



# ALBERTA LAW REFORM INSTITUTE UNIFORM INTERNATIONAL COMMERCIAL ARBITRATION



FINAL REPORT  
**114**  
MARCH 2019







## **UNIFORM INTERNATIONAL COMMERCIAL ARBITRATION**

FINAL  
REPORT || **114**

**MARCH 2019**

ISSN 0834-9037

ISBN 978-1-896078-77-9

ALRI claims copyright © in this work. ALRI encourages the availability, dissemination and exchange of public information. You may copy, distribute, display, download and otherwise freely deal with this work on the following conditions:

- (1) You must acknowledge the source of this work,
- (2) You may not modify this work, and
- (3) You must not make commercial use of this work without the prior written permission of ALRI.

# Table of Contents

Alberta Law Reform Institute .....	i
Acknowledgments.....	iii
Summary .....	v
Recommendations.....	vii
Table of Abbreviations.....	ix
<b>CHAPTER 1 Introduction .....</b>	<b>1</b>
A. International Commercial Arbitration Law in Alberta and Canada .....	1
1. The New York Convention (UNCITRAL).....	1
2. The Model Law (UNCITRAL) .....	2
3. The Uniform Act 1986 (ULCC) .....	3
B. Origin of This Project.....	4
C. Framework of This Project.....	5
D. Outline of the Report .....	6
<b>Timeline of Developments in International Commercial Arbitration .....</b>	<b>8</b>
<b>CHAPTER 2 Overview of International Commercial Arbitration .....</b>	<b>9</b>
A. Introduction.....	9
B. The Alberta Act.....	10
C. Schedule 1: The New York Convention .....	10
1. Recognition and enforcement of foreign arbitral awards.....	10
2. Referral by a court to arbitration .....	11
D. Schedule 2: The Model Law .....	11
1. Scope of application .....	11
2. Limited court involvement and assistance.....	12
3. The arbitration agreement.....	13
4. Composition of the arbitral tribunal .....	13
5. Jurisdiction of the arbitral tribunal.....	13
6. Conduct of arbitral proceedings.....	14
7. Recourse against arbitral award .....	14
8. Recognition and enforcement of arbitral awards .....	15
<b>CHAPTER 3 The Need for Reform .....</b>	<b>17</b>
A. Introduction .....	17
B. Reasons for Reform.....	18
1. The 2006 Amendments to the Model Law .....	18
2. Differences in arbitration practice and Canadian statutes .....	19
3. Additional issues .....	19
C. The Need for Reform .....	20
D. The Principles of Reform .....	21
E. General Recommendation for Reform .....	22
<b>CHAPTER 4 Main Areas of Reform .....</b>	<b>23</b>
A. Introduction.....	23
B. Organization of the Uniform Act 2014 .....	23

C. Interpretation .....	24
1. Definitions.....	24
2. Meaning of “Commercial” .....	26
D. The New York Convention .....	27
1. Reservations.....	27
2. Application in a Federal State .....	27
3. Designated Authority.....	28
a. General Overview of Masters’ Jurisdiction in Alberta .....	28
b. Types of Court Applications Permitted in the Context of International Commercial Arbitration .....	31
c. Designated authority in other jurisdictions .....	31
d. Should Alberta law be changed? .....	32
E. The Model Law.....	34
1. Adoption of the 2006 Amendments .....	34
a. International origin and general principles .....	34
b. Definition and form of arbitration agreement.....	36
c. Interim measures .....	37
d. Preliminary orders .....	41
2. Remaining Provisions dealing with the Model Act .....	44
a. Interpretation of the word “State” in the Model Law .....	45
b. Use of extrinsic material in interpretation.....	46
c. Designation of court .....	47
d. Rules applicable to substance of dispute .....	47
F. General.....	48
a. Consolidation of arbitrations.....	48
b. Stay of proceedings .....	51
c. Limitation period for recognition or enforcement of arbitral awards .....	51
d. Appeals from negative jurisdictional rulings.....	57
e. Crown bound .....	58
f. Forms of proof.....	59
g. Provisions not carried forward from the Uniform Act 1986....	59
h. Repeal of current Act and commencement of new Act.....	61
<b>CHAPTER 5 Additional Considerations .....</b>	<b>63</b>
A. Introduction.....	63
B. Appellate Review by Courts.....	63
C. Contracting Out of the Uniform Act 2014 .....	64
D. Confidentiality .....	65
E. Nationality, Independence and Impartiality of Arbitrators .....	66
F. ALRI’s Position on These Issues .....	66
G. Additional Considerations from British Columbia.....	67
H. ALRI’s Position on These Issues .....	69
<b>APPENDIX A: The Alberta Act and the Uniform Act 2014 Compared...71</b>	
<b>APPENDIX B: The New York Convention .....</b>	<b>79</b>
<b>APPENDIX C: The Model Law.....</b>	<b>83</b>
<b>APPENDIX D: Types of Court Applications Permitted in International Commercial Arbitration.....</b>	<b>101</b>

# Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

## *ALRI Board Members*

DR Cranston QC (Chair)  
 MT Duckett QC (Vice Chair)  
 A Barnsley-Kamal  
 Hon Judge DG Hancock  
 J Koshan  
 DM McKenna  
 DL Molzan QC  
 PD Paton  
 KA Platten QC  
 Hon Justice JM Ross  
 LD Weber  
 RJ Wood

## *Appointment Type*

Law Society of Alberta  
 Member at Large  
 Alberta Justice and Solicitor General  
 Member at Large  
 University of Calgary, Faculty of Law  
 Member at Large  
 Alberta Justice and Solicitor General  
 University of Alberta, Provost  
 Member at Large  
 Member at Large  
 Member at Large  
 University of Alberta, Faculty of Law

## *ALRI Staff Members*

L Buckingham	Counsel
C Burgess	Finance & Operations Manager
B Chung	Communications Associate
J Koziar	Executive Assistant
K MacKenzie	Counsel
M Mazurek	Counsel
S Petersson	Executive Director
J Taylor	Counsel
S Varvis	Counsel

ALRI reports are available to view or download from our website at:

**[www.alri.ualberta.ca](http://www.alri.ualberta.ca)**

The preferred method of contact for the Alberta Law Reform Institute is email at:

**[lawreform@ualberta.ca](mailto:lawreform@ualberta.ca)**

402 Law Centre  
 University of Alberta  
 Edmonton AB T6G 2H5

Phone: (780) 492-5291  
 Twitter: @ablawreform



# Acknowledgments

This report is based on a uniform act, final report and commentary prepared by the Uniform Law Conference of Canada (ULCC). We are grateful for all the work and analysis provided by the working group and advisory board on that project, as well as delegates to the ULCC's annual meeting who reviewed both the policy and the draft legislation. ALRI has relied heavily on their preceding work in preparing our own report in this area. Before a uniform act can be implemented, it must be examined to see if such reform is warranted in our province and, if so, be customized to fit the specific provincial context. That is the purpose of our report.

ALRI is grateful to the members of the Western Canada Commercial Arbitration Society who provided comments on an earlier version of this report.

ALRI extends special thanks to the members of our Project Advisory Committee who generously provided their time, expertise and input to this project, greatly assisting both Counsel and the ALRI Board in reaching the final recommendations in this project. The Project Advisory Committee members are:

- Kenneth R. Bailey QC (Parlee McLaws LLP)
- Mary E. Comeau (Mary E. Comeau Professional Corporation & Calgary Energy and Commercial Arbitrators)
- David R. Haigh QC (Burnett Duckworth & Palmer LLP)
- Julie G. Hopkins (Borden Ladner Gervais LLP)
- Professor Tamar Meshel (University of Alberta, Faculty of Law)
- Louise Novinger Grant (Burnett Duckworth & Palmer LLP)
- Vasilis F. L. Pappas (Bennett Jones)
- Professor Linda C. Reif (University of Alberta, Faculty of Law)
- Gordon L. Tarnowsky QC (Dentons)
- David E. Tavender QC (Dentons)
- Professor Elizabeth Whitsitt (University of Calgary, Faculty of Law)

This report was drafted by Debra Hathaway and Katherine MacKenzie, legal counsel. Katherine MacKenzie carried out the consultation on these proposals with assistance from Laura Buckingham and Jennifer Taylor, legal counsel. Additional research for this report was completed by student researchers, Ashley Hathorn and Joseph Sellman. Matthew Mazurek, legal counsel, prepared the summary. The report was prepared for publication by Barry Chung.

# Summary

In this Report, ALRI recommends that Alberta adopt the *Uniform International Commercial Arbitration Act 2014*. ALRI's recommendations are intended to bring Alberta's international commercial arbitration law up-to-date with current international standards.

## Why is Change Needed?

Alberta's current *International Commercial Arbitration Act* is based on uniform legislation developed in 1986. The Alberta Act has fallen behind the advances that are being made internationally and in other provinces. By updating its legislation, Alberta will catch up to those jurisdictions that have already implemented the changes. Uniformity of international commercial arbitration law is important to ensure consistency for foreign users who may be unfamiliar with Canada's federal system of government. Uniformity will also ensure that Canada can remain competitive as a host jurisdiction for these types of arbitrations.

## The Uniform Act 2014

The Uniform Law Conference of Canada revised aspects of its previous work to create the *Uniform International Commercial Arbitration Act (2014)*. In general the changes made in the Uniform Act 2014 include:

- Changes to general definitions;
- Changes to the application of the New York Convention on the Recognition and Enforcement of Foreign Awards in each enacting jurisdiction;
- Endorsing and incorporating the changes made to the Model Law on International Commercial Arbitration, including:
  - The requirements for interpreting the Model Law:
    - To have regard to its international origin; and
    - To promote the uniformity of application of the Model Law and the observance of good faith;
    - Making changes to the writing requirement for arbitration agreements;
    - Increased, detailed provisions that govern an arbitral tribunal's ability to make interim orders; and

- Empowering an arbitral tribunal to make *ex parte* preliminary orders in certain situations.

### **Consultation**

The Uniform Act 2014 is the result of an extensive research, and consultation process undertaken by the ULCC. Consultation by the ULCC included leading Canadian experts and practitioners in international commercial arbitration.

ALRI also benefitted from the expertise and input of its Project Advisory Committee in preparing this report.

# Recommendations

## **RECOMMENDATION 1**

Alberta's *International Commercial Arbitration Act* should be repealed and replaced by the Uniform International Commercial Arbitration Act (2014), subject to the changes specified in this Report..... 22

## **RECOMMENDATION 2**

Section 6 of the Uniform International Commercial Arbitration Act (2014) should be revised to replace the phrase “In applying article 2A(1) of the Model Law” with the phrase “In applying the Model Law” ..... 47

## **RECOMMENDATION 3**

The decision on how to bring the Uniform International Commercial Arbitration Act (2014) into force in Alberta should be left to government..... 61



# Table of Abbreviations

## LEGISLATION

Alberta Act	<i>International Commercial Arbitration Act</i> , RSA 2000, c I-5
BC Act	<i>International Commercial Arbitration Act</i> , RSBC 1996, c 233
Ontario Act	<i>International Commercial Arbitration Act</i> , SO 2017, c 2, sched 5
Uniform Act 1986	Uniform Law Conference of Canada, Uniform International Commercial Arbitration Act (1986), online: < <a href="http://www.ulcc.ca/en/component/content/article/462-josetta-1-en-gb/uniform-actsa/international-commercial-arbitration-act/292-uniform-international-commercial-arbitration-act-1987">www.ulcc.ca/en/component/content/article/462-josetta-1-en-gb/uniform-actsa/international-commercial-arbitration-act/292-uniform-international-commercial-arbitration-act-1987</a> >

## LAW REFORM PUBLICATIONS

ULCC Interim Report	Uniform Law Conference of Canada, <i>International Commercial Arbitration: Report of the Working Group</i> , (2012), online: < <a href="https://www.ulcc.ca/en/civil-section/905-civil-section-current-topics/international-commercial-arbitration">https://www.ulcc.ca/en/civil-section/905-civil-section-current-topics/international-commercial-arbitration</a> >
ULCC Final Report	Uniform Law Conference of Canada, <i>International Commercial Arbitration: Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation</i> , (2014) online (pdf): < <a href="https://www.ulcc.ca/images/stories/2014_pdf_en/2014ulcc0014.pdf">https://www.ulcc.ca/images/stories/2014_pdf_en/2014ulcc0014.pdf</a> >
Uniform Act 2014	Uniform Law Conference of Canada, Uniform International Commercial Arbitration Act (2014), online: < <a href="https://www.ulcc.ca/images/stories/2014_pdf_en/2014ulcc0014.pdf">https://www.ulcc.ca/images/stories/2014_pdf_en/2014ulcc0014.pdf</a> >

## SECONDARY SOURCES

Commercial Arbitration in Canada	J Kenneth McEwan & Ludmila B Herbst, <i>Commercial Arbitration in Canada: A Guide to Domestic and International Arbitration</i> (Toronto: Thomson Reuters Canada, 2017) (loose leaf updated 2017, release 15)
----------------------------------	---

## UNITED NATIONS PUBLICATIONS

UNCITRAL	United Nations Commission on International Trade Law
Explanatory Note	UNCITRAL, "Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006", online: < <a href="http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf">www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf</a> >
Model Law	<i>UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006</i> , GA Res 40/72 and 61/33, UNCITRAL, 2006, UN Doc A/40/17 annex I and A/61/17, annex I, online < <a href="http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html">www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html</a> >
New York Convention	<i>Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)</i> , UNCITRAL, 1958, United Nations, <i>Treaty Series</i> , vol. 330, No. 4739, online: < <a href="http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html">www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html</a> >
Secretariat Note	UNCITRAL Model Law on International Commercial Arbitration: note by the Secretariat, UN Doc A/CN.9/309 (1985), online: < <a href="http://www.un.org/en/ga/search/view_doc.asp?symbol=A/CN.9/309">http://www.un.org/en/ga/search/view_doc.asp?symbol=A/CN.9/309</a> >

## CHAPTER 1

## Introduction

**A. International Commercial Arbitration Law in Alberta and Canada**

---

[1] In Alberta, the *International Commercial Arbitration Act* [the Alberta Act] establishes the basic legislative framework for the conduct of international commercial arbitration in this province.<sup>1</sup> Enacted in 1986, it adopts and implements two United Nations initiatives — the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards [the New York Convention] and the UNCITRAL Model Law on International Commercial Arbitration [the Model Law].<sup>2</sup>

**1. THE NEW YORK CONVENTION (UNCITRAL)**

[2] The New York Convention was adopted by the United Nations Conference on International Commercial Arbitration on June 10, 1958. Although it was prepared by the United Nations before the United Nations Commission on International Trade Law [UNCITRAL] was established, promotion of the New York Convention is an important part of UNCITRAL's work.<sup>3</sup>

[3] The New York Convention establishes the rules by which jurisdictions will summarily recognize and enforce the arbitral awards of foreign jurisdictions. It has been called “[o]ne of the most important events in the modern history of arbitration – if not *the* most important”.<sup>4</sup>

<sup>1</sup> *International Commercial Arbitration Act*, RSA 2000, c I-5, enacted SA 1986 c I-6.6 [Alberta Act]. Domestic commercial arbitration, in which all parties are from Canada, is governed in Alberta by the *Arbitration Act*, RSA 2000, c A-43. Domestic commercial arbitration is not the subject of this Report.

<sup>2</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), UNCITRAL, 1958, United Nations, *Treaty Series*, vol. 330, No. 4739, online: <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)> [New York Convention]; *UNCITRAL Model Law on International Commercial Arbitration* (1985), with amendments as adopted in 2006, GA Res 40/72 and 61/33, UNCITRAL, 2006, UN Doc A/40/17 annex I and A/61/17, annex I, online <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html)> [Model Law].

<sup>3</sup> *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), 2016 ed, GA Res 62/65, UNCITRAL, 2007, at para 1, online (pdf): <[www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016\\_Guide\\_on\\_the\\_Convention.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf)>.

<sup>4</sup> J Kenneth McEwan & Ludmila B Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitration* (Toronto: Thomson Reuters Canada, 2017) (loose leaf updated 2017, release 15) at 1-6 [emphasis in original] [*Commercial Arbitration in Canada*].

[4] The New York Convention gives two options to enacting jurisdictions, who may limit the recognition and enforcement of foreign arbitral awards to:

- awards made only in other jurisdictions which have also enacted the Convention [“the reciprocity reservation”], or
- awards which only concern commercial legal relationships [“the commercial reservation”].

Regardless of which option is chosen, these rules:<sup>5</sup>

. . . facilitate international trade by ensuring that arbitration agreements in international commercial agreements are respected by national courts and that foreign arbitral awards are consistently recognized and enforced by national courts.

[5] Canada was the last of the major industrialized nations to accede to the Convention, which it did on May 12, 1986.<sup>6</sup> Federal legislation implements the Convention to govern arbitrations to which the federal Crown, corporate federal departments or Crown corporations are parties.<sup>7</sup> However, given the nature of our federal state with its constitutional division of powers, it is also necessary for each province and territory in Canada to separately implement the Convention for use in its own jurisdiction.

[6] The Alberta Act implements the New York Convention in this province and incorporates it as Schedule 1 to the Act.<sup>8</sup> Alberta restricts its recognition and enforcement to foreign commercial arbitral awards only.<sup>9</sup>

## 2. THE MODEL LAW (UNCITRAL)

[7] The Model Law was created by UNCITRAL on June 21, 1985. It “reflects an international consensus as to the appropriate text of national laws regulating international commercial arbitration.”<sup>10</sup> The Model Law is designed to:<sup>11</sup>

<sup>5</sup> Uniform Law Conference of Canada, *International Commercial Arbitration: Report of the Working Group*, (2012) at para 2, online: <<https://www.ulcc.ca/en/civil-section/905-civil-section-current-topics/international-commercial-arbitration>> [ULCC Interim Report].

<sup>6</sup> *Commercial Arbitration in Canada* at 1-7.

<sup>7</sup> *United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16 (2nd Supp).

<sup>8</sup> Alberta Act, ss 1(1)(a), 2.

<sup>9</sup> Provinces have the constitutional jurisdiction to decide whether or not they are going to implement the reservation (s) that the federal government made when acceding to the New York Convention. In this case, Alberta decided to implement the commercial reservation.

<sup>10</sup> ULCC Interim Report at para 2.

... assist states in reforming and modernizing their laws on arbitration, reduce difficulties encountered in the interpretation of the New York Convention, and minimize the possible conflicts between national laws and arbitration rules.

[8] The Model Law establishes the fundamental rules for conducting international commercial arbitrations and includes provisions governing:

- arbitration agreements;
- composition and jurisdiction of an arbitral tribunal;
- conduct of arbitral proceedings;
- making, recognition and enforcement of awards;
- recourse against awards.

[9] In contrast to its late accession to the New York Convention, Canada was the first country in the world to adopt the Model Law.<sup>12</sup>

### 3. THE UNIFORM ACT 1986 (ULCC)

[10] The Uniform Law Commission of Canada [ULCC] played a central role in promoting and facilitating the uniform implementation of the Model Law and the New York Convention across the various provincial and territorial jurisdictions of Canada. In 1986, the ULCC produced a model Uniform International Commercial Arbitration Act [Uniform Act 1986] and recommended its use for this purpose.<sup>13</sup> With a couple of exceptions, every province and territory in Canada has followed the Uniform Act 1986.<sup>14</sup>

[11] The Alberta Act is one of these statutes based on the Uniform Act 1986. It adopts the Model Law and makes it applicable in this province by incorporating

<sup>11</sup> *Commercial Arbitration in Canada* at 1-10.

<sup>12</sup> *Commercial Arbitration in Canada* at 1-11. The federal statute which adopts the Model Law is the *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp).

<sup>13</sup> Uniform Law Conference of Canada, Uniform International Commercial Arbitration Act (1986), online: <<https://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/462-josetta-1-en-gb/uniform-actsa/international-commercial-arbitration-act/292-uniform-international-commercial-arbitration-act-1987>> [Uniform Act 1986].

<sup>14</sup> British Columbia enacted its own statute that is essentially similar in substance to the Uniform Act 1986, but different in form. Quebec does not have a specific statute governing international commercial arbitration but has incorporated many of the Uniform Act 1986's concepts into its *Civil Code* and *Code of Civil Procedure*: ULCC Interim Report at para 1. Thus, despite some differences in form, there is basic uniformity across Canada in the law governing international commercial arbitration.

it as Schedule 2 to the Act.<sup>15</sup> As previously noted, the New York Convention is Schedule 1.

[12] In the three decades since achieving uniform adoption of the Model Law and New York Convention:<sup>16</sup>

Canada has been perceived as a leader in the area of international commercial arbitration law, jurisprudence, and practice, largely due to the solid legislative foundation established under the Conference's [ULCC's] leadership, which has stimulated arbitration-related activity in Canada, facilitated cross-border business by Canadian enterprises, and generally enhanced Canada's reputation...

## B. Origin of This Project

---

[13] In 2014, the ULCC revised its Uniform Act 1986 and created a new Uniform International Commercial Arbitration Act [Uniform Act 2014].<sup>17</sup> The primary impetus for this revision was to adopt amendments made in 2006 to the Model Law, which:

- accommodate electronic methods of communication in the creation of arbitration agreements;
- enact more detailed provisions concerning an arbitral tribunal's ability to grant interim measures of protection (such as prerequisite tests that must be met, provision of security, and penalties for misuse);
- authorize an arbitral tribunal to make *ex parte* preliminary orders.

[14] The ULCC also examined certain other anomalies and developments affecting the uniformity of this legislation across Canada. Most importantly, it examined the issue of whether there should be a harmonized cross-Canada limitation period for the enforcement of foreign arbitral awards.

<sup>15</sup> Alberta Act, ss 1(1)(b), 4.

<sup>16</sup> Uniform Law Conference of Canada, *International Commercial Arbitration: Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation*, (2014) at para 3, online (pdf): <[https://www.ulcc.ca/images/stories/2014\\_pdf\\_en/2014ulcc0014.pdf](https://www.ulcc.ca/images/stories/2014_pdf_en/2014ulcc0014.pdf)> [ULCC Final Report].

<sup>17</sup> Uniform Law Conference of Canada, Uniform International Commercial Arbitration Act (2014), online: <[https://www.ulcc.ca/images/stories/2014\\_pdf\\_en/2014ulcc0014.pdf](https://www.ulcc.ca/images/stories/2014_pdf_en/2014ulcc0014.pdf)> [Uniform Act 2014].

[15] Before the ULCC incorporated these changes in the Uniform Act 2014, its Working Group:<sup>18</sup>

- conducted an extensive examination of the issues;
- reviewed relevant jurisprudence;
- analyzed existing international commercial arbitration legislation from Canada and other jurisdictions;
- obtained input from a large advisory board consisting of experienced arbitration practitioners, academics and institutional leaders;
- prepared a widely-distributed discussion paper<sup>19</sup> that was discussed at conferences in Canada and in legal and arbitration publications across Canada, the USA and the UK;<sup>20</sup> and
- produced a Final Report and Uniform Act 2014.

[16] Other reasons behind the ULCC revision were to correct a few anomalies which existed among the Canadian statutes and to address practical difficulties arising from case law or differences in arbitration practice across the country.<sup>21</sup>

[17] The Alberta Law Reform Institute [ALRI] has undertaken the task of reviewing the Uniform Act 2014, with a view to recommending whether it should replace the Alberta Act in our province and, if so, whether any changes or additions need to be made.

## C. Framework of This Project

---

[18] In preparing this Final Report, ALRI had the benefit of the advice and input of a Project Advisory Committee comprised of some of Alberta's leading practitioners and academics in the area of international commercial arbitration. A full list of the Committee's members is found in the Acknowledgments. ALRI has carefully considered the views of the Project Advisory Committee and we thank them for their time, expertise and feedback.

<sup>18</sup> ULCC Interim Report at paras 9-14.

<sup>19</sup> Uniform Law Conference of Canada, *Discussion Paper: Towards a New Uniform International Commercial Arbitration Act*, (2013), online: <<https://wcart.files.wordpress.com/2014/05/2013-ulcc-discussion-paper-towards-a-new-uniform-international-commercial-a.pdf>> [ULCC Discussion Paper].

<sup>20</sup> ULCC Final Report at para 8.

<sup>21</sup> ULCC Interim Report at para 7.

[19] ALRI was also able to supply an early version of the Final Report to the members of the Western Canada Commercial Arbitration Society. Their feedback was beneficial and we also wish to thank them for their expertise and participation.

[20] Due to the participation of our Project Advisory Committee, the input from the members of the Western Canada Commercial Arbitration Society, the specialist nature of this area of practice and the extensive cross-country consultation input already reflected in the Uniform Act 2014, ALRI chose not to issue a Report for Discussion in this project but has proceeded directly to make its recommendations at the Final Report stage.

## **D. Outline of the Report**

---

[21] Chapter 1 introduces the current law of international commercial arbitration in Alberta and Canada while providing background information on the origin and framework of this project.

[22] Chapter 2 provides a general overview of Alberta's current statutory regime, found in the Alberta Act, with its incorporated New York Convention and Model Law.

[23] Chapter 3 explores the need for reform and the value of uniformity in this area, both nationally and internationally.

[24] Chapter 4 analyses the main areas of reform contained in the Uniform Act 2014. It discusses the issues, explores the uniform solutions proposed for those issues and assesses what, if any, changes or customizing might be advisable in a new Alberta Act.

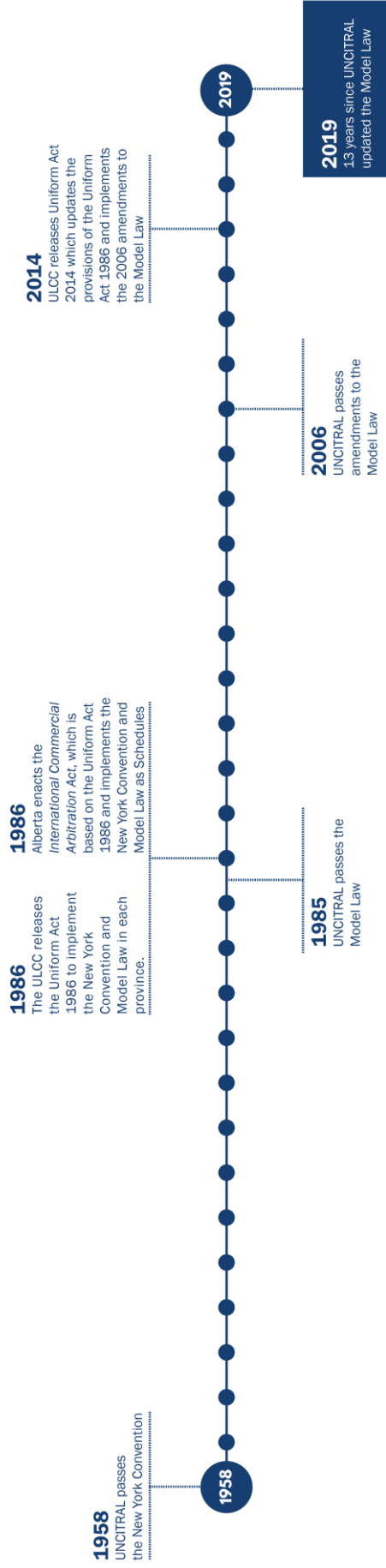
[25] Finally, Chapter 5 concludes the Report with a discussion of a few additional issues noted by the ULCC but not addressed in the Uniform Act 2014. It also includes a discussion of some provisions found in British Columbia's international commercial arbitration legislation that are not covered by the Uniform Act 2014.

[26] The Report has four Appendices containing the following material:

- a chart comparing the Alberta Act and the Uniform Act 2014;
- the full text of the New York Convention;
- the full text of the Model Law; and,

- a chart depicting the areas where court intervention is permitted under the Alberta Act, the Uniform Act 2014, the New York Convention and the Model Law.

# TIMELINE OF DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION



## CHAPTER 2

# Overview of International Commercial Arbitration

## A. Introduction

---

[27] Arbitration is a consensual process whereby parties agree to submit their dispute for adjudication by a neutral, third party decision maker (i.e., the arbitral tribunal). The tribunal's decision will be final and binding upon the parties. Arbitration is generally seen as a quicker, cheaper and more private alternative to the traditional litigation process.

[28] Hallmarks of the international commercial arbitration process include:

- Consensual agreement. Parties cannot be forced to arbitrate and must agree to be governed by the process. The parties' consent also places a limit on the tribunal's power because, in general, the tribunal can only decide matters that are within the scope of the arbitration agreement.<sup>22</sup>
- Party autonomy and control over the process. The parties are free to agree on procedural matters such as the number of arbitrators, the selection of arbitrators, the rules to be followed by the arbitral tribunal, etc.
- Neutral forum. International commercial arbitration allows the parties to select their own impartial adjudicators, rather than submitting to the jurisdiction of the other party's courts.<sup>23</sup>
- Limited court intervention. The parties may only involve the courts in an arbitral dispute where such involvement is expressly permitted by the governing legislation.
- Finality of the arbitral award. Part of the agreement to arbitrate is the agreement to be bound by the award granted by the tribunal. As such,

---

<sup>22</sup> Margaret L Moses, *The Principles and Practice of International Commercial Arbitration*, 3rd ed (Cambridge: Cambridge University Press, 2017) at 2.

<sup>23</sup> See Margaret L Moses, *The Principles and Practice of International Commercial Arbitration*, 3rd ed (Cambridge: Cambridge University Press, 2017) at 1: "This is particularly important in international commercial arbitration because parties do not want to be subject to the jurisdiction of the other party's court system. Each party fears the other party's 'home court advantage.'"

a party cannot appeal the merits of an arbitral award to a court. The only recourse against an arbitral award is to make an application to have it set aside. Such an application can only be based on the limited procedural grounds set out in the governing legislation.

- Relative ease of international recognition or enforcement. Signatories to the New York Convention and the Model Law are required to recognize and enforce foreign arbitral awards, “...unless there are serious procedural irregularities, or problems that go to the integrity of the process.”<sup>24</sup>

These principles are reflected in the provisions governing international commercial arbitration in Alberta, which are found in the Alberta Act, the New York Convention and the Model Law.

## **B. The Alberta Act**

---

[29] As noted in Chapter 1, the Alberta Act establishes the basic legislative framework for the conduct of international commercial arbitration in this province. The Act adopts the New York Convention as Schedule 1 and the Model Law as Schedule 2, making them applicable law in Alberta. The Alberta Act also includes provisions governing interpretation, application, and the consolidation of arbitral proceedings.

## **C. Schedule 1: The New York Convention**

---

### **1. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS**

[30] The purpose of the New York Convention is the summary recognition and enforcement of foreign arbitral awards. Contracting States have a general obligation to recognize foreign arbitral awards as binding and enforce them in accordance with their rules of procedure, subject to the conditions laid out in the rest of the Convention. For example, the Convention establishes that States are prohibited from imposing “substantially more onerous conditions or higher fees

---

<sup>24</sup> Margaret L Moses, *The Principles and Practice of International Commercial Arbitration*, 3rd ed (Cambridge: Cambridge University Press, 2017) at 3.

or charges” on the recognition or enforcement of foreign arbitral awards “than are imposed on the recognition or enforcement of domestic arbitral awards.”<sup>25</sup>

[31] The Convention also sets out when enforcement of a foreign arbitral award may be refused. If proven by the party against whom enforcement is sought, the following grounds may justify refusal of enforcement:<sup>26</sup>

- incapacity of the parties to the arbitration agreement;
- invalidity of the arbitration agreement;
- improper notice of the original arbitration proceedings; or
- improper composition of the arbitral tribunal.

Similarly, the Convention sets out the grounds of non-arbitrability and public policy according to which the enforcing court may, on its own initiative, refuse recognition or enforcement.<sup>27</sup>

## **2. REFERRAL BY A COURT TO ARBITRATION**

[32] The Convention also ensures that enacting states will recognize written arbitration agreements. If litigation is commenced in respect of a matter contained in the arbitration agreement, a party may request that the court refer the parties to arbitration rather than proceeding with the litigation. The court must honour the request for a referral to arbitration, unless the court finds that the arbitration agreement is “null and void, inoperative or incapable of being performed.”<sup>28</sup>

## **D. Schedule 2: The Model Law**

---

### **1. SCOPE OF APPLICATION**

[33] The Model Law applies only to international commercial arbitrations that are conducted in the territory of the enacting State.<sup>29</sup> Though the Model Law

<sup>25</sup> New York Convention, art III.

<sup>26</sup> New York Convention, art V.1.

<sup>27</sup> New York Convention, art V.2.

<sup>28</sup> New York Convention, art II.3.

<sup>29</sup> Model Law, art 1(3) provides that an arbitration is considered international if the parties have their place of business in different States, the place of arbitration is outside of the State in which the parties have their place of business, the place where a substantial part of the commercial obligations are performed is outside

does not provide a definition of what constitutes a commercial arbitration, UNCITRAL does provide an “illustrative list of commercial relationships” as a footnote to article 1(1).<sup>30</sup>

## 2. LIMITED COURT INVOLVEMENT AND ASSISTANCE

[34] It is generally accepted that the hallmark of the arbitral process is the conscious decision by the parties “to exclude court jurisdiction and ... prefer expediency and finality”<sup>31</sup> of the arbitral process. Out of respect for this decision, the Model Law contemplates court involvement only in the following instances:<sup>32</sup>

- Recognition of the arbitration agreement, including its compatibility with court-ordered interim measures (articles 8 and 9);
- Appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14);
- Determining the jurisdiction of an arbitral tribunal (article 16);
- Court assistance in taking evidence (article 27);
- Setting aside of an arbitral award (article 34);
- Recognition and enforcement of arbitral awards (articles 35 and 36).

[35] Further, the Model Law specifically provides that “In matters governed by this Law, no court shall intervene except where so provided in this Law.”<sup>33</sup> This

---

of the State in which the parties have their place of business, the State with which the subject matter is most closely connected is outside of the State in which the parties have their place of business, or the parties have expressly agreed that the subject matter of the arbitration relates to more than one country.

<sup>30</sup> *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3–21, 1985)*, UNCITRAL, 40th Sess, Supp No 17, UN Doc A/40/17 (1985) at paras 19-20, 22, online: <[daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=a/40/17\(supp\)&Lang=E](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=a/40/17(supp)&Lang=E)>. The footnote to article 1(1) of the Model Law reads as follows:

The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

<sup>31</sup> *UNCITRAL Model Law on International Commercial Arbitration: note by the Secretariat*, UNCITRAL, UN Doc A/CN.9/309 (1985) at para 14, online:

<[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/CN.9/309](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/CN.9/309)> [Secretariat Note].

<sup>32</sup> Secretariat Note at para 15.

<sup>33</sup> Model Law, art 5.

assures foreign users that all instances of possible court intervention will be found in the legislation.<sup>34</sup>

### 3. THE ARBITRATION AGREEMENT

[36] The Model Law closely follows the New York Convention by stipulating that all arbitration agreements must be in writing.<sup>35</sup> It also establishes that the courts must refer parties to arbitration if an arbitration agreement exists with respect to the same subject matter under dispute in court, unless the court finds the agreement is “null and void, inoperative or incapable of being performed”.<sup>36</sup>

### 4. COMPOSITION OF THE ARBITRAL TRIBUNAL

[37] Subject to the fundamental requirements of fairness and justice, parties to an arbitration are free to agree on the particular arbitral procedures to be followed. However, if the parties have not, or cannot, agree on the applicable procedures, or have failed to address a particular issue, the Model Law provides default rules. It also permits court assistance regarding the process of appointment, challenge or termination of the mandate of an arbitrator.<sup>37</sup>

### 5. JURISDICTION OF THE ARBITRAL TRIBUNAL

[38] An arbitral tribunal has the ability to rule on its own jurisdiction, either as a preliminary question or as part of the final award on the merits. If jurisdiction is decided as a preliminary question, and the tribunal rules that it does have jurisdiction, either party may appeal that finding to the court. The court’s determination regarding jurisdiction is not subject to a further appeal.<sup>38</sup>

[39] In addition, unless otherwise agreed by the parties, the tribunal may order interim measures of protection, including the provision of appropriate security.<sup>39</sup>

---

<sup>34</sup> *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3–21, 1985)*, UNCITRAL, 40th Sess, Supp No 17, UN Doc A/40/17 (1985) at para 63, online: <[daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=a/40/17\(supp\)&Lang=E](https://access-ods.un.org/access.nsf/Get?OpenAgent&DS=a/40/17(supp)&Lang=E)>.

<sup>35</sup> Model Law, art 7(2).

<sup>36</sup> Model Law, art 8.

<sup>37</sup> Model Law, arts 11-14.

<sup>38</sup> Model Law, art 16.

<sup>39</sup> Model Law, art 17.

## 6. CONDUCT OF ARBITRAL PROCEEDINGS

[40] Arbitrations must adhere to the fundamental requirements of procedural justice. In other words, the parties must be treated with equality and each party must be given a full opportunity to present his or her case.<sup>40</sup>

[41] The parties are permitted to establish their own rules of procedure for the arbitration. Failing agreement, the tribunal may, subject to the default provisions of the Model Law, conduct the arbitral process in any manner it considers appropriate. This may include decisions regarding admissibility, relevance, materiality and weight of evidence.<sup>41</sup>

## 7. RECOURSE AGAINST ARBITRAL AWARD

[42] Once an arbitral tribunal has made its final decision, the exclusive recourse against an arbitral award is an application to a court to have it set aside. The Model Law provides an exhaustive list of grounds for setting aside an award. The grounds are separated into two categories: (1) grounds that are to be proven by one party and (2) grounds that the court may consider on its own initiative.

[43] The grounds that must be proven by one party are:

- One of the parties lacked the capacity to conclude the agreement;
- Lack of a valid agreement;
- Lack of notice regarding the proceedings;
- Lack of notice regarding the appointment of an arbitrator;
- Inability of one party to present its case;
- The resulting award deals with matters not covered by the submission to arbitration; and
- The composition of the arbitral tribunal or the conduct of the proceedings were contrary to the arbitration agreement or the Model Law.

---

<sup>40</sup> Model Law, art 18.

<sup>41</sup> Model Law, art 19.

[44] The grounds that the court may consider on its own initiative are:

- the subject matter of the dispute is not capable of settlement through arbitration under the national law of the State; or
- the award violates public policy.

However, because the set aside application may only be made to a court in the State where the award was granted, “the grounds relating to public policy, including non-arbitrability, may be different in substance, depending on the State in question”.<sup>42</sup>

[45] Finally, a set aside application does not preclude an appeal to an arbitral tribunal of second instance, if the parties agree to that mechanism. It also does not preclude seeking court control by way of defence in enforcement proceedings.

## **8. RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS**

[46] The Model Law provisions regarding recognition and enforcement of arbitral awards “reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the 1958 New York Convention.”<sup>43</sup> In other words, any arbitral award shall be recognized as binding and enforceable, regardless of where it was made, unless one of the grounds justifying refusal of recognition or enforcement applies.

[47] The Model Law sets out an exhaustive list of grounds upon which recognition or enforcement of an arbitral award may be refused. These grounds are identical to the grounds set out in the New York Convention. Any other procedural details are left to the laws and practices of the court where recognition and enforcement is sought.

---

<sup>42</sup> Secretariat Note at para 44.

<sup>43</sup> Secretariat Note at para 45.



## CHAPTER 3

## The Need for Reform

A. Introduction

---

[48] Parties engaged in international commercial litigation prefer to resolve disputes by arbitration. There are several reasons for this. Arbitration provides a neutral forum under the control of the parties, which prevents the uncertainty of litigating substantive matters before foreign courts. Arbitration also largely prohibits foreign court interference in its process. Summary recognition and enforcement of arbitral awards are available in jurisdictions where assets are found, without having to re-litigate the merits of the case. The flexibility of arbitration also accommodates the parties' legal and cultural backgrounds, which can vary dramatically. Moreover, as with any kind of arbitration, the arbitral process ensures privacy, finality and the ability to choose an appropriately skilled and experienced arbitrator to decide the dispute.<sup>44</sup>

[49] As noted in Chapter 1, Canada's status as a Model Law state and a New York Convention state helps to make it a leader in international commercial arbitration. Because of the widespread adoption of the Uniform Act 1986 among the provinces and territories, Alberta can claim and benefit from this status as well. Not only has this status facilitated the growth of Canada's international trade, it has also resulted in:<sup>45</sup>

... the growth of the community of arbitration practitioners within Canada to the point where many of the world's most respected international arbitrators, academics and arbitration counsel are Canadians. Increasingly, international arbitrations are "seated" in Canada. A number of home-grown Canadian arbitral institutions have emerged to consolidate and promote our arbitration expertise and resources, and to try to exploit the business opportunity of attracting more international arbitrations, more international arbitration conferences and more involvement by Canadians in international dispute resolution.

[50] Today, however, thirty years after the creation of the Uniform Act 1986 and its adoption in the Alberta Act, this status has been eroded by several factors

---

<sup>44</sup> ULCC Interim Report at para 4.

<sup>45</sup> ULCC Interim Report at para 6 [footnote in quoted text has been omitted].

which put at risk our ability to demonstrate leadership in the field of international commercial arbitration. Alberta law should provide for the most effective and modern international commercial arbitration system, which would best facilitate international trade and commerce in Alberta and Canada.

## **B. Reasons for Reform**

---

### **1. THE 2006 AMENDMENTS TO THE MODEL LAW**

[51] The main factor eroding our status as an up-to-date Model Law state is that the version of the Model Law incorporated in the Alberta Act is no longer current. In 2006, UNCITRAL amended the Model Law to address several problematic gaps which had become apparent. The main areas covered by these amendments are:<sup>46</sup>

- A new provision requiring those who interpret the Model Law to have regard to its international origin and promote uniformity of application and observance of good faith;
- As electronic communication and other technologies become widely used, Model Law states are given an option either to:
  - modify the requirement for written arbitration agreements so as to accommodate these new realities, or
  - remove the writing requirement altogether;
- Much more detailed provisions governing an arbitral tribunal's ability to make interim orders, including:
  - what types of interim orders are available;
  - the tests for obtaining them;
  - authorization for an arbitral tribunal to modify, suspend or terminate interim orders;
  - ordering of security;
  - creation of a requirement for prompt disclosure of material circumstances and changes affecting interim orders;

---

<sup>46</sup> ULCC Final Report at paras 47-62.

- creation of a cause of action for damages where an interim measure is wrongly obtained;
- enforcement of interim orders by a court and the grounds on which a court may refuse recognition and enforcement;
- Empowering an arbitral tribunal to make an *ex parte* preliminary order if the party intends to make an interim application and can show that its purpose would be frustrated without such an order.

[52] Alberta and other Canadian jurisdictions have been able to get by so far without having these 2006 amendments in our Uniform Law-based statutes because lawyers who are aware of this deficiency either choose to draft equivalent provisions into clients' arbitration agreements or incorporate by reference into those agreements the Rules of recognized arbitration institutions or organizations which also contain those equivalents.

[53] If the 2006 amendments are necessary and worthwhile improvements to the original Model Law, then it would be better if they were simply included directly in the Alberta Act. This, of course, would require legislative reform.

## 2. DIFFERENCES IN ARBITRATION PRACTICE AND CANADIAN STATUTES

[54] When implementing the Uniform Act 1986 across Canada, certain anomalies arose among some of the provincial statutes which undermine a harmonized international commercial arbitration practice in Canada. Other differences in arbitration practice have also led to some practical difficulties. The most notable issue in this area is the question of what the harmonized limitation period should be for recognizing and enforcing a foreign arbitral award.

## 3. ADDITIONAL ISSUES

[55] The ULCC also examined four other issues but decided against including provisions to address them in the Uniform Act 2014. Legislating in these areas would cause Canadian law to depart too substantially from international norms and undermine the benefits of international harmonization. These four issues are:<sup>47</sup>

---

<sup>47</sup> ULCC Final Report at paras 100-116.

- When the Model Law is silent about whether an appeal lies from a court order, should such appeals be prohibited in the Uniform Act 2014?
- To what extent should parties be allowed to contract out of the Uniform Act 2014?
- Should the Uniform Act 2014 contain provisions governing confidentiality of arbitral proceedings?
- When it comes to selecting an arbitrator, should the Uniform Act 2014 prevent parties from agreeing to nationality restrictions? Moreover, when courts appoint an arbitrator, should the legislation contain a specific test of impartiality and independence for the court to use?

[56] Similarly, British Columbia's recently amended international commercial arbitration statute contains three provisions that are not included in the Uniform Act 2014.<sup>48</sup> These three provisions address:

- Whether third party funding of an arbitration is against public policy;
- Who may represent a party to an arbitral proceeding; and,
- The liability of an arbitrator.

## C. The Need for Reform

---

[57] Maintenance of Canada's and Alberta's reputations as strong Model Law jurisdictions is a critical factor in attracting and retaining international commercial arbitration business. Our laws need to be updated and modernized so that they are again on par with international standards. The value and importance of uniformity in this area, or at least of strong harmonization, cannot be overstated.

[58] Not only would reform benefit Alberta's international commercial arbitration community, but it would make our system easier to navigate for foreign users, especially in the area of recognition and enforcement of arbitral awards. Uniformity promotes familiarity with and ease of use of our arbitration infrastructure by foreign commercial interests. This provides an effective and modern arbitration system for those concluding international investments in

---

<sup>48</sup> *International Commercial Arbitration Act*, RSBC 1996, c 233, ss 21.01, 36(3)-(4), 36.02 [BC Act].

Alberta and Canada which, of course, would promote and benefit cross-border business.

[59] Ontario has already implemented the Uniform Act 2014.<sup>49</sup> The *International Commercial Arbitration Act, 2017* [the Ontario Act] came into effect on March 22, 2017. Quebec has also incorporated the substance of the 2006 Model Law into the arbitration chapter of its new *Code of Civil Procedure* which came into effect on January 1, 2016.<sup>50</sup>

[60] British Columbia established a working group to update its international commercial arbitration legislation, with the 2006 Model Law amendments as a key area to be addressed. In May 2018, the amendments to the *International Commercial Arbitration Act* [the BC Act] came into force.<sup>51</sup> Retaining its current form, the BC Act incorporates the text of the Model Law directly into the statute, rather than appending it as a Schedule. It also adopts the 2006 Model Law amendments and certain provisions of the Uniform Act 2014.<sup>52</sup>

## D. The Principles of Reform

---

[61] In revising its Uniform Act 1986, the ULCC formulated and chose to abide by the following policy guidelines:<sup>53</sup>

- The Uniform Act 2014 should continue to be based on the Model Law and New York Convention;
- It should continue to be a single statute which incorporates the Model Law and Convention as schedules;
- It should depart from the Model Law only for good reason;
- There should continue to be separate statutes for international and non-international (domestic) arbitration;
- Uniformity within Canada should be actively promoted so as to avoid undue complexity for foreign users.

<sup>49</sup> *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Schedule 5 [Ontario Act].

<sup>50</sup> Sheldon Gordon, "International Commercial Arbitration Harmony", *Lexpert Magazine* 19:1 (16 October 2017) 50 at 54; online: <[www.lexpert.ca/article-print/international-commercial-arbitration-harmony/](http://www.lexpert.ca/article-print/international-commercial-arbitration-harmony/)>

<sup>51</sup> BC Act.

<sup>52</sup> The New York Convention is not addressed in the BC Act. Rather, it is appended as a Schedule to the *Foreign Arbitral Awards Act*, RSBC 1996, c 154.

<sup>53</sup> ULCC Final Report at para 4.

[62] ALRI also endorses these guidelines and principles of reform as being eminently reasonable in this area of the law. We will apply them in reaching our own decisions and recommendations in this Report.

## **E. General Recommendation for Reform**

---

[63] The Uniform Act 2014 is the end result of a lengthy and extensive process of research, input and consultation from leading Canadian experts and practitioners in the area of international commercial arbitration.<sup>54</sup> ALRI is satisfied that a pressing need for reform exists and that the Uniform Act 2014 represents a thorough, Canada-wide consensus on how best to achieve the necessary updating of our law in this area. However, while ALRI recommends its general framework for implementation in Alberta, we will in this Report examine each of the issues at play to assess how best to address it in our province, as well as ways in which the Uniform Act 2014 must be revised or customized to suit Alberta needs.

### **RECOMMENDATION 1**

---

Alberta's *International Commercial Arbitration Act* should be repealed and replaced by the Uniform International Commercial Arbitration Act (2014), subject to the changes specified in this Report.

---

<sup>54</sup> ULCC Final Report at paras 5-11.

## CHAPTER 4

# Main Areas of Reform

## A. Introduction

---

[64] This chapter examines the Uniform Act 2014 for the purposes of:

- Discussing the issues addressed by each section;
- Exploring the uniform solutions proposed by the Uniform Act 2014 for those issues;
- Assessing what, if any, changes or customizing might be advisable in a new Alberta Act.

[65] Since Recommendation 1 in Chapter 3 has already recommended the general adoption of the Uniform Act 2014 in Alberta, this chapter will not contain separate, formal recommendations about individual provisions that ALRI endorses. Any formal recommendations made in this chapter will only concern changes to the Uniform Act 2014 or customized provisions that ALRI considers necessary.

## B. Organization of the Uniform Act 2014

---

[66] The Uniform Act 2014 is divided into four formal Parts entitled:

- Interpretation – contains key definitions;
- The Convention – implements the New York Convention (Schedule I of the Act) and contains all provisions relevant to this area;
- The Model Law – implements the Model Law with its 2006 amendments (Schedule II of the Act) and contains all provisions relevant to this area;
- General – contains supplementary provisions of general application.

[67] The headings of each Part have been updated in the Uniform Act 2014 to more succinctly and accurately address the contents of each Part. Certain provisions have also been placed in different Parts than in the current statute. These changes all represent an improvement.

[68] There was some discussion during the Project Advisory Committee meetings about the overall form of the Uniform Act 2014. Certain members felt that appending the New York Convention and the Model Law as Schedules to the Uniform Act 2014 creates repetition, confusion and unnecessary overlap between the provisions governing recognition and enforcement. In their view, the Uniform Act 2014 should follow the BC Act and incorporate the text of the New York Convention and the Model Law directly into the legislation, merging duplicate provisions where necessary.

[69] However, most members of the Project Advisory Committee felt that a change in form is unnecessary. The current approach is universally familiar and signals to international users that Alberta is a Model Law jurisdiction. There is no need for parties to review the legislation in order to confirm that the provisions are the same as the New York Convention or Model Law. Further, the New York Convention and the Model Law tend to have different users, so there is no need to eliminate overlap. Finally, the ULCC's principles of reform – which ALRI has adopted – specifically state that it is desirable to continue to append the New York Convention and Model Law as separate Schedules to a single statute.<sup>55</sup> ALRI agrees that the New York Convention and Model Law should be appended as schedules and, as a result, is not recommending a change to the form of the Uniform Act 2014.

## C. Interpretation

---

### 1. DEFINITIONS

[70] Section 1 of the Uniform Act 2014 makes several changes to the uniform definitions as currently found in the Alberta Act's equivalent section:

- Use of the term “Model Law” instead of “International Law.” This is the more logical short form to use and is a welcome change;

<sup>55</sup> In the ULCC Discussion Paper, note 19 at para 22, the ULCC Working Group justified their decision to append the New York Convention and the Model Law as separate Schedules to a single statute as follows:

The Working Group considers that implementing both instruments in the form of schedules to a single, relatively short statute has several advantages. The international arbitration community is familiar with the text of the two instruments. Jurisprudence and academic commentary cite their provisions. No changes can or should be made to the text of the multi-lateral Convention. Additions to or departures from the Model Law can be highlighted in the operative part of the Act.

- Amendment of the definition of “Model Law” to make it absolutely clear that the 2006 amendments are now included. However, the ULCC Final Report quite rightly notes that:<sup>56</sup>

The definition of Model Law does not include any amendments UNCITRAL may make to the Model Law in the future. If such amendments are made, their suitability for adoption in Canada will have to be considered separately and specific amendments to Canadian legislation would have to be made to implement any further changes.

- Restatement in a more precise way that words and expressions used in the Uniform Act 2014 have the same corresponding meanings as in the Convention and the Model Law. Because some words have slightly different meanings in the Convention than they do in the Model Law, the restatement clarifies that the Convention’s meanings are to be used in the Part about the Convention, and the Model Law’s meanings are to be used in the Part about the Model Law.

[71] In organizing its new Act, Ontario did not retain a general interpretation section at the start of its new statute.<sup>57</sup> Nor does it define “Convention” or “Model Law” *per se* although those short form terms are used throughout the Ontario Act, choosing instead to treat their meaning as obviously self-evident.

[72] As an alternative to the Uniform Act 2014’s approach, Ontario combines the substantive parts of the definition section with the Ontario sections which formally incorporate the Convention and Model Law and make them applicable law in the province, as follows:

- In the Part dealing with the Convention, section 1 of the Ontario Act provides that words and expressions in the Part have the same meaning as in the Convention. Then section 2 states the full name and date of the Convention, identifies it as being schedule 1 to the Act, and provides that it has “force of law in Ontario in relation to arbitral

<sup>56</sup> ULCC Final Report at para 25.

<sup>57</sup> Generally speaking, Alberta legislative style does not make a general interpretation section its own “Part” in a statute but simply locates it at the beginning of a statute as section 1, stating that the definitions apply throughout the Act. So in a new Alberta Act, these definitions should not formally constitute Part I of the Act as they do in the Uniform Act 2014. But otherwise, the substance of the Uniform Act 2014’s revised definitions should remain the same.

awards or arbitration agreements in respect of differences arising out of commercial legal relationships.”

- In the Part dealing with the Model Law, sections 4 and 5 enact equivalent provisions for the Model Law.

[73] Ontario’s approach uses a more sophisticated and precise drafting style than the Uniform Act 2014, but either approach is technically fine and substantively amounts to the same thing. The Project Advisory Committee expressed a preference for the Ontario approach because, in their view, it is easier to read and understand.

[74] Either approach achieves the same result. Thus, the decision about which style to use is best left to Alberta’s legislative drafters.

## 2. MEANING OF “COMMERCIAL”

[75] Like its predecessor, the Uniform Act 2014 does not define “commercial” or “commercial legal relationship.” The ULCC Working Group which created the new uniform model apparently debated this issue at length but ultimately decided to retain the same approach on this matter:<sup>58</sup>

There was some support among commentators to include definitions of “commercial” and “commercial relationship.” It was noted that the current British Columbia ICAA [*International Commercial Arbitration Act*] sets out when an arbitration is to be considered to be “commercial,” based largely on the footnote in the Model Law. In the end, the [ULCC] Core Group concluded that the New Uniform ICAA should not contain such separate definitions, because:

- (a) there is no indication that the current approach has created any particular mischief;
- (b) it is very difficult, and perhaps impossible, to anticipate the kind of “borderline” cases and relationships that might arise so as to be confident that a suitable comprehensive definition can be developed; and
- (c) the footnote in the Model Law likely provides sufficient guidance while leaving appropriate flexibility to serve the interests of justice in individual cases.

---

<sup>58</sup> ULCC Final Report at para 30.

[76] The Project Advisory Committee expressed similar sentiments. ALRI agrees with the ULCC's decision and does not recommend deviating from the Uniform Act 2014 in this regard.

## **D. The New York Convention**

---

[77] In this Part of the Uniform Act 2014, section 2 details how the New York Convention applies within the enacting jurisdiction. Three aspects of application are addressed.

### **1. RESERVATIONS**

[78] Section 2(1) provides that the Convention applies:

... to arbitral awards or arbitration agreements, whether made before or after the coming into force of this Part, in respect of differences arising out of commercial legal relationships.

[79] As previously noted in Chapters 1 and 2, the Convention gives enacting jurisdictions two options concerning application. Article I.3 allows an enacting State to limit the Convention's application to awards made in another contracting State only ["the reciprocity reservation"]. It also allows an enacting State to limit the Convention's application only to commercial legal relationships ["the commercial reservation"]. No Canadian jurisdiction has enacted the reciprocity reservation. All Canadian jurisdictions except Quebec have opted to enact the commercial reservation in their existing statutes. Therefore, the Uniform Act 2014 simply carries forward this existing uniform situation of enacting the commercial reservation, without further mention of the reciprocity reservation.<sup>59</sup> Alberta should continue with this established policy as well.

### **2. APPLICATION IN A FEDERAL STATE**

[80] Section 2(2) of the Uniform Act 2014 clarifies how application of the Convention is to occur within our federal system, where each province and territory is itself an enacting State vis-à-vis the other provinces and territories. This provision ensures that an international arbitral award made in one Canadian jurisdiction will be treated as such in all the other Canadian jurisdictions, not as a domestic arbitral award. Similarly, a domestic arbitral

---

<sup>59</sup> ULCC Final Report at paras 27-28.

award made in one Canadian jurisdiction will be treated as such across Canada, not as an international arbitral award.<sup>60</sup>

[81] The Uniform Act 1986 did not have such a provision. Neither does the Alberta Act which is based on it. The new section 2(2) remedies this ambiguity and “create[s] a clearer foundation for the application of the Convention”.<sup>61</sup> Section 2(3) of the Ontario Act replicates the new provision. It should be adopted in Alberta as well.

### 3. DESIGNATED AUTHORITY

[82] Section 3 of the Uniform Act 2014 designates the appropriate court in the enacting jurisdiction that will deal with applications to recognize and enforce an arbitral award pursuant to the Convention. In the Alberta Act, the designated court is the Court of Queen’s Bench.

[83] The Project Advisory Committee indicated that any new international commercial arbitration legislation should specify that applications made to the Court of Queen’s Bench must be made to a judge, rather than a master in chambers. Because arbitration legislation limits parties’ rights of appeal in certain circumstances to only one level of review, it is important that these appeal arguments are heard by a judge.<sup>62</sup>

#### a. General Overview of Masters’ Jurisdiction in Alberta

[84] Organizationally, a master in chambers is part of the Court of Queen’s Bench. Thus, a reference to the Court of Queen’s Bench includes a master, unless a more specific rule applies to exclude the master’s jurisdiction.<sup>63</sup>

<sup>60</sup> ULCC Final Report at paras 36-42.

<sup>61</sup> ULCC Final Report at para 39.

<sup>62</sup> For example, appeals are not allowed from court decisions made pursuant to article 11 or article 14 of the Model Law. In other words, if the initial court application under either article were made to a master, an appeal from the master to a judge would be prohibited.

<sup>63</sup> See *Alberta Rules of Court*, Alta Reg 124/2010, Appendix - Definitions:

“Court” means the Court of Queen’s Bench of Alberta acting by a judge or master except

(a) when the context refers to the Court as an institution, and

(b) in a form set out in Division 2 of Schedule A, where it means either the Court of Queen’s Bench of Alberta or the Provincial Court of Alberta, as the circumstances require;

See also The Honourable William A Stevenson & The Honourable Jean E Côté, “Judges’ and Other Officers’ Powers” in *Civil Procedure Encyclopedia*, vol 1 (Edmonton: Juriliber, 2003) at 3-2:

Therefore, it is understood that where a statute gives power to ‘the court’ to do something, short of trial, a master has that power.

[85] In Alberta, the general jurisdiction of a master in chambers is governed by section 9 the *Court of Queen's Bench Act*:<sup>64</sup>

### **Jurisdiction**

9(1) In regard to all matters brought or proposed to be brought in the Court, a master in chambers

(a) has the same power and may exercise the same jurisdiction as a judge sitting in chambers except in respect of

- (i) appeals, applications in the nature of appeals, applications concerning the hearing of appeals and applications to vary or rescind an order made by a judge,
- (ii) subject to subsection (2), stays of proceedings after verdict or on judgment after trial or hearing before a judge, unless all parties consent to the exercise of that jurisdiction by the master, and
- (iii) a matter for which the Chief Justice has given a direction that a master is not to exercise that jurisdiction,

and

(b) with the consent of the parties, has the same power and may exercise the same jurisdiction as a judge for hearing, determining and disposing of all applications and other matters.

(2) A master in chambers may, under section 181(1)(a) of the *Traffic Safety Act*, order that a suspension of a licence be stayed.

(3) Notwithstanding subsection (1), the power of and the jurisdiction exercisable by a master in chambers does not include

- (a) the trial of actions,
- (b) the determination of disputed or contentious questions of fact unless the parties agree to the disposition of the questions in chambers on affidavit evidence and without the trial of an issue or the hearing of oral evidence,
- (c) any matters relating to criminal proceedings or the liberty of the subject,
- (d) applications relating to civil contempt or for an injunction or a judgment or order in the nature of certiorari, prohibition, mandamus or quo warranto, or
- (e) anything that by law is required to be done by a judge.

<sup>64</sup> *Court of Queen's Bench Act*, RSA 2000, c C-31, s 9.

(4) Notwithstanding subsection (3), a master in chambers has the same power and may exercise the same jurisdiction as the Court under sections 17 and 27 to 32 of the *Maintenance Enforcement Act*.

[86] Further principles regarding masters' jurisdiction can also be found in case law. For example, the Alberta Court of Appeal has clarified that masters in chambers have jurisdiction to grant attachment orders under the *Civil Enforcement Act*,<sup>65</sup> but that they do not have jurisdiction to weigh evidence or assess a claim for unliquidated damages.<sup>66</sup>

[87] A 2016 Notice to the Profession and Public published on the Alberta courts website sets out the general types of applications a master may and may not hear.<sup>67</sup> It establishes that masters have jurisdiction to hear many procedural applications under the *Alberta Rules of Court*, as well as applications under the listed statutes.<sup>68</sup> It also specifically states that, where possible, any application that can be heard by a master should be returned before a master, rather than a judge.<sup>69</sup>

[88] There are two conflicting points worth highlighting with respect to jurisdiction. First, the majority of court applications permitted under international commercial arbitration legislation are procedural. Since Alberta masters generally deal with matters of procedure, it is arguable that they should have jurisdiction to hear all applications under Alberta's international commercial arbitration legislation.

[89] Second, masters do not have jurisdiction to weigh evidence, hear oral testimony or decide an application based on contentious or disputed facts (unless the parties agree to proceed by way of affidavit evidence).<sup>70</sup> It is conceivable that every international commercial arbitration court application would involve

<sup>65</sup> *Proprietary Industries Inc v Workum*, 2006 ABCA 225; *Civil Enforcement Act*, RSA 2000, c C-15.

<sup>66</sup> *SBI Management Ltd v 109014 Holdings Ltd*, 1981 ABCA 235.

<sup>67</sup> Court of Queen's Bench of Alberta, "Court Applications and Master's Jurisdiction – Revised November 25, 2016", (Notice to the Profession and Public), at 1, online: <<https://www.albertacourts.ca/qb/resources/notices-to-the-profession-public>>.

<sup>68</sup> *Alberta Rules of Court*, Alta Reg 124/2010. The listed statutes include the *Builders' Lien Act*, the *Civil Enforcement Act*, the *Condominium Property Act*, the *Law of Property Act*, the *Maintenance Enforcement Act*, the *Land Titles Act* and the *Residential Tenancies Act*: Court of Queen's Bench of Alberta, "Court Applications and Master's Jurisdiction – Revised November 25, 2016", (Notice to the Profession and Public), at 3, online: <<https://www.albertacourts.ca/qb/resources/notices-to-the-profession-public>>.

<sup>69</sup> Court of Queen's Bench of Alberta, "Court Applications and Master's Jurisdiction – Revised November 25, 2016", (Notice to the Profession and Public), at 1, online: <<https://www.albertacourts.ca/qb/resources/notices-to-the-profession-public>>.

<sup>70</sup> *SBI Management Ltd v 109014 Holdings Ltd*, 1981 ABCA 235; *Court of Queen's Bench Act*, RSA 2000, c C-31, s 9.

contentious or disputed facts. Thus, there is at least a theoretical argument that a master does not have any jurisdiction under the Alberta Act, the Uniform Act 2014, the New York Convention or the Model Law.

**b. Types of Court Applications Permitted in the Context of International Commercial Arbitration**

[90] One of the fundamental principles of arbitration is limited court intervention. In other words, in the context of international commercial arbitration, court involvement or court applications are only permitted where specifically authorized by statute, the New York Convention or the Model Law.<sup>71</sup> A chart summarizing the areas where court intervention is permitted in Alberta is attached as Appendix D.

**c. Designated authority in other jurisdictions**

[91] The following list summarizes the authorities designated to hear court applications under each province's or territory's international commercial arbitration statute:

- British Columbia – Supreme Court<sup>72</sup>
- Alberta – Court of Queen's Bench<sup>73</sup>
- Saskatchewan – Court of Queen's Bench<sup>74</sup>
- Manitoba – Court of Queen's Bench<sup>75</sup>
- Ontario – Superior Court of Justice<sup>76</sup>
- New Brunswick – Court of Queen's Bench<sup>77</sup>
- Nova Scotia – Trial Division of the Supreme Court<sup>78</sup>

<sup>71</sup> Article 5 of the Model Law provides:

In matters governed by this Law, no court shall intervene except where so provided in this Law.

<sup>72</sup> BC Act; *Foreign Arbitral Awards Act*, RSBC 1996, c 154, s 4. The only exception under the BC Act is with respect to the appointment of arbitrators, which specifically designates the Chief Justice of the Supreme Court as the designated authority. See BC Act, s 11.

<sup>73</sup> Alberta Act, ss 3, 9.

<sup>74</sup> *The International Commercial Arbitration Act*, SS 1988-89, c I-10.2, s 2(1)(a).

<sup>75</sup> *The International Commercial Arbitration Act*, CCSM c C151, ss 3,9.

<sup>76</sup> Ontario Act, ss 3, 6(2).

<sup>77</sup> *International Commercial Arbitration Act*, RSNB 2011, c 176, s 4.

- Prince Edward Island – Supreme Court<sup>79</sup>
- Newfoundland and Labrador – Trial Division<sup>80</sup>
- Nunavut - Nunavut Court of Justice<sup>81</sup>
- Northwest Territories – Supreme Court<sup>82</sup>
- Yukon – Supreme Court<sup>83</sup>

[92] With the exception of the provision dealing with the appointment of arbitrators in British Columbia (which designates the Chief Justice of the Supreme Court), each province or territory only designates the level of court. In other words, no province or territory specifically excludes the jurisdiction of a master in chambers in their international commercial arbitration legislation.

[93] It should be noted, however, that not all provinces and territories have masters in chambers or an equivalent (for example, none of the territories have masters in chambers). In those provinces and territories, a reference to particular level of court would only include a judge of that court.

**d. Should Alberta law be changed?**

[94] There are two options for how to deal with the designated authority issue in Alberta:

- Option 1: recommend that the Court of Queen’s Bench should continue to be identified as the designated authority under both the New York Convention and the Model Law.
- Option 2: recommend that a judge of the Court of Queen’s Bench should be identified as the designated authority under both the New York Convention and the Model Law.

[95] Option 1 has the following advantages:

- It preserves Alberta’s current policy;

---

<sup>78</sup> *International Commercial Arbitration Act*, RSNS 1989, c 234, ss 4, 10.

<sup>79</sup> *International Commercial Arbitration Act*, RSPEI 1988, c I-5, ss 3, 9.

<sup>80</sup> *International Commercial Arbitration Act*, RSNL 1990, c I-15, ss 4, 10.

<sup>81</sup> *International Commercial Arbitration Act*, RSNWT (Nu) 1988, c I-6, ss 5, 6.

<sup>82</sup> *International Commercial Arbitration Act*, RSNWT 1988, c I-6, ss 5, 6.

<sup>83</sup> *International Commercial Arbitration Act*, RSY 2002, c 123, s 7.

- It permits masters in chambers to assist with matters of procedure;
- It leaves decisions regarding the court's internal functioning up to court administration;
- It is usually faster to appear before a master, which reinforces the expediency of the arbitral process;
- It follows the current legislative practice across Canada by designating only the level of court in the international commercial arbitration statute; and,
- It strengthens uniformity across Canada.

[96] The main disadvantage of Option 1 is that it does not clearly communicate the exact applications that are returnable before a master, which is not as useful for foreign audiences.

[97] Option 2 has the following advantages:

- It provides a clear rule, which is especially important for foreign users;
- It recognizes that, in situations where an appeal is prohibited, it may be more appropriate for the application to be heard by a judge; and,
- It provides consistency by ensuring that all international commercial arbitration applications will be heard by the same type of decision maker.

[98] Considering that the Alberta Act only refers to the level of court (i.e., the Court of Queen's Bench) as the designated authority for both the New York Convention and the Model Law, the main disadvantage of Option 2 is that it would represent a policy change in Alberta.

[99] Ultimately, ALRI prefers to follow the uniform Canadian practice by designating only the level of court. As such, the new Alberta legislation should follow the current practice from the Alberta Act and appoint the Court of Queen's Bench as the designated authority under both the New York Convention and the Model Law.

## E. The Model Law

---

### 1. ADOPTION OF THE 2006 AMENDMENTS

[100] In this part of the Uniform Act 2014, section 4 makes the Model Law applicable in the enacting jurisdiction, thereby also incorporating the 2006 amendments to the Model Law. This is the major reform instituted by the Uniform Act 2014 and, of course, “was the primary impetus for the present legislative reform initiative.”<sup>84</sup>

[101] The 2006 amendments create four main areas of change in the Model Law. The ULCC Working Group examined and consulted on each area before recommending implementation. As the ULCC noted:<sup>85</sup>

For the most part, the benefits of the 2006 Model Law amendments were widely recognized and the proposal for their implementation in Canada was not controversial.

The one area of the 2006 amendments which did garner the most debate and concern is the new set of provisions about preliminary orders, but these provisions were ultimately recommended for adoption by the ULCC.

[102] This Report will now examine each of the four main areas of reform created by the 2006 amendments.

#### a. International origin and general principles

[103] Article 2A is a new provision in the Model Law. Article 2A(1) is a direction to those who interpret the Model Law to have regard “to its international origin and to the need to promote uniformity in its application and the observance of good faith.” As the ULCC noted:<sup>86</sup>

It does not go so far as to require consistency or to give legal effect to decisions of foreign courts. It endorses the practice that is already followed in Canada, as evident in many recent decisions of the Supreme Court of Canada.

---

<sup>84</sup> ULCC Final Report at para 45.

<sup>85</sup> ULCC Final Report at para 46.

<sup>86</sup> ULCC Final Report at para 48.

[104] However, the requirement to have regard to “the need to promote . . . the observance of good faith” raised some controversy during consultation because:<sup>87</sup>

[i]n the common law provinces of Canada there is no general duty of good faith. A good faith obligation of narrow scope may be implied into a contract only in very limited circumstances. Some commentators asked whether article 2A might impact parties’ substantive contractual rights by adding a good faith obligation of indeterminate scope. The large majority of commentators did not share that concern, however, and found that article 2A merely directs a court to be mindful that arbitration proceedings are expected to be conducted in good faith.

[105] While they did not view it as an overwhelming risk, some members of the Project Advisory Committee did share the concern that the wording of Article 2A(1) might cause unnecessary confusion. Often, arbitration agreements include a provision directing the parties to negotiate in good faith for a specific period of time before commencing an arbitration. The ambiguity in Article 2A(1) might allow one side to “game the system” by claiming that negotiations were not conducted in good faith, which would require repeat negotiations and would delay the arbitration. However, Committee members were also worried about the optics of removing the good faith wording and how that would affect the international perception of Alberta as a Model Law jurisdiction.

[106] The ULCC has made it clear throughout their commentaries that Article 2A(1) does not affect the parties’ substantive rights. At one point during the ULCC’s consultation, it discussed including an explanatory provision in the Uniform Act 2014, such as:<sup>88</sup>

Article 2A(1) of the Model Law is not to be interpreted as adding to the substantive rights and obligations of the parties to a dispute under applicable law, but shall be interpreted as requiring that when interpreting the Model Law regard is to be had to the need to promote the observance of good faith in the conduct of an arbitration.

[107] Though the suggested provision was not included in the Uniform Act 2014, the discussion surrounding it demonstrates that Article 2A(1) should not be interpreted as affecting the parties’ substantive obligations or their underlying commercial relationship.

<sup>87</sup> ULCC Final Report at para 49.

<sup>88</sup> ULCC Discussion Paper, note 19 at para 156.

[108] Ultimately, the ULCC concluded that the concerns on this point were relevant but they did not justify departing from the Model Law text. Both ALRI and the Project Advisory Committee members share this opinion.

[109] Article 2A(2) is a common sense provision that any matter not expressly settled in the Model Law is to be settled according to the general principles on which the Model Law is based. It does not affect the parties' substantive contractual rights. Both the ULCC and ALRI affirm this new provision.

**b. Definition and form of arbitration agreement**

[110] Article 7(2) of the original Model Law has a strict writing requirement for the validity of arbitration agreements. There must be a signed, written agreement or an exchange of "letters, telex, telegrams or other means of telecommunications which provide a record of the agreement, or . . . statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another." The writing requirement is also satisfied if a document containing an arbitration clause is incorporated as part of another written contract.

[111] In order to increase flexibility and ensure that modern electronic communications can also create a binding arbitration agreement, the 2006 amendments to the Model Law give enacting states two options in this area:

- Option I continues to mandate writing but relaxes the technical requirements to include situations where the *content* of the agreement is recorded in written form, regardless of whether the arbitration agreement itself was created orally, by conduct, or by other means. Other provisions ensure that the writing requirement can be met by electronic communications, an exchange of pleadings, or documents incorporated in a contract;
- Option II completely removes any writing requirement and simply leaves it to the applicable contract laws to govern the validity of the arbitration agreement's form.

[112] The ULCC would not go so far as to recommend removing all requirements for a written arbitration agreement and rejects Option II. Instead, it prefers the flexibility of Option I because:<sup>89</sup>

---

<sup>89</sup> ULCC Final Report at para 55.

While sophisticated commercial parties typically reduce their arbitration agreements to writing, formal writing requirements can become an issue with less sophisticated parties, whose arbitration agreements may arise by course of conduct. The Working Group considers it desirable for those parties' expectations to be recognized and enforced.

[113] Some members of the Project Advisory Committee had issues with the wording of Article 7(3) under Option I because, in their view, it contemplates a completely oral arbitration agreement. Parties give up certain due process rights when they agree to arbitrate, so it must be crystal clear that they have agreed to be governed by the process. In other words, oral arbitration agreements are insufficient and, to the extent that Article 7(3) suggests that they are permissible, it should not be implemented in Alberta.

[114] In the end, the majority of the Committee agreed that Article 7(3) must mean that an arbitration agreement is enforceable if it is reached orally but its terms are then reduced to writing. They suggested it would be clearer if the phrase "whether or not" was replaced by the phrase "regardless of whether", so that Article 7(3) read as follows:

An arbitration agreement is in writing if its content is recorded in any form, regardless of whether the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

However, the Committee did not ultimately suggest deviation from the Model Law on this point. In their view, provided that it is clear that the content of an arbitration agreement must still be recorded in writing, Option I is preferable to Option II.

[115] Accordingly, section 4(2) of the Uniform Act 2014 and section 5(2) of the Ontario Act explicitly implement Option I and reject Option II. The BC Act also adopts Option I, though the structure of the BC provision is slightly different. ALRI agrees with implementing the uniform approach in Alberta.

### **c. Interim measures**

[116] Article 17 of the original Model Law, as reflected in the Alberta Act and Uniform Act 1986, is a very general provision which authorizes an arbitrator to grant interim measures of protection. However, Article 17:<sup>90</sup>

---

<sup>90</sup> ULCC Final Report at para 57.

gives almost no guidance as to what constitutes an interim measure, the tests that should apply when interim measures are sought from an arbitral tribunal, the conditions that may be attached to such orders, or the vexing question of whether orders or awards granting interim measures of protection can be enforced by courts in the same manner as final awards under the Convention or the Model Law.

[117] The 2006 amendments remedy this vague and unsatisfactory situation with new, more detailed provisions created by UNCITRAL in consultation with numerous state delegations and experienced arbitration practitioners.<sup>91</sup>

[118] Revised article 17 now defines interim measures as temporary measures pending the resolution of the dispute that are designed to maintain or restore the status quo, prevent harm or prejudice to the arbitral process, or preserve assets or evidence. Article 17A sets out the fairly strict tests which applicants for an interim measure must meet. The harm must not be adequately reparable by damages, it must outweigh the harm caused to the party against whom the interim measure is ordered, and there must be a reasonable possibility that the requesting party will ultimately succeed on the merits of the claim.

[119] One member of the Project Advisory Committee expressed concern about the “reasonable possibility” test set out in Article 17A. In *RJR-MacDonald Inc v Canada (Attorney General)*, the Supreme Court of Canada established a three part test for granting interim relief:<sup>92</sup>

- There must be a serious question to be tried;
- There must be irreparable harm to the applicant if the request were refused; and,
- The balance of convenience must favour the applicant.

[120] In the Committee member’s view, the “reasonable possibility” test under Article 17A sets a lower threshold than the “serious question” test articulated by the Supreme Court and it is problematic for parties who arbitrate to be able to obtain relief more easily than parties who litigate. However, the majority of the Committee did not share this concern. They noted that the Model Law provisions governing interim measures were drafted by international parties with the intent that they be used and accepted across multiple countries and jurisdictions. In other words, creating an acceptable international scheme necessarily requires

<sup>91</sup> ULCC Final Report at para 58.

<sup>92</sup> *RJR-Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311.

certain departures from Canadian law. Changing the test under Article 17A to correspond with the test in *RJR MacDonald* would undermine uniformity and make Alberta less attractive as a Model Law jurisdiction.

[121] Articles 17B and 17C specifically address *ex parte* preliminary orders which are made without notice to the other party and are designed to preserve the status quo pending the making of an interim measure. Preliminary orders are the most controversial part of the 2006 amendments and will be separately discussed next under their own heading.

[122] Article 17D provides that an arbitral tribunal may modify, suspend or terminate an interim measure, including on its own initiative in exceptional circumstances and on notice to the parties. Article 17E(1) says that the arbitral tribunal may order appropriate security to be given by the party requesting the interim measure. Under article 17F(1), the arbitral tribunal may order that any material changes in circumstances affecting the order be promptly disclosed. If it turns out later that the interim measure should not have been granted, the party who applied for it is liable under article 17G for any costs and damages caused by the measure.

[123] Article 17H provides for court recognition and enforcement of an interim measure issued by an arbitral tribunal, irrespective of the jurisdiction in which it was issued. This is, however, subject to specified grounds in article 17I on which such recognition or enforcement may be denied. This “important innovation . . . was modelled, as appropriate, on the regime for the recognition and enforcement of arbitral awards under articles 35 and 36 of the Model Law.”<sup>93</sup> These provisions serve to make interim measures effective at preserving assets and evidence in an interjurisdictional setting.

[124] Finally, article 17J makes it clear that courts themselves can also issue interim measures in international commercial arbitration matters. This provision was added:<sup>94</sup>

...to put it beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that the party to such an arbitration

<sup>93</sup> UNCITRAL, “Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006” at para 27, online: [www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf) [Explanatory Note].

<sup>94</sup> Explanatory Note at para 30.

agreement is free to approach the court with a request to order interim measures.

Giving such authority to courts as well as to arbitral tribunals is especially important in situations where an arbitration has commenced, but an arbitral tribunal has not yet been constituted. Time is always of the essence in order to preserve assets or evidence via an interim order. Also, where assets or evidence are in the hands of a third party (such as a bank), an interim order from a court will be required since an arbitral tribunal cannot make orders against third parties who, by definition, are not parties to the arbitration agreement.<sup>95</sup>

[125] Certain members of the Project Advisory Committee disagreed with giving courts and arbitral tribunals concurrent jurisdiction under Article 17]. They agreed that, in the examples described above, it made sense for courts to have jurisdiction to order interim measures. However, in their view, it would be more appropriate to carve out legislative exceptions specifying when courts will have the ability to order interim measures, rather than providing for blanket concurrent jurisdiction. The majority of the Project Advisory Committee did not share these concerns.

[126] Leaving aside the matter of preliminary orders, the new general provisions concerning interim measures were (apart from some reservations by Quebec) “enthusiastically endorsed by members of the [ULCC] Working Group and all commentators.”<sup>96</sup>

[127] ALRI agrees that there is no principled reason to reject the proposed interim measure provisions. They provide an additional means to promote the just and expeditious resolution of disputes and the parties are free to exclude them if they wish. As a result, ALRI joins UNCITRAL and the ULCC in endorsing these interim measures.

[128] The Project Advisory Committee discussed one additional issue related to interim measures; namely, whether the Uniform Act 2014 should specifically provide that an interim measure available to an arbitral tribunal is an order for security for costs. Article 17(2) currently includes four subsections which describe the types of interim measures available to an arbitral tribunal. The BC

<sup>95</sup> *Commercial Arbitration in Canada* at 6-38 - 6-39.

<sup>96</sup> ULCC Final Report at para 58.

Act implements Article 17(2) and adds an extra subsection that specifically empowers an arbitral tribunal to order security for costs.<sup>97</sup>

[129] Some Committee members were in favour of enacting a similar provision in Alberta. According to them, it is currently unclear whether an arbitral tribunal has the authority to order security for costs and it would be beneficial to clarify the issue. Further, if the BC Act contains a security for costs provision and any new legislation in Alberta does not, the Committee members felt there may be an inference made that tribunals in Alberta do not have this power.

[130] Other Committee members felt that the power to order security for costs was already encompassed under Article 17E, so an additional provision would be unnecessary. However, they were also in favour of certainty and did not see an issue with including an explicit provision. Ultimately, the Committee came to a consensus that a provision similar to section 17(2)(e) in the BC Act would be beneficial in Alberta.

[131] However, ALRI is of the view that this issue does not merit a departure from the text of the Model Law, which is one of the core principles of reform in this report. In this instance, it is more appropriate for the development of the law surrounding security for costs to be left up to the tribunals.

#### **d. Preliminary orders**

[132] As noted, the most controversial reform introduced by the 2006 amendments is an arbitral tribunal's new authority under articles 17B and 17C to make preliminary orders. The Model Law deliberately uses the term "preliminary order" so as to emphasize its limited nature compared to an interim measure.<sup>98</sup>

[133] An application for a preliminary order is made *ex parte*, without notice to the other party. A preliminary order precedes the making of an interim order (the application for which is brought simultaneously, but with notice) and, as stated in article 17B(1), directs the other party "not to frustrate the purpose of the interim measure requested." A main purpose, of course, would be to preserve assets, evidence, or both, pending the hearing of the interim measure. Under article 17B(2), the arbitral tribunal must be satisfied, before making a preliminary

<sup>97</sup> BC Act, s 17(2)(e).

<sup>98</sup> Explanatory Note at para 28.

order, that prior disclosure of the application “risks frustrating the purpose of the [interim] measure.”

[134] Article 17C(1) provides that, immediately after the arbitral tribunal’s decision concerning the preliminary order, it must give notice of everything to the party against whom the order is made, who may present their case “at the earliest practicable time” according to article 17C(2). Article 17C(3) provides that a preliminary order expires after twenty days from the date on which it was issued although, after notice and a hearing, the arbitral tribunal “may issue an interim measure adopting or modifying the preliminary order.”

[135] Article 17C(5) makes a preliminary order binding on the parties but expressly states that it is not subject to enforcement by a court and does not constitute an award. Procedural orders made by arbitral tribunals are often not enforceable as awards and parties understand this approach. It is in the best interest of parties to comply with such orders so as not to alienate the arbitrator who will be hearing the main dispute.<sup>99</sup>

[136] Under article 17E(2), the party seeking a preliminary order must provide security unless the arbitral tribunal considers it inappropriate or unnecessary. That party also has a mandatory duty to disclose all relevant circumstances relating to the matter which, pursuant to article 17F(2), continues until the other party presents its case concerning the preliminary order. Both of these requirements are stricter than those required of parties who apply for an interim measure.

[137] The arbitral tribunal may also modify, suspend or terminate a preliminary order under article 17D, just as it can for interim measures. Similarly, a person who obtains a preliminary order that should not have been granted is liable under article 17G for costs and damages.

[138] Finally, there are two other important points to note about preliminary orders:<sup>100</sup>

These provisions, as with many others in the Model Law, are not mandatory. The parties can agree to exclude the power to make preliminary orders.

Even with the inclusion of these sections, parties remain at liberty to seek an interim measure from a court rather than from an

<sup>99</sup> ULCC Final Report at para 63.

<sup>100</sup> ULCC Final Report at paras 61-62.

arbitral tribunal. Whether or not a court would entertain an *ex parte* application would depend upon its local court practice.

[139] Arguments for and against adopting these provisions were made to the ULCC Working Group. Opponents' concerns include the following:<sup>101</sup>

- The power to make *ex parte* orders should not be granted by statute because it intrudes upon party autonomy. Procedural matters and arbitral authority should be determined solely by agreement of the parties because arbitration is a consensual process;
- Widely accepted protocols in arbitration strictly limit *ex parte* communication between arbitrators and parties concerning the merits of the dispute. Such communication can taint the independence or impartiality of the arbitrator. Giving statutory authority to make an *ex parte* order breaches that fundamental principle;
- It is unnecessary to have provisions empowering an arbitral tribunal to make an *ex parte* preliminary order because if a party needs such an order, they can apply to a court for one;
- The purpose of arbitration legislation is to give direction to courts about the limited areas in which courts are empowered by that legislation, not to regulate aspects of arbitration in which courts have no involvement. Since courts cannot enforce a preliminary order made by an arbitral tribunal, it is not proper for the legislation to deal with *ex parte* preliminary orders at all.

[140] Arguments in favour of implementing these new Model Law provisions include the following:<sup>102</sup>

- Parties can agree to exclude the power to make preliminary orders. This protects party autonomy and preserves the fundamental principles of arbitration;
- Articles 17B and 17C provide fair and balanced procedural protections and limitations on the exercise of *ex parte* power. The parties can also, by agreement, add to or exclude these protections and limitations if they so desire;

<sup>101</sup> ULCC Final Report at para 64.

<sup>102</sup> ULCC Final Report at para 63.

- There is a practical need for such orders in some circumstances in order to preserve assets, evidence or both. This maintains the integrity of the arbitration process;
- The availability of preliminary orders can itself act as a deterrent to the kind of bad behaviour which would otherwise justify its exercise;
- Opinion is currently divided about whether arbitral tribunals in Canada already have the power to make *ex parte* orders. These provisions clarify and resolve that issue, bringing legal certainty to this area;
- It is not in arbitration's best interests to say that courts are better placed to assess whether an *ex parte* order should be made than an arbitral tribunal. The authority of both courts and arbitrators should be similar or it will jeopardize the perceived utility and attractiveness of arbitration as an alternative to litigation. Just like arbitral tribunals, courts have a duty to give all parties an opportunity to be heard, but this does not preclude the making of *ex parte* orders in appropriate circumstances. Nor should it for arbitral tribunals.

[141] The Project Advisory Committee was generally in favour of including the provisions governing preliminary orders. In its consultation, the ULCC Working Group reports that the "preponderant view of the Advisory Board and other commentators was that articles 17B and 17C should be included."<sup>103</sup> Also taking into account its principle of reform that the Uniform Act 2014 should depart from the Model Law only for good reason, the ULCC Working Group recommended that the preliminary order provisions be implemented. The ULCC endorsed that view, so as to advance the benefits of uniformity in this area.

[142] ALRI also approves of the principles underlying the provisions and agrees that they should be included in Alberta law.

## 2. REMAINING PROVISIONS DEALING WITH THE MODEL ACT

[143] The remaining provisions in this Part of the Uniform Act 2014 deal with other matters necessary for the seamless application of the Model Law in each implementing province or territory.

---

<sup>103</sup> ULCC Final Report at para 63.

**a. Interpretation of the word “State” in the Model Law**

[144] Throughout the Model Law, the word “State” has a singular meaning because the Model Law assumes that implementation will occur in a unitary state. However, in the context of our multi-jurisdiction Canadian federation, this assumption does not work and use of the singular word “State” is ambiguous without further clarification. Section 5 of the Uniform Act 2014 provides interpretive clarification by detailing those articles of the Model Law in which “State” means Canada and those in which “State” means an enacting provincial or territorial jurisdiction:<sup>104</sup>

***Meaning of certain terms used in Model Law***

**5. (1)** In article 1(1) of the Model Law, an "agreement in force between this State and any other State or States" means an agreement that is in force in [*enacting jurisdiction*] between Canada and any other country or countries.

**(2)** In articles 1(2), 17 J, 27, 34(2)(a)(i), 34(2)(b)(ii), and 36(1)(b)(ii) of the Model Law, “this State” means [*enacting jurisdiction*].

**(3)** In article 1(3) of the Model Law, “different States” means different countries, and “the State” means the country.

**(4)** In articles 1(5), 34(2)(b)(i), and 36(1)(b)(i) of the Model Law, “law of this State” means the law of [*enacting jurisdiction*] and any laws of Canada that are in force in [*enacting jurisdiction*].

**(5)** In article 35(2) of the Model Law, “this State” means Canada.

This represents an improvement of the Uniform Act 1986 and the Alberta Act, which are silent on this matter.

[145] Section 5 of the Uniform Act 2014 is drafted in a traditional style using subsections but the equivalent section 6(1) of the Ontario Act uses a more stylistically modern table format to convey the same information:<sup>105</sup>

**Interpretation of Model Law**

**6 (1)** For the purposes of subsection 5 (1), the words and expressions listed in Column 2 of the following table, as used in the provisions of the Model Law set out in Column 1 of the table, shall be

<sup>104</sup> Uniform Act 2014, s 5.

<sup>105</sup> Ontario Act, s 6(1).

read as the words and expressions listed in the corresponding row of Column 3 of the table.

Column 1	Column 2	Column 3
article 1 (1)	“agreement in force between this State and any other State or States”	“an agreement that is in force in Ontario between Canada and any other country or countries”
articles 1 (2), 17 J, 27, 34 (2) (a) (i), 34 (2) (b) (ii), and 36(1) (b) (ii)	“this State”	“Ontario”
article 1 (3)	“different States” and “the State”	“different countries” and “the country”, respectively
article 1 (5)	“any other law of this State”	“any other law of Ontario or laws of Canada that are in force in Ontario”
articles 34 (2) (b) (i), and 36 (1) (b) (i)	“the law of this State”	“the law of Ontario and any laws of Canada that are in force in Ontario”
article 35 (2)	“this State”	“Canada”

[146] Both drafting methods achieve the same result, however. The Project Advisory Committee expressed a preference for the Ontario method, indicating that the table format is easier to read and understand. While ALRI agrees with the substance of the provision, we are of the view that questions about legislative style should be left up to the drafters.

#### **b. Use of extrinsic material in interpretation**

[147] The Alberta Act and the Uniform Act 1986 on which it is based provide that, in interpreting the Model Law, two official United Nations documents may be used to assist in that task. Section 6 of the Uniform Act 2014 continues that provision, but adds to the list two more official United Nations documents which specifically deal with the 2006 amendments.

[148] However, the current requirement that the UN documents must also be published in each enacting jurisdiction’s Gazette has been dropped as an unnecessary expense, since all these documents are easily available on the internet from UNCITRAL. To assist in accurate identification, the section now also lists the UN publication number for each document.<sup>106</sup> The BC Act implements the revised uniform provision.<sup>107</sup>

[149] ALRI endorses this revised provision except for one detail. The Uniform Act 2014 says the extrinsic material may be used “[i]n applying article 2A(1) of the Model Law.” The cross-reference is to the new 2006 provision (discussed in this chapter above at heading CHAPTER 4E.1.a) which directs those who interpret the Model Law to have regard “to its international origin and to the need to promote uniformity in its application and the observance of good faith.”

<sup>106</sup> ULCC Final Report at para 69.

<sup>107</sup> BC Act, s 6(b).

In its equivalent section 6(3), the Ontario Act simply says the extrinsic material may be used “[i]n applying the Model Law” which is much less circular, maintains this provision’s current language and accomplishes the same legal result more directly. ALRI would prefer to use this simpler language as well.

## **RECOMMENDATION 2**

---

Section 6 of the Uniform International Commercial Arbitration Act (2014) should be revised to replace the phrase “In applying article 2A(1) of the Model Law” with the phrase “In applying the Model Law”.

### **c. Designation of court**

[150] In several articles, the Model Law requires an enacting State to designate which of its courts will handle applications concerning various matters. Section 7 of the Uniform Act 2014 is the section in which that designation is made. For the reasons already discussed above, Alberta should appoint the Court of Queen’s Bench as the designated court under the Model Law.

### **d. Rules applicable to substance of dispute**

[151] Article 28(1) of the Model Law allows parties to designate the rules of law which will apply to the substance of the dispute. The article specifically says that this designation “shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.” If parties don’t make such a designation, article 28(2) requires the arbitral tribunal to “apply the law determined by the conflict of laws rules which it considers applicable.”

[152] The Uniform Act 1986 deliberately departed from article 28(2) so that conflicts of law rules need not necessarily be applied.<sup>108</sup> As stated in section 7 of the Alberta Act, the arbitral tribunal “shall apply the rules of law it considers to be appropriate given all the circumstances respecting the dispute.”

[153] This situation continues unchanged in section 8 of the Uniform Act 2014 because the ULCC concluded that it causes no mischief and should be carried forward unchanged.<sup>109</sup> ALRI agrees with the uniform approach.

---

<sup>108</sup> ULCC Final Report at para 73.

<sup>109</sup> ULCC Final Report at para 75.

## F. General

---

[154] The final Part of the Uniform Act 2014 contains provisions largely relating to procedure under the Convention, the Model Law, or both.

### a. Consolidation of arbitrations

[155] In some circumstances, consolidation of arbitrations can enhance cost-effectiveness by avoiding multiplicity of proceedings. Historically, however, arbitrators have had limited power to order the consolidation of two or more arbitrations. Section 8 of the Alberta Act, based on the Uniform Act 1986, contains a provision allowing a court to order consolidation where all parties agree.<sup>110</sup> The court shall also appoint to conduct the consolidated hearings any arbitral tribunal agreed to by the parties. If the parties cannot agree, then the court may appoint the arbitral tribunal. The section also makes it clear, however, that parties can agree to consolidate and do all other necessary things for that purpose without seeking a court order.

[156] This basic provision is continued, with some elaborations, in section 9 of the Uniform Act 2014. If the parties have agreed in principle to consolidate the proceedings, but cannot agree on the mechanism or procedure for how to do so, one of them may make an application for court assistance. However, a court will be prohibited from ordering a consolidation under two or more incompatible arbitration agreements unless the parties have agreed to:

- the same place of arbitration or method for determining it;
- the same procedural rules or a method for determining them; and
- administration by the same arbitral institution or by none at all.

---

<sup>110</sup> Alberta Act, s 8 provides:

#### **Consolidation of proceedings**

**8(1)** The Court of Queen's Bench, on application of the parties to 2 or more arbitration proceedings, may order

- (a) the arbitration proceedings to be consolidated, on terms it considers just,
- (b) the arbitration proceedings to be heard at the same time, or one immediately after another, or
- (c) any of the arbitration proceedings to be stayed until after the determination of any other of them.

**(2)** Where the Court orders arbitration proceedings to be consolidated pursuant to subsection (1)(a) and all the parties to the consolidated arbitration proceedings are in agreement as to the choice of the arbitral tribunal for that arbitration proceeding, the arbitral tribunal shall be appointed by the Court, but if all the parties cannot agree, the Court may appoint the arbitral tribunal for that arbitration proceeding.

**(3)** Nothing in this section shall be construed as preventing the parties to 2 or more arbitration proceedings from agreeing to consolidate those arbitration proceedings and to take such steps as are necessary to effect that consolidation.

[157] In making any order under section 9, the court will be directed to consider factors such as whether the applicant delayed in applying for an order or whether any material prejudice or injustice may result from the order.

[158] Given recent case law interpreting section 8 of the Alberta Act (the current consolidation provision), the Project Advisory Committee had major concerns about how section 9 of the Uniform Act 2014 would be interpreted. For example, in *Western Canada Oil Sands Inc v Allianz Insurance Company of Canada*, Justice Hawco found that the court had no authority to order consolidation under section 8 of the Alberta Act unless all parties to the arbitration consented to the consolidation.<sup>111</sup> He interpreted the phrase “on application of the parties” in section 8(1) to mean all of the parties to the arbitration.<sup>112</sup> The party opposed to consolidation argued that it would be redundant to empower the court to order something that was already agreed to by the parties, so section 8(1) must have meant that something less than unanimous consent was required. Justice Hawco dismissed that argument, stating:<sup>113</sup>

Nor in my view is it absurd or superfluous for the legislation to provide an avenue whereby the parties may seek a court order on a matter to which they all agree. Indeed, it is not uncommon for parties to agree to terms and then seek an order to document that agreement and ensure compliance therewith. There may also be occasions where, although the parties agree to consolidation, they may require the court’s assistance in determining the appropriate terms or procedures to be applied.

[159] Justice Hawco’s reasoning was followed by Justice Pentelechuk in *Alberta Motor Association Insurance Company v Aspen Insurance UK Limited*.<sup>114</sup> She also relied on the ULCC Interim Report and ALRI’s Final Report 103, *Arbitration Act: Stay and Appeal Issues* (September 2013) to support her decision that unanimous party consent to consolidation is required.<sup>115</sup>

[160] In *Pricaspian Development Corporation v BG International Ltd*, Chief Justice Wittmann came to the opposite conclusion.<sup>116</sup> He relied on section 26(3) of the *Interpretation Act* to conclude that the word “parties” in section 8(1) of the Alberta

<sup>111</sup> *Western Canada Oil Sands Inc v Allianz Insurance Company of Canada*, 2004 ABQB 79 at para 33.

<sup>112</sup> *Western Canada Oil Sands Inc v Allianz Insurance Company of Canada*, 2004 ABQB 79 at para 24.

<sup>113</sup> *Western Canada Oil Sands Inc v Allianz Insurance Company of Canada*, 2004 ABQB 79 at para 29.

<sup>114</sup> *Alberta Motor Association Insurance Company v Aspen Insurance UK Limited*, 2018 ABQB 207 at para 165.

<sup>115</sup> *Alberta Motor Association Insurance Company v Aspen Insurance UK Limited*, 2018 ABQB 207 at paras 155-157.

<sup>116</sup> *Pricaspian Development Corporation v BG International Ltd*, 2016 ABQB 611 at para 92.

Act necessarily includes the singular “party”, which would make it acceptable for a consolidation application to be brought without unanimous consent.<sup>117</sup> Further, if unanimous party consent is required under section 8(1), then section 8(3) of the Alberta Act, which permits parties to consolidate by agreement, would be redundant.<sup>118</sup>

[161] Chief Justice Wittmann’s reasoning was followed by Justice Romaine in *Japan Canada Oil Sands Ltd v Toyo Engineering Canada Ltd*.<sup>119</sup> Justice Romaine’s decision was controversial because she not only ordered consolidation without the consent of all the parties, but she also consolidated a domestic arbitration into the international arbitration.<sup>120</sup> A recent commentary interpreting *Japan Canada Oil Sands* suggests that its willingness to order consolidation without the consent of all parties “...is inconsistent with the weight of Canadian and international jurisprudence”.<sup>121</sup>

[162] All of the above cases were decided under section 8 of the Alberta Act, the wording of which is different from section 9 of the Uniform Act 2014. The opening words of section 8(1) of the Alberta Act refer to an “application of the parties to 2 or more arbitration proceedings”, while section 9(1) of the Uniform Act 2014 provides:<sup>122</sup>

**Enforcement of consolidation agreements**

9. (1) If all parties to two or more arbitral proceedings have agreed to consolidate those proceedings, a party, with notice to the others, may apply to the [Court of Queen’s Bench] for an order that the proceedings be consolidated as agreed to by the parties.

[163] Due to the difference in wording, it is unclear how Alberta courts would interpret the new provision. However, the Project Advisory Committee emphasized that they were only in favour of implementing section 9 of the

<sup>117</sup> *Pricaspian Development Corporation v BG International Ltd*, 2016 ABQB 611 at paras 72-73; *Interpretation Act*, RSA 2000, c I-8, s 26(3).

<sup>118</sup> *Pricaspian Development Corporation v BG International Ltd*, 2016 ABQB 611 at para 84.

<sup>119</sup> *Japan Canada Oil Sands Ltd v Toyo Engineering Canada Ltd*, 2018 ABQB 844.

<sup>120</sup> *Japan Canada Oil Sands Ltd v Toyo Engineering Canada Ltd*, 2018 ABQB 844 at paras 65, 108-109. In order to prevent the future consolidation of domestic and international arbitrations, one Project Advisory Committee member suggested that section 9 of the Uniform Act 2014 should explicitly state that it only applies to arbitral proceedings conducted “under this Act”.

<sup>121</sup> Matti Lemmens, “Consolidation of arbitration proceedings without consent: cautionary tale” (6 December 2018), online: *International Law Office* <<https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Canada/Borden-Ladner-Gervais-LLP/Consolidation-of-arbitration-proceedings-without-consent-cautionary-tale>>.

<sup>122</sup> Alberta Act, s 8(1) [emphasis added]; Uniform Act 2014, s 9(1) [emphasis added].

Uniform Act 2014 if it was clear that, notwithstanding the precedents established by *Pricaspian* and *Japan Canada Oil Sands*, consolidation would be prohibited without unanimous party consent.

[164] The ULCC did not recommend that a court be empowered to order consolidation without unanimous party consent. In fact, the initial wording of section 9 was changed in order to make it clear unanimous consent is required.<sup>123</sup> The ULCC concluded:<sup>124</sup>

. . . that it is not feasible or advisable to add to the New Uniform [Act] . . . a court power to order consolidation of arbitrations in cases where all parties to the proceedings proposed to be consolidated have not agreed. The [ULCC] Working Group concluded, however, that where such an agreement exists (either in the arbitration agreement or in rules that the parties have incorporated by reference) but one or more of the parties refuses to honour that agreement, other parties should be able to apply to the court to enforce the consolidation agreement.

[165] ALRI agrees with continuing this approach to consolidation of arbitrations; namely, allowing courts to consolidate only where there is unanimous party consent.<sup>125</sup>

## **b. Stay of proceedings**

[166] If a party to an arbitration agreement nevertheless tries to litigate the dispute in court, both the Convention and the Model Law require the court to “refer the parties to arbitration,” subject to a very few exceptions.<sup>126</sup> Court proceedings must be stayed pursuant to section 10 of the Uniform Act 2014, which replicates the same provision from the Uniform Act 1986 and Alberta Act.

## **c. Limitation period for recognition or enforcement of arbitral awards**

### ***i. Benefits of a uniform limitation period***

[167] At the moment, the Uniform Act 1986 on which the Alberta Act and other Canadian international commercial arbitration statutes are based does not specify a limitation period governing the time within which recognition or

<sup>123</sup> ULCC Discussion Paper, note 19 at 38-40.

<sup>124</sup> ULCC Final Report at para 78.

<sup>125</sup> Both British Columbia and Ontario adopted the uniform provision. See BC Act, s 27.01; Ontario Act, s 8.

<sup>126</sup> Litigation may continue if all the parties agree or the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed: New York Convention, art II.3; Model Law, art 8.

enforcement of international commercial arbitral awards must be sought. Accordingly, the Alberta Act and its counterparts are also silent on this issue and so the limitation period is currently determined by other applicable provincial and territorial laws.

[168] Section 11 of the Uniform Act 2014, however, does specify a limitation period in this area – ten years from the date on which the arbitral award becomes final once the time limit for setting aside the award either expires or such proceedings are concluded. The ULCC believes that a single, uniform limitation period for registration and enforcement is desirable because:<sup>127</sup>

- It prevents jurisdictional variation in the limitation period within Canada. If uniform international commercial arbitration legislation across Canada makes each jurisdiction more attractive to foreign arbitral parties, then so would a uniform limitation period when it comes to enforcing arbitral awards;
- There is no principled reason why this limitation period should differ across Canada;
- A uniform limitation period encourages businesses abroad to do business with Canadian or international enterprises which have assets in individual provinces or territories.

*ii. Length of limitation period*

[169] Some arbitration supporters feel that recognition or enforcement of arbitral awards should not be subject to any limitation period at all. Indeed, a minority of nations like Germany and Japan impose no limitation period in this area. However, the ULCC concluded that:<sup>128</sup>

...eliminating any limitation period would expose Canadian and multinational businesses to an excessive burden of uncertainty and would overexpose international enterprises with assets in Canada.

[170] The ULCC chose ten years as an appropriate limitation period in this area because it:<sup>129</sup>

...would compare favourably with the counterpart limitation periods of Canada's major trading partners, and it would also recognize that

<sup>127</sup> ULCC Final Report at para 86.

<sup>128</sup> ULCC Final Report at para 89.

<sup>129</sup> ULCC Final Report at para 89.

international commercial arbitration awards are akin to foreign judgments (which are normally subject to a ten-year limitation period in Canada).

[171] The ULCC's choice of ten years was also influenced by the Supreme Court of Canada's 2014 decision in *Yugraneft Corp v Rexx Management Corp.*<sup>130</sup> In this case, the Court held that a foreign arbitral award faces a limitation period of two years for recognition and enforcement under Alberta's *Limitations Act*.<sup>131</sup> The ULCC called this result "overly Draconian".<sup>132</sup> Although the *Yugraneft* case settles the law only in Alberta, clearly the ULCC fears it may be applied in other provinces and territories as well. A uniform provision would prevent this and overturn the law in Alberta at the same time.

[172] Under Alberta's *Limitations Act*, there is a similar ten-year limitation period to seek a remedial order enforcing "a judgment or order for the payment of money."<sup>133</sup> In *Yugraneft*, this limitation period was held to apply only to a court order or judgment, not to an arbitral award. The Uniform Act 2014's ten-year limitation period changes that result for foreign arbitral awards.

[173] At least one member of the Project Advisory Committee indicated that *Yugraneft* should remain the law in Alberta. The member did not agree that international parties need more time to enforce an award. Other members thought it was appropriate for international parties to have more time. They may be trying to realize in other jurisdictions before coming to Alberta, or the party against whom they are trying to enforce the award may be moving their assets around. By leaving the limitation period at 2 years, Alberta law essentially forces an international party to enforce an award in Alberta first or risk running out of time. However, this may not make practical or commercial sense for the enforcing party.

[174] Though many Committee members felt that 10 years might be too long, they felt strongly that it was important to encourage uniform limitation periods across Canada. Since both Ontario and British Columbia have enacted a 10 year limitation period, there was consensus from the Committee that it should be implemented in Alberta as well.

<sup>130</sup> *Yugraneft Corp v Rexx Management Corp*, 2010 SCC 19, aff'g 2008 ABCA 274, aff'g 2007 ABQB 450.

<sup>131</sup> *Limitations Act*, RSA 2000, c L-12, s 3. The limitation period begins to run from the date the enforcing party knew, or ought to have known, the circumstances warranted an enforcement proceeding in Alberta.

<sup>132</sup> ULCC Final Report at para 88.

<sup>133</sup> *Limitations Act*, RSA 2000, c L-12, s 11.

### iii. Placement of provision

[175] Ordinarily, the ULCC is a strong supporter of all limitation periods being placed in the corresponding provincial or territorial *Limitations Act*. However, in this instance, the ULCC put this limitation period directly in the Uniform Act 2014 instead. Ontario put its limitation period in the Ontario Act, while British Columbia's is found in its *Limitations Act*.<sup>134</sup>

[176] The Project Advisory Committee was divided on where such a limitation period should be located. Some members felt very strongly that Alberta's *Limitations Act* is meant to provide a complete limitations scheme.<sup>135</sup> As such, all possible limitation periods in the province should be located in that statute. Others felt it was more user-friendly to follow the uniform approach and put the limitation period directly in the statute governing international commercial arbitration.

[177] The main group which will be relying on knowledge of this limitation period will be foreign users, who will be disadvantaged if they have to consult multiple statutes to figure out what the limitation period is.<sup>136</sup> ALRI agrees with the ULCC that it would be easier for foreign users if the uniform limitation period were implemented directly in Alberta's international commercial arbitration statute.

### iv. Extension of limitation period

[178] Given that ten years is already a generous amount of time, the ULCC saw no need to include a provision that the limitation period could be extended.<sup>137</sup>

### v. Effect on other provincial legislation

[179] Article III of the New York Convention states that:

[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

[180] Assuming that this article speaks also to differing length of limitation periods, which may be debatable, the ULCC nevertheless further recommended,

<sup>134</sup> Ontario Act, s 10; *Limitations Act*, SBC 2012, c 13, s 1.

<sup>135</sup> *Limitations Act*, RSA 2000, c L-12.

<sup>136</sup> ULCC Final Report at para 87.

<sup>137</sup> ULCC Final Report at para 90.

“out of an abundance of caution,” that limitation periods for recognition and enforcement of domestic arbitral awards not be more generous than the Uniform Act 2014’s ten-year period for foreign arbitral awards.<sup>138</sup>

[181] This concern caused Ontario to enact consequential amendments to its *Arbitration Act, 1991* and *Limitations Act, 2002* when it passed the Ontario Act.<sup>139</sup> Previously in Ontario, enforcement of domestic arbitral awards was not subject to any limitation period. Now they too are subject to a ten-year limitation period.<sup>140</sup>

[182] In Alberta’s *Arbitration Act*, the limitation period to enforce a domestic arbitral award is 2 years from the date on which it is received by the applicant, or 2 years from the date on which all appeal periods expire, whichever is later.<sup>141</sup> Since this is not more generous than the ten years for enforcement of foreign arbitral awards under the Uniform Act 2014, it need not be changed. However, the resulting disparity of treatment between domestic awards and foreign awards may perhaps cause some to question why domestic awards should not also have a ten-year enforcement period.

[183] Domestic arbitration issues are outside the scope of this Report and, as a result, any changes to the limitation period for domestic awards would best be done in a separate project. The factors and stakeholders relevant to a domestic arbitration project are quite different from those involved in this Report.

[184] If a ten-year limitation period will now govern the recognition and enforcement of international commercial arbitral awards, one consequence is that enforcement of such awards under the *Reciprocal Enforcement of Judgments Act* (REJA) will decline.<sup>142</sup> REJA is more restrictive than the Uniform Act 2014 in two ways:

- Its limitation period is six years from the date of the judgment or award; and

<sup>138</sup> ULCC Final Report at para 91.

<sup>139</sup> Bill 27, *Burden Reduction Act, 2017*, 2d Sess, 41st Parl, Ontario, 2017, sched 5: *International Commercial Arbitration Act, 2017*, ss 13-14.

<sup>140</sup> *Arbitration Act, 1991*, SO 1991, c 17, s 52(3) as amended; *Limitations Act, 2002*, SO 2002, c 24, sched B, ss 16(1)(d), 19(1)(a) and Sched, as amended. This new limitation period applies to all domestic arbitral awards, whether commercial in nature or not, such as family arbitral awards.

<sup>141</sup> *Arbitration Act*, RSA 2000, c A-43, s 51(3).

<sup>142</sup> REJA is uniform legislation found in most Canadian provinces and territories. In Alberta, see: *Reciprocal Enforcement of Judgments Act*, RSA 2000, c R-6.

- It applies only to reciprocating jurisdictions. Typically, this constitutes a very short list usually comprised of most other Canadian provinces and territories, with perhaps a small handful of American states or foreign countries as well.<sup>143</sup>

[185] Once the Uniform Act 2014's ten-year limitation period is enacted, non-reciprocating jurisdictions will be treated better under it than reciprocating jurisdictions are under REJA. It will then make no sense for reciprocating jurisdictions to use REJA instead of the better deal available under the international commercial arbitration legislation. Insofar as arbitral awards are concerned, REJA will likely remain attractive only for the enforcement of foreign non-commercial arbitral awards.

[186] Ontario did not amend that province's REJA to increase its limitation period to ten years when it enacted the Ontario Act, presumably because the reciprocal nature of the legislation makes unilateral amendment unfeasible and perhaps undesirable. However, we note that in 2008, when ALRI made our recommendations to adopt the ULCC's Uniform Enforcement of Canadian Judgments and Decrees Act and its Uniform Enforcement of Judgments Act, both of which contain ten-year limitation periods, ALRI also recommended that REJA be similarly amended "so as to have the same enforcement registration limitation under all three Acts."<sup>144</sup> Unilateral amendment of existing reciprocal legislation did not seem to pose a concern then.

[187] Ultimately, the amendment of reciprocal legislation like REJA is outside the scope of a project dealing with international commercial arbitration. If REJA needs to be amended, it should be dealt with in a separate project.

#### **vi. Transitional issue**

[188] In setting a uniform ten-year limitation period, the Uniform Act 2014 also contains a transitional provision in section 11(2) to address foreign arbitral awards made before the coming into force of the Uniform Act 2014 provision but whose recognition or enforcement is sought after the coming into force date. In

<sup>143</sup> For example, in Alberta the list of reciprocating jurisdictions consists of the other Canadian provinces and territories (except Quebec), the Commonwealth of Australia, and the American states of Washington, Idaho and Montana: *Reciprocating Jurisdictions Regulation*, Alta Reg 344/1985, s 1. Ontario's list comprises only the other Canadian provinces and territories except Quebec: *Application of Act Regulation*, O Reg 322/92, s 1.

<sup>144</sup> Alberta Law Reform Institute, *Enforcement of Judgments*, Final Report 94 (2008) at para 82. In Recommendation 2 at para 94 of that Report, ALRI recommended that REJA should also be amended to limit its application to situations not otherwise dealt with under the recommended ULCC uniform enforcement legislation.

such a case, the limitation date will be the *earlier* of: the date calculated under the new ten-year limitation period, or the expiry date of the limitation period existing before the coming into force of the Uniform Act 2014 provision.

[189] Ontario enacted a somewhat different transitional provision. Section 10 of the Ontario Act sets a specific date (December 31, 2018) as one end point for bringing an application, the other end point being the calculated date according to the uniform ten-year limitation period, and then provides that no application may be brought after the *later* of the two. At the same time, a similar transitional provision was also added to Ontario's *Arbitration Act, 1991*.<sup>145</sup> Ontario's method is necessary because, as mentioned, there was previously no limitation period for the recognition or enforcement of domestic arbitral awards and therefore, no reference may be had to an otherwise calculated expiry date.

[190] Since this is not the situation in Alberta, we should be able to follow the Uniform Act 2014 model without any problem. However, the majority of the Project Advisory Committee felt that section 11(2) of the Uniform Act 2014 was unnecessary and should not be implemented in Alberta. In their view, if the ULCC feels that 10 years is an appropriate limitation period for the recognition and enforcement of foreign arbitral awards then it should apply across the board, regardless of when the award was granted.

[191] Other members felt that it would be unfair to retroactively apply a longer limitation period to parties that may be relying on the limitation established under *Yugraneft*. ALRI agrees with this position and does not recommend a deviation from the transitional provision found in section 11(2) of the Uniform Act 2014.

#### **d. Appeals from negative jurisdictional rulings**

[192] Article 16 of the Model Law confirms that an arbitral tribunal is competent to rule on its own jurisdiction, either as a preliminary question or in an award on the merits. Article 16(3) provides that if an arbitral tribunal makes a positive ruling that it does have jurisdiction, a party may appeal that ruling to "the court specified in article 6". This report proposes that the designated court should continue to be the Court of Queen's Bench.<sup>146</sup>

<sup>145</sup> *Arbitration Act, 1991*, SO 1991, c 17, s 52(3).

<sup>146</sup> Alberta Act, s 9.

[193] Conversely, article 16 is silent about any appeal right when an arbitral tribunal makes a negative ruling that it does not have jurisdiction. This silence carries a real consequence:<sup>147</sup>

Without the ability to appeal a negative ruling, even if that ruling is incorrect a party may be forced to pursue its claims in a national court. UNCITRAL documents indicate that appeals from negative rulings were not expressly authorized, because it was considered inappropriate to compel a tribunal to decide matters that it concluded it lacked jurisdiction to decide.

[194] A growing international consensus, however, considers that this imbalance in remedies creates an unfair, unjust and inconsistent situation. Not being able to correct a wrongly-decided negative jurisdictional ruling frustrates the parties' intention to avoid litigating the substance of their dispute in national courts. Because of this, parties may choose to hold their arbitrations in states which allow appeals from negative jurisdictional rulings. A "growing number" of states have accordingly reformed their legislation to expressly authorize such appeals.<sup>148</sup> The Project Advisory Committee agreed with allowing appeals from negative jurisdictional rulings.

[195] Section 12 of the Uniform Act 2014 follows this trend and allows a court appeal in the Canadian context as well. The provision clarifies that no further appeal lies from that court's decision, however.<sup>149</sup> ALRI agrees with the ULCC that we should allow an appeal to the Court of Queen's Bench from a negative jurisdictional ruling by an arbitral tribunal. Both the Ontario Act and the BC Act also implement this reform.

#### **e. Crown bound**

[196] Section 12(1) of the Uniform Act 1986 provides that the Act binds the Crown, while section 12(2) specifies that an arbitral "award recognized pursuant to this Act is enforceable against the Crown in the same manner and to the same extent as a judgment is enforceable against the Crown." Section 13 of the

<sup>147</sup> ULCC Final Report at para 93.

<sup>148</sup> These states include Belgium, England, France, India, Italy, New Zealand, Singapore, Sweden, Switzerland and the United States: ULCC Final Report at para 94.

<sup>149</sup> One Project Advisory Committee member was concerned about only allowing one appeal when the question goes to an issue as fundamental as jurisdiction. Given the consensual nature of arbitration and the fact that parties are aware from the outset that court intervention is limited, even on fundamental questions, the other Committee members did not share this concern.

Uniform Act 2014 replicates this provision verbatim and section 12 of the Ontario Act implements this provision word for word.

[197] Section 11 of the Alberta Act has always simply provided that the Act binds the Crown but leaves out the subsection about enforcing judgments, presumably considering it to be legally superfluous and unnecessary to state explicitly.

[198] When implementing the Uniform Act 2014 in Alberta, ALRI sees no harm in including the full provision for the sake of uniformity. However, since it is a question of legislative style, the ultimate decision should be left up to the drafters.

**f. Forms of proof**

[199] Section 14 of the Uniform Act 2014 is an evidentiary provision authorizing the use of a ministerial certificate in proof of a foreign state's status as a Contracting State under the New York Convention. It replicates section 13 of the Uniform Act 1986. This provision is only necessary, however, in those jurisdictions which enact the reciprocity reservation concerning the recognition and enforcement of foreign arbitral awards. Since Alberta does not require reciprocity, this provision was never included in the Alberta Act and need not be implemented now. For the same reason, it is not present in either the Ontario Act or the BC Act.

**g. Provisions not carried forward from the Uniform Act 1986**

[200] The Uniform Act 1986, and the Alberta Act based on it, contain two additional provisions which no longer appear in the Uniform Act 2014. One addresses the use of other alternative dispute resolution techniques by an arbitral tribunal, and the other mandates a rehearing be held if an arbitrator on the arbitral tribunal is replaced or removed.

**i. Use of other ADR techniques**

[201] Section 6 of the Uniform Act 1986 and section 5 of the Alberta Act provide that, with the parties' agreement, an arbitral tribunal may use other alternate dispute resolution techniques such as mediation or conciliation in an effort to encourage settlement and, again with the parties' agreement, doing so does not disqualify the arbitral tribunal from subsequently resuming its role as arbitrator.

[202] Apparently, using alternate dispute resolution techniques during an arbitration is very popular in Asian markets. One Project Advisory Committee

member predicted that Alberta would not attract Asian parties if this provision were removed. Further, British Columbia is likely our biggest competitor with respect to attracting international commercial arbitration business and the BC Act retains this provision. Other Committee members indicated that, regardless of the impact that removing the provision has on attracting arbitration business, they agreed with the uniform approach.

[203] The ULCC Working Group was concerned about authorizing arbitrators to act in multiple roles, even with parties' consent.<sup>150</sup>

What impact might this provision have on the enforceability of an award that is challenged on the basis that the arbitral tribunal improperly treated as evidence or was influenced by "without prejudice" communications heard during a mediation? The section protects the arbitrators from disqualification but does it also protect the award?

[204] The ultimate consensus from the ULCC was not to carry this provision forward and to eliminate it from the Uniform Act 2014. Although mediation is to be encouraged, it is not the arbitral tribunal which should act in that capacity. An arbitrator must decide based only on a record of admissible evidence. When an arbitrator also serves as a mediator, it risks the arbitrator being exposed to inadmissible evidence from "without prejudice" communications.<sup>151</sup>

[205] ALRI concurs with this decision as well.

*ii. Necessity for rehearing by new arbitrator*

[206] Section 7 of the Uniform Act 1986 and section 6 of the Alberta Act provide that, if an arbitrator is replaced or removed pursuant to the Model Law, any hearing held prior to that change must be repeated unless the parties otherwise agree. The section also says that the parties may remove an arbitrator under the Model Law at any time prior to the final award, regardless of how the arbitrator was appointed.

---

<sup>150</sup> ULCC Discussion Paper, note 19 at para 126.

<sup>151</sup> Uniform Law Conference of Canada, Working Group on Arbitration Legislation, "Memorandum of Discussion of Policy Issues: Towards a New Uniform International Commercial Arbitration Act" (unpublished paper, 2013) at 21.

[207] The ULCC consensus about this section was that the consequences of an arbitrator being replaced or removed are a matter of procedure best left to:<sup>152</sup>

the applicable arbitration rules and the tribunal's overall obligation to ensure that the proceedings are conducted in a fair manner. . . . [It is not] necessary or desirable for Canadian law to dictate an answer (or even propose a default answer) to this procedural question.

[208] ALRI also agrees with this decision.

#### **h. Repeal of current Act and commencement of new Act**

[209] Two final provisions will be needed to implement the Uniform Act 2014 in Alberta. One section must repeal the current Alberta Act, and the other must provide for the commencement of the new Act in its place. Section 15 of the Uniform Act 2014 suggests commencing on a date to be fixed by proclamation, which allows time for practitioners to learn of the change and prepare for it. Both Ontario and British Columbia chose to have their Acts come into force on the date of royal assent instead.<sup>153</sup> A third option is to designate a specific date on which the new legislation would come into force in Alberta. ALRI expresses no opinion on which approach should be used.

### **RECOMMENDATION 3**

---

The decision on how to bring the Uniform International Commercial Arbitration Act (2014) into force in Alberta should be left to government.

[210] A final issue transition issue is how the new legislation should apply to international commercial arbitration agreements concluded before the new statute comes into force. For example, if the new Alberta statute would significantly expand the tribunal's powers, it may be inappropriate to subject existing agreements to that regime. However, the 2006 amendments to the Model Law and the new provisions in the Uniform Act 2014 are better characterized as clarifying issues that were confusing under the existing legislation; thus, it should not be a concern to subject existing arbitration agreements to these proposed updates.

<sup>152</sup> Uniform Law Conference of Canada, Working Group on Arbitration Legislation, "Memorandum of Discussion of Policy Issues: Towards a New Uniform International Commercial Arbitration Act" (unpublished paper, 2013) at 21.

<sup>153</sup> Bill 27, *Burden Reduction Act, 2017*, 2d Sess, 41st Parl, Ontario, 2017, sched 5: *International Commercial Arbitration Act, 2017*, s 16; Bill 11-2018, *International Commercial Arbitration Amendment Act, 2018*, 3rd Sess, 41st Parl, British Columbia 2018, s 23.



## CHAPTER 5

# Additional Considerations

## A. Introduction

---

[211] In preparing the Uniform Act 2014, the ULCC considered an additional four issues related to international commercial arbitration. However, for various reasons, the ULCC decided against including these matters in the Uniform Act 2014. The overarching rationale is that none of these issues justify having Canadian law depart from the international standard, thereby undermining the benefits of international harmonization.

## B. Appellate Review by Courts

---

[212] It is axiomatic that commercial parties who arbitrate their disputes have deliberately chosen not to resort to or rely on the traditional court system. The Model Law and New York Convention reinforce this by prohibiting or restricting court intervention in the arbitration process. For example, articles 11(5), 13(3) and 14(1) of the Model Law explicitly prohibit appeals from court decisions which appoint arbitrators, resolve arbitrator challenges, terminate arbitrators, and decide positive jurisdictional pleas. Yet the Model Law is silent on appeals from other types of court decisions.<sup>154</sup>

In particular, there was no indication as to whether appeals lay from decisions that referred parties to arbitration, decisions in respect of recognition and enforcement of interim arbitral measures, and decisions in respect of recognition and enforcement of arbitral awards.

[213] The ULCC Working Group was of the opinion that any policy against court intervention should also extend to appeal proceedings from those interventions. Moreover, if an appeal exists, all appellants should first have to obtain leave to appeal in every case.<sup>155</sup>

[214] However, this tougher, more restrictive stance was never formally recommended in the ULCC Final Report because it would arguably violate

---

<sup>154</sup> ULCC Final Report at para 101.

<sup>155</sup> ULCC Final Report at paras 101-102.

article III of the Convention which forbids “substantially more onerous conditions” being imposed on the recognition or enforcement of arbitral awards than are imposed on domestic arbitration awards. In the end, unable to resolve this issue, the ULCC Working Group simply decided to leave the matter.<sup>156</sup>

### C. Contracting Out of the Uniform Act 2014

---

[215] The ULCC Working Group did not include a specific provision in the Uniform Act 2014 concerning parties’ ability to contract out of the Act because:<sup>157</sup>

As the Convention is a state obligation, parties cannot derogate from its application by agreement. The [ULCC] Working Group noted that many provisions of the Model Law are expressly subject to any agreement of the parties to the contrary. The Working Group concluded that the provisions of the Model Law which are not expressly subject to contrary agreement deal with subjects that should not be subject to variation by party agreement.

[216] The Working Group did, however, advise that the domestic arbitration legislation of a province or territory should clearly ensure that, regardless of any agreement by the parties, an international commercial arbitration taking place in that jurisdiction must be governed by its international commercial arbitration statute and not by its domestic arbitration statute.<sup>158</sup> Ontario’s *Arbitration Act, 1991* already has such a provision so Ontario did not need to make any consequential amendment in that regard when it enacted the Ontario Act.<sup>159</sup> Alberta’s domestic *Arbitration Act* has a similar provision and therefore is already basically compliant as well.<sup>160</sup>

[217] One member of the Project Advisory Committee provided anecdotal evidence about a case where an arbitral tribunal had been convinced that the parties were permitted to contract out of the Alberta Act. Other members

<sup>156</sup> ULCC Final Report at paras 103-105.

<sup>157</sup> ULCC Final Report at para 107.

<sup>158</sup> ULCC Final Report at para 109.

<sup>159</sup> *Arbitration Act, 1991*, SO 1991, c 17, s 2(1)(b) provides that: “This Act applies to an arbitration conducted under an arbitration agreement unless . . . the *International Commercial Arbitration Act* applies to the arbitration.”

<sup>160</sup> *Arbitration Act, RSA 2000, c A-43, s 2(1)(b)* provides that: “This Act applies to an arbitration conducted under an arbitration agreement or authorized or required under an enactment unless . . . Part 2 of the *International Commercial Arbitration Act* applies to the arbitration.” If the name or relevant Part number of the new Alberta Act should change, this provision would need to be consequentially amended accordingly to update it.

indicated that the situation is not as certain as the ULCC describes and they would prefer a provision that clarifies the matter. However, there was no strong consensus on the how the issue should be handled.

## D. Confidentiality

---

[218] There is no general principle of law which automatically makes arbitral proceedings confidential. Whether the proceedings, issues, evidence, outcome or details of any award are confidential is primarily dependent on the parties' agreement. Parties can agree to confidentiality in the arbitration agreement or by adopting institutional arbitration rules for the conduct of the arbitration which contain confidentiality provisions.

[219] Occasionally, however, a jurisdiction will enact a confidentiality provision in its arbitration statute, often on an "opt-in" or "opt-out" basis.<sup>161</sup> Alberta has no such provision, either in the Alberta Act or in its domestic arbitration statute. Notably, section 36.01 of the BC Act does include a confidentiality provision.

[220] The ULCC Working Group consulted on whether the Uniform Act 2014 should contain a confidentiality provision and received divided opinions. Those who supported it also predominantly supported an "opt-in" model, thus giving the determining choice to positive party agreement. Given this feedback, and given that most institutional arbitration rules address the issue anyway, the ULCC Working Group concluded that the Uniform Act 2014 need not address the matter.<sup>162</sup>

[221] One member of the Project Advisory Committee was critical of allowing parties to agree to whatever they wanted concerning confidentiality and felt very strongly that there should be a legislated limit on confidentiality. For example, there should be exceptions to confidentiality for certain purposes, such as judicial review or making arbitral information available to auditors, insurers or lawyers. Another risk of allowing extreme confidentiality is that it limits the development of precedent for international commercial disputes.

[222] Other Committee members agreed that there is a lack of precedent available because arbitration has diverted a lot of complex commercial disputes out of the court system. Precedent development would benefit the arbitration

---

<sup>161</sup> ULCC Final Report at para 111.

<sup>162</sup> ULCC Final Report at paras 112-113.

community and they would support arbitral institutions publishing decisions, with party consent and without any identifying factual information. However, they did not agree with the idea of restricting the parties' ability to agree to confidentiality provisions. In their view, a legislative limit on confidentiality would quickly make Alberta an undesirable jurisdiction for arbitration.

## **E. Nationality, Independence and Impartiality of Arbitrators**

---

[223] Article 11(1) of the Model Law does not prohibit anyone from acting as an arbitrator by reason of nationality, unless the parties agree otherwise. The ULCC Working Group considered whether the Uniform Act 2014 should override this ability of parties to agree to nationality restrictions, but concluded that insufficient grounds exist to warrant departing from the Model Law.<sup>163</sup>

[224] Article 12 of the Model Law requires arbitrators to disclose "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence", which are the only two grounds on which an arbitrator can be challenged, unless parties have agreed to nationality restrictions. The ULCC Working Group considered whether these factors should be made the explicit test for a court to appoint an arbitrator, but concluded that it would be unnecessary.<sup>164</sup>

## **F. ALRI's Position on These Issues**

---

[225] In each of these cases, ALRI concurs with the ULCC's conclusion that no legislative action is needed or warranted. This area should be governed by the principles of reform endorsed in Chapter 3, especially the principles that departure from the Model Law should occur only for good reason and that uniformity within Canada should be actively promoted.

[226] Just as none of these issues justify making the Uniform Act 2014 depart from the international standard, which would undermine the benefits of international harmonization, so do none of these issues justify Alberta's departure from the Uniform Act 2014, which would undermine the benefits of Canadian harmonization.

---

<sup>163</sup> ULCC Final Report at para 116.

<sup>164</sup> ULCC Final Report at paras 114-115.

[227] It is also noteworthy that Ontario did not choose to depart from the Uniform Act 2014 in this regard either. The Ontario Act is silent on all these additional issues.

## G. Additional Considerations from British Columbia

---

[228] There are three provisions in the BC Act that are not addressed in the Uniform Act 2014. The Project Advisory Committee is of the view that all three provisions should be included in Alberta's international commercial arbitration legislation.

[229] First, subsections 36(3) and (4) of the BC Act define the term "third party funding" and specifically state that third party funding of an arbitration is not against public policy in British Columbia:<sup>165</sup>

### Grounds for refusing recognition or enforcement

**36** (1) Recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only

(...)

(b) if the court finds that

(...)

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy in British Columbia.

(...)

(3) For the purposes of subsection (1) (b) (ii), third party funding for an arbitration is not contrary to the public policy in British Columbia.

(4) In subsection (3), **"third party funding"**, in relation to an arbitration, means funding for the arbitration that is provided

(a) to a party to the arbitration agreement by a person who is not a party to that agreement, and

(b) in consideration of the person who provides the funding receiving a financial benefit if the funded party is successful in the arbitration.

---

<sup>165</sup> BC Act, ss 36(1), (3)-(4).

[230] As a result, the mere fact that an arbitration has been funded by a third party cannot be used as a basis for refusing recognition or enforcement of a foreign arbitral award. While the Project Advisory Committee acknowledged that they are not aware of any cases where recognition of an award had been refused on that basis, they indicated that it would be a good idea for Alberta legislation to provide clarity on the matter.

[231] Second, section 21.01 of the BC Act establishes who may represent a party to an arbitral proceeding. Specifically, it confirms that a party may choose anyone they wish to represent them in an arbitral proceeding and that person does not have to be a legal practitioner from another state. Further, section 15 of British Columbia's *Legal Profession Act* (which restricts people, other than practising lawyers, from engaging in the practice of law) does not apply to a person who is not a member of the Law Society of British Columbia and is appearing as counsel, giving legal advice or preparing documents in connection with arbitral proceedings:<sup>166</sup>

**Representation in arbitral proceedings**

**21.01** (1) A party may be represented in arbitral proceedings by any person of that party's choice, including, but not limited to, a legal practitioner from another state.

(2) Section 15 of the *Legal Profession Act* does not apply to a person who

- (a) is not a member of the Law Society of British Columbia, and
- (b) does one or more of the following:
  - (i) appears as counsel or advocate in arbitral proceedings;
  - (ii) gives legal advice concerning arbitral proceedings;
  - (iii) prepares statements, documents or other materials in connection with arbitral proceedings.

[232] Again, the Project Advisory Committee thought that a similar provision would be helpful in Alberta in order to provide clarity.

[233] Finally, section 36.02 of the BC Act establishes that an arbitrator is not liable for acts or omissions done in good faith. Immunity does not apply,

---

<sup>166</sup> BC Act, s 21.01; *Legal Profession Act*, SBC 1998, c 9, s 15.

however, if the arbitrator's behaviour amounts to bad faith or intentional wrongdoing.<sup>167</sup>

### Immunity

**36.02** An arbitrator is not liable for anything done or omitted in connection with an arbitration unless the act or omission is in bad faith or the arbitrator has engaged in intentional wrongdoing.

[234] The Project Advisory Committee agreed that a similar provision should be enacted in Alberta.

## H. ALRI's Position on These Issues

---

[235] Third party funding and representation are complicated issues that have implications outside of the narrow topic of international commercial arbitration.<sup>168</sup> For example, the issue of representation would likely require amendments to the *Legal Profession Act*, which would impact many different areas of Alberta law.<sup>169</sup> A full exploration of these issues is beyond the scope of a project dealing solely with international commercial arbitration.

[236] In ALRI's opinion, it would be inappropriate to include provisions regarding third party funding and representation in Alberta's new legislation without study and consultation in other areas.

[237] The issue of arbitrator immunity is already dealt with at common law. It is clear that "[i]n the absence of fraud or bad faith, an arbitrator enjoys immunity from civil liability."<sup>170</sup> As such, it is unnecessary to include a specific provision regarding arbitrator immunity in the international commercial arbitration legislation.

[238] As a result, ALRI is of the view that this additional provision is not required in Alberta.

<sup>167</sup> BC Act, s 36.02.

<sup>168</sup> For example, see the discussion of the common law doctrines of champerty and maintenance in British Columbia Law Institute, *Financing Litigation*, Study Paper No. 9 (2017), online (pdf): <[www.bcli.org/wordpress/wp-content/uploads/2017/10/2017-10-04-BCLI-Study-Paper-on-Financing-Litigation-PUBLICATION-COPY-rev.pdf](http://www.bcli.org/wordpress/wp-content/uploads/2017/10/2017-10-04-BCLI-Study-Paper-on-Financing-Litigation-PUBLICATION-COPY-rev.pdf)>.

<sup>169</sup> *Legal Profession Act*, RSA 2000, c L-8, s 106.

<sup>170</sup> *Flock v Beattie*, 2010 ABQB 193 at para 17.



# Appendix A: The Alberta Act and the Uniform Act 2014 Compared

Alberta Act	Uniform Act 2014
<i>International Commercial Arbitration Act</i> , RSA 2000, c I-5	Uniform International Commercial Arbitration Act (2014) <sup>171</sup>
	<b>Part I</b> <b>Interpretation</b>
<p><b>Interpretation</b></p> <p>1(1) In this Act,</p> <p>(a) “Convention” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958, as set out in Schedule 1;</p> <p>(b) “International Law” means the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in Schedule 2.</p> <p>(2) Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the Convention or the International Law, as the case may be.</p>	<p><b>Definitions</b></p> <p>1. (1) In this Act,</p> <p>(a) "Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Conference on International Commercial Arbitration in New York on 10 June 1958 as set out in Schedule I; and</p> <p>(b) "Model Law" means the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the United Nations Commission on International Trade Law on 7 July 2006 as set out in Schedule II.</p> <p>(2) Except as otherwise provided in this Act,</p> <p>(a) words and expressions used in Part II have the same meaning as the corresponding words and expressions in the Convention; and</p> <p>(b) words and expressions used in Part III have the same meaning as the corresponding words and expressions used in the Model Law.</p>

<sup>171</sup> [https://ulcc.ca/images/stories/2014\\_pdf\\_en/2014ulcc0014.pdf](https://ulcc.ca/images/stories/2014_pdf_en/2014ulcc0014.pdf)

<p style="text-align: center;"><b>Part 1</b> <b>Foreign Arbitral Awards</b></p>	<p style="text-align: center;"><b>Part II</b> <b>The Convention</b></p>
<p><b>Application of Convention</b></p> <p>2(1) Subject to this Act, the Convention applies in the Province.</p> <p>(2) The Convention applies to arbitral awards and arbitration agreements, whether made before or after the coming into force of this Part, but applies only in respect of differences arising out of commercial legal relationships, whether contractual or not.</p>	<p><b>Application of Convention</b></p> <p>2. (1) Subject to this Act, the Convention applies in [enacting jurisdiction] to arbitral awards or arbitration agreements, whether made before or after the coming into force of this Part, in respect of differences arising out of commercial legal relationships.</p> <p>(2) In determining whether the Convention applies to certain types of arbitral awards,</p> <p style="padding-left: 20px;">(a) an arbitral award made in a jurisdiction within Canada that is considered to be international in that jurisdiction is not considered to be a domestic award for the purpose of article I(1) of the Convention; and</p> <p style="padding-left: 20px;">(b) an arbitral award made in a jurisdiction within Canada that is not considered to be international in that jurisdiction is considered to be a domestic award for the purpose of article I(1) of the Convention.</p>
<p><b>Application to court</b></p> <p>3 For the purpose of seeking recognition of an arbitral award pursuant to the Convention, application shall be made to the Court of Queen's Bench.</p>	<p><b>Designation of court</b></p> <p>3. For the purpose of seeking recognition and enforcement of an arbitral award pursuant to the Convention, application shall be made to [enacting jurisdiction to designate appropriate court].</p>
<p style="text-align: center;"><b>Part 2</b> <b>International Commercial Arbitration</b></p>	<p style="text-align: center;"><b>Part III</b> <b>The Model Law</b></p>
<p><b>Application of International Law</b></p> <p>4(1) Subject to this Act, the International Law applies in the Province.</p>	<p><b>Application of Model Law</b></p> <p>4. (1) Subject to this Act, the Model Law applies in [enacting jurisdiction].</p> <p>(2) With respect to article 7 of the</p>

<p>(2) The International Law applies to international commercial arbitration agreements and awards, whether made before or after the coming into force of this Part.</p>	<p>Model Law, option I applies in [enacting jurisdiction]; option II does not.</p> <p>(3) The Model Law applies to international commercial arbitration agreements and awards made in international commercial arbitrations, whether made before or after the coming into force of this Part.</p>
<p><b>Conciliation and other proceedings</b></p> <p>5 For the purpose of encouraging settlement of a dispute, an arbitral tribunal may, with the agreement of the parties, employ mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure.</p>	<p>This section is not carried forward in the Uniform Act 2014.</p>
<p><b>Removal of arbitrator</b></p> <p>6(1) Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the International Law, any hearing held prior to the replacement or removal shall be repeated.</p> <p>(2) With respect to article 15 of the International Law, the parties may remove an arbitrator at any time prior to the final award, regardless of how the arbitrator was appointed.</p>	<p>This section is not carried forward in the Uniform Act 2014.</p>
	<p>For ss 5- 6 of the Uniform Act 2014, see Alberta Act, s 12</p>
	<p>For s 7 of the Uniform Act 2014, see Alberta Act, s 9</p>
<p><b>Rules applicable to substance of dispute</b></p> <p>7 Notwithstanding article 28(2) of the International Law, if the parties fail to make a designation pursuant to article 28(1) of the International Law, the arbitral tribunal shall apply the rules of law it considers to be appropriate</p>	<p><b>Rules applicable to substance of dispute</b></p> <p>8. Notwithstanding article 28(2) of the Model Law, if the parties fail to make a designation pursuant to article 28(1) of the Model Law, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the</p>

<p>given all the circumstances respecting the dispute.</p>	<p>circumstances respecting the dispute.</p>
<p><b>Consolidation of proceedings</b></p> <p>8(1) The Court of Queen's Bench, on application of the parties to 2 or more arbitration proceedings, may order</p> <ul style="list-style-type: none"> <li>(a) the arbitration proceedings to be consolidated, on terms it considers just,</li> <li>(b) the arbitration proceedings to be heard at the same time, or one immediately after another, or</li> <li>(c) any of the arbitration proceedings to be stayed until after the determination of any other of them.</li> </ul> <p>(2) Where the Court orders arbitration proceedings to be consolidated pursuant to subsection (1)(a) and all the parties to the consolidated arbitration proceedings are in agreement as to the choice of the arbitral tribunal for that arbitration proceeding, the arbitral tribunal shall be appointed by the Court, but if all the parties cannot agree, the Court may appoint the arbitral tribunal for that arbitration proceeding.</p> <p>(3) Nothing in this section shall be construed as preventing the parties to 2 or more arbitration proceedings from agreeing to consolidate those arbitration proceedings and to take such steps as are necessary to effect that consolidation.</p>	<p><b>Enforcement of consolidation agreements</b></p> <p>9. (1) If all parties to two or more arbitral proceedings have agreed to consolidate those proceedings, a party, with notice to the others, may apply to the [enacting jurisdiction to designate appropriate court] for an order that the proceedings be consolidated as agreed to by the parties.</p> <p>(2) Subsection (1) does not prohibit parties from consolidating arbitral proceedings without a court order.</p> <p>(3) On an application under subsection (1), if all parties to the arbitral proceedings have agreed to consolidate the proceedings but have not agreed, through the adopting of procedural rules or otherwise,</p> <ul style="list-style-type: none"> <li>(a) to the designation of parties as claimants or respondents or a method for making those designations; or</li> <li>(b) to the method for determining the composition of the arbitral tribunal</li> </ul> <p>the court may, subject to subsection (4), make an order deciding either or both of those matters.</p> <p>(4) If the arbitral proceedings are under different arbitration agreements, no order shall be made under subsection (1) unless, by their arbitration agreements or otherwise, the parties have agreed</p> <ul style="list-style-type: none"> <li>(a) to the same place of arbitration or a method for determining a single place of arbitration for the consolidated proceeding within [enacting jurisdiction];</li> <li>(b) to the same procedural rules or a method for determining a single set of procedural rules for the conduct of the consolidated proceedings; and</li> <li>(c) either to have the consolidated proceedings administered by the same arbitral institution or to have the consolidated proceedings not be</li> </ul>

	<p>administered by any arbitral institution.</p> <p>(5) In making an order under this section, the [enacting jurisdiction to designate appropriate court] may have regard to any circumstances that it considers relevant, including</p> <ul style="list-style-type: none"> <li>(a) whether one or more arbitrators have been appointed in one or more of the arbitral proceedings;</li> <li>(b) whether the applicant delayed applying for the order; and</li> <li>(c) whether any material prejudice to any of the parties or any injustice may result from making an order.</li> </ul>
<p><b>Court</b></p> <p>9(1) The functions referred to in article 6 of the International Law shall be performed by the Court of Queen's Bench.</p> <p>(2) For the purposes of the International Law, a reference to "court" or "competent court", where in the context it means a court in the Province, means the Court of Queen's Bench.</p>	<p><b>Designation of court</b></p> <p>7. (1) The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3), 17 H, and 34(2) of the Model Law shall be performed by [enacting jurisdiction to designate appropriate court].</p> <p>(2) For the purposes of the Model Law, a reference to "court" or "competent court", where in the context it means a court of [enacting jurisdiction], means the [enacting jurisdiction to designate appropriate court] except where the context otherwise requires.</p>
<p><b>Part 3</b></p> <p><b>General</b></p>	<p><b>Part IV</b></p> <p><b>General</b></p>
<p><b>Stay of proceedings</b></p> <p>10 Where, pursuant to article II(3) of the Convention or article 8 of the International Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.</p>	<p><b>Stay of proceedings</b></p> <p>10. Where, pursuant to article II(3) of the Convention or article 8 of the Model Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.</p>
<p>There is no equivalent in the Alberta Act.</p>	<p><b>Limitation period for recognition or enforcement of arbitral awards</b></p> <p>11. (1) No application under the Convention or the Model Law for recognition or enforcement, or both, of</p>

	<p>an arbitral award shall be made after the tenth anniversary of</p> <ul style="list-style-type: none"> <li>(a) the date on which the time limit expired for the commencement of proceedings at the place of arbitration to set aside the award, if no such proceedings were commenced; or</li> <li>(b) the date on which proceedings at the place of arbitration to set aside the award concluded, if such proceedings were commenced.</li> </ul> <p>(2) Despite subsection (1), if an arbitral award was made before the coming into force of this Act but an application under the Convention or Model Law for the recognition or enforcement of that award was not made before that day, no application shall be made after the earlier of the following</p> <ul style="list-style-type: none"> <li>(a) the date determined under subsection (1); or</li> <li>(b) the date on which the limitation period that applied in respect of the recognition or enforcement of the arbitral award before the coming into force of this Act expired or would have expired.</li> </ul> <p>(3) Where there is a conflict between this Act and any other Act on the limitation period for recognition or enforcement of arbitral awards, this Act prevails.</p>
<p>There is no equivalent in the Alberta Act.</p>	<p><b>Appeals from negative jurisdictional rulings</b></p> <p>12. (1) If, pursuant to article 16(2) of the Model Law, an arbitral tribunal rules on a plea that it does not have jurisdiction, any party may apply to the [enacting jurisdiction to designate appropriate court] to decide the matter.</p> <p>(2) The decision of the [enacting jurisdiction to designate appropriate court] shall not be subject to an appeal.</p> <p>(3) If the arbitral tribunal rules on the plea as a preliminary question, the proceedings of the arbitral tribunal are not stayed with respect to any other</p>

	<p>matters to which the arbitration relates and are within its jurisdiction.</p>
<p><b>Crown bound</b></p> <p>11 This Act binds the Crown.</p>	<p><b>Crown bound</b></p> <p>13. (1) This Act binds the Crown.</p> <p>(2) An award recognized pursuant to this Act is enforceable against the Crown in the same manner and to the same extent as a judgment is enforceable against the Crown.</p>
<p><b>Aids in interpretation</b></p> <p>12(1) This Act shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the Act in their context and in the light of its objects and purposes.</p> <p>(2) In applying subsection (1) to the International Law, recourse may be had to</p> <p>(a) the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3-21, 1985), and</p> <p>(b) the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, which shall be published in The Alberta Gazette.</p>	<p><b>Meaning of certain terms used in Model Law</b></p> <p>5. (1) In article 1(1) of the Model Law, an "agreement in force between this State and any other State or States" means an agreement that is in force in [enacting jurisdiction] between Canada and any other country or countries.</p> <p>(2) In articles 1(2), 17 J, 27, 34(2)(a)(i), 34(2)(b)(ii), and 36(1)(b)(ii) of the Model Law, "this State" means [enacting jurisdiction].</p> <p>(3) In article 1(3) of the Model Law, "different States" means different countries, and "the State" means the country.</p> <p>(4) In articles 1(5), 34(2)(b)(i), and 36(1)(b)(i) of the Model Law, "law of this State" means the law of [enacting jurisdiction] and any laws of Canada that are in force in [enacting jurisdiction].</p> <p>(5) In article 35(2) of the Model Law, "this State" means Canada.</p> <p><b>Use of extrinsic material in applying article 2 A(1) of Model Law</b></p> <p>6. In applying article 2A(1) of the Model Law, recourse may be had to:</p> <p>(a) the Reports of the United Nations Commission on International Trade Law on the work of its 18th (3-21 June 1985) and 39th (19 June - 7 July 2006) sessions (U.N. Docs. A/40/17 and A/61/17);</p> <p>(b) the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on</p>

	<p>International Commercial Arbitration (U.N. Doc A/CN.9/264); and</p> <p>(c) the Commentary of the United Nations Commission on International Trade Law concerning the UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006 (U.N. Sales No. E.08.V.4).</p>
There is no equivalent in the Alberta Act.	<p><b>Forms of proof</b></p> <p>14. (1) In any proceeding, a certificate issued by or under the authority of the Minister of Foreign Affairs containing a statement that a foreign state is a Contracting State is, in the absence of evidence to the contrary, proof of the truth of the statement without proof of the signature or official character of the person who issued or certified it.</p> <p>(2) Nothing in this section precludes the taking of judicial notice pursuant to the <i>Evidence Act</i> or any other enactment.</p>
The Alberta Act came into effect on Royal Assent.	<p><b>Coming into force</b></p> <p>15. This Act comes into force on a day to be fixed by proclamation.</p>

# Appendix B: The New York Convention

## CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

### Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

### Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

### Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

### Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
  - a) The duly authenticated original award or a duly certified copy thereof;
  - b) The original agreement referred to in article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award

shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

#### Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- b) The recognition or enforcement of the award would be contrary to the public policy of that country.

#### Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

#### Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

## Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.
2. This Convention shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

## Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

## Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

## Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

- a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
- b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
- c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

### Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

### Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.
3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

### Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

### Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- a) Signatures and ratifications in accordance with article VIII;
- b) Accessions in accordance with article IX;
- c) Declarations and notifications under articles I, X and XI;
- d) The date upon which this Convention enters into force in accordance with article XII;
- e) Denunciations and notifications in accordance with article XIII.

### Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

# Appendix C: The Model Law

## UNCITRAL Model Law on International Commercial Arbitration

(United Nations documents A/40/17, annex I and A/61/17, annex I)

**(As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006)**

### CHAPTER I. GENERAL PROVISIONS

#### *Article 1. Scope of application<sup>1</sup>*

(1) This Law applies to international commercial<sup>2</sup> arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

*(Article 1(2) has been amended by the Commission at its thirty-ninth session, in 2006)*

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

<sup>1</sup> Article headings are for reference purposes only and are not to be used for purposes of interpretation.

<sup>2</sup> The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

- (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
- (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

## *Article 2. Definitions and rules of interpretation*

For the purposes of this Law:

(a) “arbitration” means any arbitration whether or not administered by a permanent arbitral institution;

(b) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators;

(c) “court” means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25(a) and 32(2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

## *Article 2 A. International origin and general principles*

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

*Article 3. Receipt of written communications*

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

*Article 4. Waiver of right to object*

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

*Article 5. Extent of court intervention*

In matters governed by this Law, no court shall intervene except where so provided in this Law.

*Article 6. Court or other authority for certain functions of arbitration assistance and supervision*

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

## CHAPTER II. ARBITRATION AGREEMENT

*Option I*

*Article 7. Definition and form of arbitration agreement*

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

(1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

- (2) The arbitration agreement shall be in writing.
- (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
- (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
- (5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
- (6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

## *Option II*

### *Article 7. Definition of arbitration agreement*

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

“Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

### *Article 8. Arbitration agreement and substantive claim before court*

- (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
- (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

### *Article 9. Arbitration agreement and interim measures by court*

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

### CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

#### *Article 10. Number of arbitrators*

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be three.

#### *Article 11. Appointment of arbitrators*

- (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

- (3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

- (4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

- (5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a

sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

*Article 12. Grounds for challenge*

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

*Article 13. Challenge procedure*

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

*Article 14. Failure or impossibility to act*

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

*Article 15. Appointment of substitute arbitrator*

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

## CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

*Article 16. Competence of arbitral tribunal to rule on its jurisdiction*

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

## CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

*(As adopted by the Commission at its thirty-ninth session, in 2006)*

### ***Section 1. Interim measures***

*Article 17. Power of arbitral tribunal to order interim measures*

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

#### *Article 17 A. Conditions for granting interim measures*

(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

### **Section 2. Preliminary orders**

#### *Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders*

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

*Article 17 C. Specific regime for preliminary orders*

- (1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.
- (2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.
- (3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.
- (4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.
- (5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

***Section 3. Provisions applicable to interim measures and preliminary orders***

*Article 17 D. Modification, suspension, termination*

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

*Article 17 E. Provision of security*

- (1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
- (2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

*Article 17 F. Disclosure*

- (1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.
- (2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party

against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

*Article 17 G. Costs and damages*

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

**Section 4. Recognition and enforcement of interim measures**

*Article 17 H. Recognition and enforcement*

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

*Article 17 I. Grounds for refusing recognition or enforcement<sup>3</sup>*

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

- (i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or
- (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
- (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

- (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or
- (ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

<sup>3</sup> The conditions set forth in article 17 I. are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

## ***Section 5. Court-ordered interim measures***

### ***Article 17 J. Court-ordered interim measures***

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

## **CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS**

### ***Article 18. Equal treatment of parties***

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

### ***Article 19. Determination of rules of procedure***

- (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

*Article 20. Place of arbitration*

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

*Article 21. Commencement of arbitral proceedings*

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

*Article 22. Language*

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

*Article 23. Statements of claim and defence*

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

*Article 24. Hearings and written proceedings*

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other

materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

#### *Article 25. Default of a party*

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

#### *Article 26. Expert appointed by arbitral tribunal*

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

#### *Article 27. Court assistance in taking evidence*

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

## CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

### *Article 28. Rules applicable to substance of dispute*

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
- (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
- (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.
- (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

### *Article 29. Decision-making by panel of arbitrators*

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

### *Article 30. Settlement*

- (1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
- (2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

### *Article 31. Form and contents of award*

- (1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
- (2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

*Article 32. Termination of proceedings*

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

*Article 33. Correction and interpretation of award; additional award*

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the

award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

## CHAPTER VII. RECOURSE AGAINST AWARD

### *Article 34. Application for setting aside as exclusive recourse against arbitral award*

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the award is in conflict with the public policy of this State.<sup>f</sup>

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

## CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

### *Article 35. Recognition and enforcement*

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.<sup>4</sup>

*(Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)*

<sup>4</sup> The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

### *Article 36. Grounds for refusing recognition or enforcement*

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the

decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

# Types of Court Applications Permitted in International Commercial Arbitration

Type of Application	Type of Relief Sought	Does a Master have Jurisdiction?	Ability to Appeal from Court's Decision?
Court assistance regarding procedure Model Law, Articles 11(3)-(5)	Application to appoint an arbitrator	Yes	Appeal prohibited
Court assistance regarding procedure Model Law, Article 14(1)	Application to terminate the mandate of an arbitrator	Yes	Appeal prohibited
Court assistance regarding procedure New York Convention, Article II.3; Model Law, Article 8	Application to stay court proceedings and refer parties to arbitration	Yes	Appeal not specifically prohibited
Court assistance regarding procedure Alberta Act, section 8; Uniform Act 2014, section 9	Application to consolidate arbitral proceedings	Yes	Appeal not specifically prohibited
Court assistance regarding procedure Model Law, Article 27	Application for court assistance in taking evidence	Yes	Appeal not specifically prohibited
Interim measure Model Law, Articles 9 and 17J	Application for an interim measure	Yes	Appeal not specifically prohibited

Type of Application	Type of Relief Sought	Does a Master have Jurisdiction?	Ability to Appeal from Court's Decision?
Recourse against award Model Law, Article 34	Application to set aside an arbitral award	Yes	Appeal not specifically prohibited
Recognition or enforcement New York Convention, Article V; Model Law, Articles 35 and 36(1)	Application to recognize and enforce an arbitral award	Yes	Appeal not specifically prohibited
Recognition or enforcement Model Law, Articles 17H and 17I	Application for recognition and enforcement of an interim measure granted by an arbitral tribunal	Yes	Appeal not specifically prohibited
Recognition or enforcement New York Convention, Article VI; Model Law, Article 36(2)	Application for adjournment and security if enforcement proceedings are delayed by a set aside application elsewhere	Yes	Appeal not specifically prohibited
Appeal from tribunal's decision Model Law, Article 13(3)	Application to challenge the appointment of an arbitrator	No	Appeal prohibited
Appeal from tribunal's decision Model Law, Article 16; Uniform Act 2014, section 12	Application to review the tribunal's decision regarding its jurisdiction	No	Appeal prohibited





**Web:** [alri.ualberta.ca](http://alri.ualberta.ca)

**Phone:** 780.492.5291

**Email:** [lawreform@ualberta.ca](mailto:lawreform@ualberta.ca)

**Follow us on Twitter!** [@ablawreform](https://twitter.com/ablawreform)

---