Exclusion of arbitration appeal rights requires 'final and binding' clause

By Brett Harrison and Emily White

Drafting an appeal exclusion clause that the courts will not overturn is surprisingly difficult. The majority of Canadian jurisdictions refuse to enforce this type of clause. Even in a permissible jurisdiction, the court will only enforce an appeal exclusion clause where it is satisfied that the parties unequivocally intended to renounce their appeal rights.

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The question of whether an arbitration agreement excluding appeal rights will be enforceable depends partly on location. In Nova Scotia, New Brunswick, Manitoba and Alberta, parties to an arbitration agreement are not permitted to exclude the statutory right to seek leave to appeal on a question of law. In B.C., parties are permitted to seek leave on a question of law, but only with the consent of all the parties to the arbitration. In Quebec, annulment is the only recourse from an arbitration award. In Ontario and Saskatchewan, however, parties can agree to abandon their rights to appeal an arbitrator's decision through contract.

In Saskatchewan, the right to abrogate appellate review is well established in the jurisprudence. The leading decision of *Bank of Nova Scotia v. Span West Farms Ltd.,* [2003] S.J. No. 489 confirms that where a provision abrogating an appeal right in an arbitration agreement is properly drafted, the court will not interfere.

Likewise, in Ontario, parties are free to contract out of this statutory right, but must do so carefully. The Ontario Court of Appeal in *Denison Mines Ltd. v. Ontario Hydro* (2001), 56 O.R. (3d) 181 confirmed that parties in Ontario are permitted to displace the statutory right to appeal an arbitrator's decision by agreement.

In both of these jurisdictions, arbitration agreements will only be upheld where the wording is such that the intention of the parties to abrogate their right to appellate review is clear. The Ontario Court of Appeal in *L.I.U.N.A., Local 183 v. Carpenters & Allied Workers, Local 27,* (1997), 34 O.R. (3d) 472 stated that in the absence of a clear exclusion provision, parties will be permitted to exercise their statutory right of appeal.

In *Denison,* a provision stating that the arbitration was "final and binding" was sufficient to signify the parties' intention to exclude appeal rights.

This can be compared to *National Ballet of Canada v. Glasco,* [2000] O.J. No. 2083, where the Ontario Superior Court held that a provision stating that the arbitrator's decision was "binding" was insufficient to exclude appeal rights.

In *National Ballet,* the parties not only used the term "binding" with respect to their submission to arbitration in their agreement but also, elsewhere in the agreement, stated that the Ontario Labour Relations Board application in question would be "fully and finally disposed of" in the mediation/arbitration and that the grievance will be withdrawn and "fully and finally determined in the mediation/arbitration."

The court reasoned that the omission of the phrase "final and

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binding" with respect to the paragraph on the submission to arbitration coupled with a provision stating that the arbitration would proceed and be enforceable under the *Arbitration Act* mitigated in favour of finding a right of appeal. The court further found that the references to a "final and binding" determination by the OLRB complaint and "fully and finally determined" with respect to the grievance were not specifically drafted to exclude appeal rights but rather were intended to prevent further recourse to the board or grievance arbitration.

In *Span West Farms*, which involved an arbitration clause in a lease, the Saskatchewan Court of Queen's Bench found that the terms "settled" and "binding" were insufficient to constitute an abrogation of the right of appeal. The court found that "settled" and "binding" were not equivalent to "final and binding".

The decisions above find that clauses which at first appear to exclude appeal rights are often not enforceable. Anything short of a clause stating that the arbitrator's decision will be "final and binding" will result in the court finding in favour of an appeal right.

To end disputes at the arbitrator's table, the best evidence with which to provide the court is the phrase "final and binding".

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