Playing with the big boys

Proposed legislative changes would keep Canada in the major leagues of international arbitration and raise stock of all Canadian lawyers, say proponents.

BY MARK CARDWELL

If international arbitrators were ranked like boxers, Gerry Ghikas would likely be considered a world heavyweight contender. A commercial arbitration lawyer at Vancouver Arbitration Chambers and a former managing partner, head of litigation, and chairman of Borden Ladner Gervais LLP's international trade and arbitration group, he has served as sole arbitrator, co-arbitrator, or tribunal chairman in dozens of international commercial disputes over the past 35 years, some of them involving billions of dollars.

Now Ghikas is preparing for a fight to fix the differences and inconsistencies that have slipped into the rules for international arbitration between Canada's 13 provinces and territories since 2006, when the country's model law on international commercial arbitration was last updated.

At stake, he says, is Canada's reputation as an arbitration-friendly nation, the high regard for Canadian arbitrators in international legal circles, and an opportunity to raise the profile and hone the instincts and reflexes of all Canadian lawyers in regards to alternative dispute resolution strategies and clauses in today's fast-paced, free-trade world.

The bout is set for Aug. 11 to 15 in Victoria, B.C., at a closed-door meeting of the civil section of the Uniform Law Conference of Canada, a national organization of public and private sector lawyers, judges, law professors, and law reformers who meet annually to recommend ways to modernize and harmonize federal, provincial, and territorial laws. As chairman of a ULCC working group that has been looking at ways to create consistent laws across Canada on a range of arbitration-related issues, Ghikas will present a half-dozen recommendations ranging from the power of arbitral tribunals to make *ex parte* orders to the appropriateness of having the same limitation periods in all jurisdictions across the country.

"Canada has had relatively uniform arbitration laws since 1985 when it adopted the model law on international commercial arbitration," says Ghikis, "but there have been developments in

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the rest of the world and some variations have crept in between different jurisdictions in Canada. Our recommendations aim to ensure that we've got the best legislation we can have for international arbitration, and to restore, as far as we are able, complete uniformity."

Problems, explains Ghikas, have arisen from the fact arbitration laws on key issues like the selection of arbitrators, rights of appeal, and limitation periods are laid down by provincial statutes in Canada. Like many aspects of life in a decentralized federal system such as ours, that has given rise to an incongruous patchwork of legal decisions rendering Canada's commercial dispute playing field both uneven and uninviting for some international litigants.

In addition to a perceived need to grant arbitrators *ex parte* powers when both sides agree to the regime — a vexing issue Ghikas says was a source of vigorous debate within the working group, and will likely continue to be within the wider ADR community in Canada, where legislation is silent on the issue — he says differences in limitation periods for the recognition of international awards is a problem that needs to be ironed out.

The issue was notably at the heart of *Yugraneft Corp. v. Rexx Management Corp.*, a high-profile Alberta case in which the Supreme Court of Canada set the limitation period for the recognition of international awards to two years in that province — one year more than in Ontario.

By implementing a recommendation to set the same limitation period across Canada (but not on how long that period should be), Ghikas says it would clear up confusion among international arbitration seekers, stop them from shopping around for the most favourable jurisdiction, and reduce research and legal costs, the most sought-after advantages of arbitration over litigation in international commercial disputes.

Based on the 89-page discussion paper "Towards a New Uniform International Commercial Arbitration Act" the working group sent out to Canada's arbitration community in January, and on feedback and further discussions between the group's 14 core members and the ULCC's advisory board, the working group recommends the ULCC lead "an orderly review and constructive discussion" of the proposed act, and help develop "a strong consensus to facilitate its ultimate implementation by the legislatures."

For Ghikas, a politically and financially stable country like Canada, which boasts a fair and transparent bi-juridical court system accustomed to dealing with both common law and civil law disputes, and enjoys an enviable international reputation for impartiality and neutrality — not to mention a demonstrated willingness to enforce arbitration agreements and arbitral awards — has much to gain from the proposed changes. "There is a big and growing demand for arbitration as a faster, simpler, and more private process for resolving international commercial disputes than litigation," he says. "Typically, litigants want a neutral location, and we think Canada has a lot to offer."

He also sees international arbitration work as a growth industry for Canadian lawyers who possess the right mix of experience and credentials in ADR and international commercial litigation. Following in the footsteps of internationally renowned arbitration trailblazers like Yves Fortier and Marc Lalonde, roughly 100 lawyers are now members of the Canadian committee of the International Court of Arbitration of the International Chamber of Commerce (or ICC), the world's oldest and most representative dispute resolution institution.

Several ICC Canada members are also resident and member arbitrators of the handful of private Canadian chambers that have sprung up in recent years and offer a full slate of services — everything from hearing rooms and concierge-level administrative services to on-site court reporting, simultaneous translation services, and around-the-clock technical support — to international litigants looking for a neutral forum to resolve their dispute.

"Canada is seen as a place to recruit good neutrals and as being pro-arbitration," said Stan Fisher, one of the two-dozen members of Toronto's Arbitration Place. According to Fisher, who spent five decades as a top-flight commercial litigator at all court levels before switching exclusively to neutral work several years ago, making changes that would make Canada a five-star destination for international commercial litigants makes good business sense. "There are tremendous spin-off benefits," he says. "If an international company decides to do arbitration in Toronto or Montreal or Vancouver, they will likely use local counsel, as well as services like hotels and restaurants. No wonder established international arbitration centres like London and Singapore fight like mad to keep that business."

Though a cynic might suggest the proposed legislative changes are aimed at helping put feathers in the caps of a handful of well-connected, distinguished lawyers and judges in the twilight of their legal careers, one young Montreal lawyer who is a member of the ULCC working group says the group's efforts to make Canada both a homogenous and attractive place for international arbitration is important for all of the country's lawyers. "With the Internet and all the cross-border business being done by small businesses today, you don't have to be a huge client to have an international commercial dispute," said Martin Valasek, a member of the international arbitration team at Norton Rose Fulbright's Montreal office.

He adds that well-established international conventions and treaties have helped to make the outcomes of arbitration highly enforceable, fuelling both the popularity and prestige of such forums for solving cross-border commercial disputes. "Most lawyers will not practise it, but they all need to know the ABCs of international arbitration," says Valasek, who worked on several big international arbitration cases with Yves Fortier and Pierre Bienvenu at the former Ogilvy Renault. "You need to know what to do if confronted with an arbitration clause [or] the need for having a strategy like an arbitration clause in case things go sour."

"We're trying to make Canada as attractive a place as possible for international arbitration," adds Valasek. "It brings a certain level of prestige to Canada [and] as the tide rises, it raises the boat for everyone."