An Argument Against Using the Supreme Court Rules in UMP Arbitrations

by Kenneth Glasner, Q.C. FCIArb.

The purpose of this exercise is to impart to the reader (the parties and their counsel) the advantage of employing all of the benefits of the new *Arbitration Act, SBC 2020 c 2* (the *Act*) and the Vancouver International Arbitration Centre's (VanIAC) Rules (the Rules), recognizing the disadvantages of the *Supreme Court Civil Rules*, *BC Reg 168/2009* (SCR) when prosecuting or defending an underinsured motorist protection program (UMP) case.

UMP Arbitrations

Claims against the Respondent, generally but not always, the Insurance Corporation of British Columbia (ICBC), for underinsured motorist benefits (UMP Compensation), pursuant to the Underinsured Motorist Protection Regulations of the *Insurance (Vehicle) Act* (the Regulations), are subject to subsection 148.2 (1.1):

> "the determination as to whether an insured provided underinsured motorist protection under section 148.1 is entitled to compensation and, if so entitled, the amount of compensation, shall be made by agreement between the insured and the corporation, but any dispute as to whether the insured is entitled to compensation or as to the amount of compensation shall be submitted to arbitration under the Commercial Arbitration Act."

Sections 148.1 to 148.4 of the revised Regulations provide certain limited financial benefits for an Insured person (as defined) from injuries suffered by an Uninsured Motorist (as defined) "who is legally liable for the injury or death of an insured but is unable, when the injury or death occurs, to pay the full amount of damages recoverable by the insured or his personal representative in respect of the injury or death".

The regime to resolve the issue(s) is not the public court process, but rather the regime, process and culture set out in section 148.2 by having the matter submitted to arbitration. This is commonly referred to as an UMP arbitration. Notwithstanding the process is governed by the Regulations, the applicable party is not entitled to an order for costs as set out in the Act, but rather such costs are limited on party and party costs basis – presumably referring to the SCR.

There are no other references to the court system. The courts and even ICBC have long acknowledged the distinctions not only between UMP benefits and other recourses but also between the court procedures and those anticipated in UMP arbitration.

In *I.C.B.C. v. Pozzi*, 2004 BCCA 440, the Court of Appeal reversed the chambers judge for an error in law which involved taking into account "an irrelevant factor", namely UMP coverage, to determine pro rata adjustment involving third party motor vehicle insurance. In doing so, the Court distinguished clearly between the different insurance coverage and their respective processes for resolution:

> [16] I have concluded that the appeal must succeed. In my respectful opinion, the chambers judge erred in law by taking into account an irrelevant factor, the UMP coverage, in deciding the matter before him. At issue was a discrete fund related to third party insurance to which three claimants were entitled. The chambers judge held, in effect, that two of them were disentitled because they had other insurance. However, the fact that I.C.B.C. was the insurer under both the third party insurance and the UMP is beside the point. The two forms of insurance cannot be put in one pot, as it were, for these purposes. <u>They are distinct coverages with different rules: third party coverage is first loss insurance; UMP is last to pay. Each is governed by separate enactments within the overall scheme of motor vehicle insurance. Third party insurance disputes can be litigated in court; UMP disputes must be arbitrated</u>.[1] (emphasis added)

The distinction is acknowledged by ICBC which, in one of the earliest cases involving mention of the UMP arbitration process, noted the distinctions between procedural formalities. In *Insurance Corporation of British Columbia v. West*, 1994 CanLII 1264 (BC CA), the Court summarized ICBC's arguments in favour of appeal and included ICBC's remarks on the nature of an UMP arbitration:

> [21] The applicant urges that the importance of this point stems from the fact that U.M.P. coverage is held by all I.C.B.C. certificate holders, members of their households, and occupants of their vehicles, and because the minimum U.M.P. coverage is $1 million per insured person. Counsel submitted that it is "publicly important" to determine whether claims for consequential and punitive damages arising from the administration of U.M.P. coverage are to be decided by the arbitrator dealing with the claims in the U.M.P. proceedings or in different judicial proceedings. <u>Counsel submitted that arbitrators follow a different and generally more expeditious procedure than the courts and are not bound by the legal rules of evidence and that their awards are not appealable on issues of fact</u>.[2] (emphasis added)

[1] I.C.B.C. v. Pozzi, 2004 BCCA 440 para. 16.
[2] Insurance Corporation of British Columbia v. West, 1994 CanLII 1264 (BC CA) para. 21.

In *Hannan v. Medicine Hat School District* No. 76, 2020 ABCA 343, the Court in discussing the advantages of summary judgement made a point which is also applicable for arbitration.

> [48] It is certainly true in Alberta today and it has been for many years. Currently the amount of time that separates the date an action is commenced in Alberta and the date it is resolved by trial is trending upwards.
>
> [58] Until this trend is reversed, Alberta litigants will have a high interest in having access to a workable expedited dispute resolution procedure – summary judgment or summary trial. Or they will continue to take their commercial business elsewhere – private dispute resolution.[3]

On September 1, 2020, the Provincial Legislation enacted the new *Act*, the most progressive domestic arbitration legislation in Canada. Contemporaneous with the enactment was the adoption by VanIAC (formerly BCICAC) of its new set of Domestic Arbitration Rules (and forms). This enhanced the process allowing for what the *Act* describes in section 21 the mandate that the arbitral tribunal must "[s]trive to achieve a just, speedy and economical determination of proceeding on its merits".

Gerald Ghikas, QC in his article titled, "Arbitration Advocacy," (The Advocate (Volume 69, part 2, March 2011) suggested the following ingredients for a successful commercial arbitration are:

- A suitable arbitration agreement
- An arbitrator with appropriate experience
- Counsel who appreciates the differences between arbitration and litigation
- Judges who know when not to interfere (emphasis added)

A review of Mr. Ghikas's article will assist counsel in better understanding the differences between arbitration and litigation. In accepting the four factors, one must appreciate that it is not to the parties' advantage to appoint an experienced arbitrator only to find that they are limited in their tasks by the adoption of the SCR. The occasion could easily arise where, on an application before the arbitrator, he or she will need to interpret and apply conflicting authority as among the SCR, consent of the parties, the *Act,* and possibly the Rules.

[3] Hannan v. Medicine Hat School District No. 76, 2020 ABCA 343 paras 48 and 58.

The Supreme Court of Canada in *Desputeaux v. Éditions Chouette* (1987) Inc., 2003 SCC 17 (CanLII), [2003] 1 SCR 178 observed that "[b]oth Parliament and the provincial legislatures, however, have themselves recognized the existence and legitimacy of the private justice system, often consensual, parallel to the state's judicial system".[4]

The mandate of both the SCR and the *Act* is to secure a just, speedy, and inexpensive determination of every proceeding on its merits. Both regimes have the same goal, yet differ in ways of achieving it.

Arbitration Act

Some of the relevant aspects of the new *Act* worth mentioning are:

- The well-structured new *Act* offers a road map to the conduct of arbitral proceedings.
- Section 28 creates a codified presumption that direct evidence will be given in writing (this can be changed by the parties' agreement) leaving witness cross-examination on the merits at hearing. This curtails hearing time, and therefore, overall expense.
- Section 32 allows an arbitral tribunal to establish and make procedural orders for the conduct of the proceedings.
- Under section 14, the parties may agree on a procedure for appointing an arbitral tribunal, and if the parties fail to agree on the arbitrator, the designated appointing authority (VanIAC) must, on request of a party, appoint the arbitrator.
- The new Act preserves the inherent ability for the parties to consensually amend the procedure by adapting it to a particular dispute.

VanIAC's Rules

[4] Desputeaux v. Éditions Chouette (1987) Inc., 2003 SCC 17, [2003] 1 SCR 178 at para. 40.

The new VanIAC Rules, which are consistent and supportive of the new *Act*, also offer certain procedural options that are not available under the *Act*. The Rules are meant to be read in conjunction with the *Act* and are based on best arbitration practices.

One of the many valuable features of the Rules is a more direct and focused production of documents. In addition to the exchange of witness statements, arguments, and expert reports that have to be done before a hearing, under the new Rules the default for document production prescribes the parties to exchange document requests after the first exchange of submissions. This allows for a meaningful and focused determination of the relevance of certain documents and requirements for production, which in return contributes to efficient hearings and overall arbitration proceedings.

The new Rules contain a new section called Expedited Procedures, found under Part B; it was created for claims under $250k. It offers a flat compensation fee for a single arbitrator, as well as proceedings without oral hearings, based primarily on written materials. Unless agreed otherwise, oral hearings are limited to one day. Submission of all written materials has to be done within 90 days of the appointment of an arbitrator, and an Award has to be rendered within 30 days of the last written material made, or 45 days of any oral hearing, where an oral hearing has been ordered.

A new separate section was dedicated to conducting virtual hearings. The set procedures are based on best practices, so that the parties and arbitral tribunal are guided through this highly demanded new way of conducting hearings.

Query

Combined, the courts and ICBC each remark on the distinction between the nature of the rights, the venue, and the procedures. So, if the courts overseeing everything and the Respondent to virtually all UMP arbitrations have that approach, why do parties insist on making the process longer and more complicated?

To date, many counsel familiar with the court process resist moving to the more effective process of arbitration**.** The present challenge is how to impart to lawyers the need to redirect their reasoning and their competitive spirit in advising their clients on resolving disputes.[5]

The parties may by consent (including I assume the consent of their client) discard implementing the VanIAC Rules and forms, and perhaps certain sections of the *Act,* in favour of a more expensive, time-consuming**,** and impractical process designed for litigation.

But what of the arbitral process? A one-hour review of the *Act,* coupled with a 30-minute review of the Rules, should be sufficient to encourage the parties to take full advantage of the *Act* (and Rules) over that designed for another regime, and for a general and not specific purpose – the courts. The *Act* provides an easier and quicker procedure for applications to be bought on a timely basis compared to a similar application to court.

Query, when the parties adopt the SCR, is that adoption of all of the SCR or just some of the SCR? Which of the SCR has been accepted by consent and which have not been accepted? If there is a dispute as to the applicability of the SCR, how is that to be clearly resolved?

It seems logical for counsel to familiarize themselves with the *Act* and VanIAC's Rules, and to use the regime prescribed in the Regulations rather than to juggle between two regimes and risk creating potential clashes.

At the end of the day, counsel in advising their clients will be required to explain to their clients why they have been advised to agree to the SCR and not the process set out in the *Act*, or the VanIAC Rules. The parties might consider private dispute resolution and choose counsel who are willing, able, and are familiar with the benefits of arbitration – benefits to both the client and their counsel.

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[5] Kenneth Glasner, Q.C. "Shifting the Paradigm: Moving from Litigation to Arbitration", Chapter 3, p. 67 in Marvin J. Huberman ed., A Practitioner's Guide to Commercial Arbitration, (Toronto: Irwin Law, 2017).