course would be to have the appropriate non-Ontario law proved to the court as a matter of fact. The appeal court can make its own decision or send the award back to the arbitrator to get it right, or to conduct the arbitration in a particular way.[38]

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[28] *Arbitration Act,* 1991, s. 19. See also s. 6, which gives as another reason a court may intervene in an arbitration "to prevent unequal or unfair treatment of parties to arbitration agreements."
[29] *Arbitration Act*, 1991, s. 3.
[30] *Arbitration Act,* 1991, s. 39.
[31] *Arbitration Act,* 1991, s. 3.
[32] *Arbitration Act,* 1991, s. 46(1).
[33] *Arbitration Act,* 1991, s. 3.
[34] *Arbitration Act,* 1991, s. 48.
[35] *Arbitration Act,* 1991, s. 3.
[36] *Arbitration Act,* 1991, s. 45.
[37] The *Arbitration Act,* 1991, s. 3, does not include s. 45 in the non-waivable provisions. Ontario differs from the Uniform Arbitration Act in this respect; the Uniform Act does not allow parties to opt out of appeals on questions of law, with leave of the court.
[38] *Arbitration Act,* 1991, s. 45(5).

In addition, the court cannot enforce an award if the award may still be appealed or if an application may be brought to set it aside, or if an appeal or application is outstanding or has succeeded.[39]

(iii) substantive limits

The power of the court to enforce an award is subject to some other limits. At least one Ontario court has interpreted the obligation to treat the parties equally and fairly as not limited to procedural fairness but even-handed in substance.[40]

Ontario courts have refused to enforce an arbitral award dealing with the custody of children, not on the ground that the children were not a party to the arbitration agreement, but because the court has a general jurisdiction (a "*parens patriae*" jurisdiction) to oversee the treatment of children and to ensure that their best interests are protected.[41]

A fraudulent order could be set aside under the *Arbitration Act*.[42]

The court may refuse to enforce any order that it would not have had jurisdiction to make itself or would not have granted.[43] Courts order people to pay money or transfer property to someone else, or to do or refrain from doing things according to their agreements, or to act honestly. They do not go much further.

The Act does not expressly give the court any right to review the merits of the award, in the absence of an appeal. There is no power to refuse enforcement on grounds that the award violates "public policy", however that might be defined. Nevertheless, the power to refuse enforcement under s. 50(7) noted above refers to an order that the court "would not have had jurisdiction to make itself". Jurisdiction has been a very flexible tool among judges who did not want to enforce another tribunal's order.

It may be noted that other laws may protect the participants in arbitration. The most recent example is the *Consumer Protection Act, 2002*, [44] which prevents a consumer from agreeing to arbitrate certain kinds of disputes until the dispute has arisen. The consumer, like anyone else, may waive or compromise his or her rights, but the Act requires that he or she be aware of the dispute, and thus in a better position to evaluate how his or her rights might be affected, before agreeing to do so.[45]

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[39] *Arbitration Act,* 1991, s. 50(3).
[40] *Hercus v. Hercus*, [2001] O.J. No. 534 (Sup.Ct.).
[41] *Duguay v. Thompson-Duguay*, [2000] O.J. No. 1541, 7 R.F.L. (5th) 301 (Sup. Ct.) at para. 41.
[42] *Arbitration Act,* 1991, s. 46(1) at para. 9.
[43] *Arbitration Act,* 1991, s. 50(7).
[44] S.O. 2002, c.30, Sch. A., s. 7, online: <http://www.elaws.gov.on.ca/DBLaws/Statutes/English/02c30_e.htm>.
[45] The British Columbia Law Reform Commission's Report on Arbitration (1982) recommended that the choice of a law other than B.C. law to govern an arbitration should be not be made until after a dispute had arisen, so the parties would better be able to estimate the consequences of that decision, and possibly be more equal in bargaining power about the rules of the arbitration than when they had agreed to arbitrate. Until the reforms of the 1980s, Quebec law

(iv) A limit to the limits

Some of the protections mentioned in this section must be exercised promptly or the party will lose the ability to assert them.[46] If an arbitrator is moving to decide matters that are outside the scope of the agreement, for example, the party who does not want this to happen must complain within a reasonable time.

These rules intend to ensure that when the parties have agreed to arbitrate, they carry out the process expeditiously. If the arbitration is to be stopped in favour of litigation, it must be stopped when the grounds for stopping it arise, not when the award goes against the complaining party. If a party participates in the arbitration despite knowing of a defect of jurisdiction or bias, then he or she can lose the right to complain on that ground. However, an objection on the ground of unfair treatment is not lost in this way.[47]

An application to set an award aside must be brought within 30 days of the award.[48] If a party did not know of the award, this limit would not apply. Likewise the limit does not apply if the award is fraudulent.[49] An application to enforce an award must be brought within two years of the date of the award.[50]

Summary

Generally our society accepts that its members may resolve their disputes without recourse to state-sponsored mechanisms like the courts. Arbitration is one method of private dispute resolution. Like the others, it depends on the agreement of the disputants for its legitimacy. The law recognizes this legitimacy by providing for public enforcement of the private decisions, but only subject to a number of legal, procedural and substantive protections. The law of arbitrations permits people to arbitrate family law and inheritance disputes, though not matters of civil status or affiliation. It also permits people to choose any rule of law, or none, by which the dispute is to be resolved.

Does this system sufficiently protect people whose status, language, education, understanding of the law, or other characteristics make them vulnerable to inappropriate resolution of their disputes? Should new types of protection be built into the system for matters of family law or for faith-based dispute resolution in general? These are the essential issues that this Review addresses.

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did not allow the parties to submit a dispute to arbitration at all until the dispute had arisen. British Columbia Law Reform Commission *Report on Arbitration* (British Columbia Law Reform Commission, 1982).

[46] *Arbitration Act,* 1991, s. 4.

[47] *Arbitration Act,* 1991, s. 46(4) – (6).

[48] *Arbitration Act,* 1991, s. 47.

[49] *Arbitration Act,* 1991, s. 47(2).

[50] *Arbitration Act,* 1991, s. 52(3).