INSTITUTE OF LAW RESEARCH AND REFORM
Edmonton, Alberta

PROPOSALS FOR A NEW ALBERTA ARBITRATION ACT

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INSTITUTE OF LAW RESEARCH AND REFORM

The Institute of Law Research and Reform was established on January 1, 1968, 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 of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

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ACKNOWLEDGEMENTS

During the period when the proposals in this report were being developed, the Chairman of the Institute's Board was the late J.W. Beames, Q.C., whose integrity, ability and energy illuminated the work of the Institute throughout the time of his association with the Institute.

HOW TO READ THIS REPORT

A reader may get the general thrust of our proposals by reading the Executive Summary (pages 1 and 2).

A reader may get an overview of our proposals with a minimum of explanation by reading the Summary of Proposals (Part III, pages 43 - 64).

In order to get a complete account of our proposals, the reader must read the Draft Arbitration Act (Part IV, Item A, pages 67 - 111) and the draft amendment to the Limitation of Actions Act (Part IV, Item B, page 112).

However, a reader who wants a complete account may find it more efficient to work from the Summary of Proposals (Part III, pages 43 - 64) and follow the cross-references to the draft legislation.

A reader who wants a greater understanding of the principal issues and of the Institute's approach to them should read Part II, Proposals Leading to a New Arbitration Act, pages 3 - 41.

REFERENCE MATERIALS

The following reference materials are attached to this report:

Appendix A: Arbitration Act (Alberta), pages 113 to 124.

Appendix B: International Commercial Arbitration Act (Alberta), pages 125 to 152, Schedule 2 of which is the UNCITRAL Model Law of 1985, pages 135 to 152.

Appendix C: Comparative Chart, which compares in summary form (a) the existing Arbitration Act, (b) the Model Law as varied by the International Commercial Arbitration Act, and (c) the draft Arbitration Act, pages 153 to 166.

With these reference materials the reader should be able to read and understand this report without referring to other sources of information.

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TABLE OF ABBREVIATED REFERENCES

Statute or convention	Abbreviated reference
Arbitration Act, RSA 1980, c. A-43, as amended by SA 1983 c. 18, which is Appendix A to this report and appears at pages 113 to 124	Arbitration Act, or Arbitration Act (Alberta), or AA
International Commercial Arbitration Act, SA 1986, c. I-6.6 c. I-6.6, which is Appendix B to this report and appears at pages 125 to 152	ICAA
UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985, which is Schedule 2 to the ICAA and appears at pages 135 to 152	UNCITRAL Model Law, Model Law, or ML
Commercial Arbitration Act, Statutes of British Columbia 1986, c. 3	BC Act, or BC CAA
International Commercial Arbitration Act, Statutes of British Columbia 1986, c. 4	BC ICAA
Arbitration Act 1889 (UK)	1889 UK
Arbitration Act 1950 (UK)	1950 UK
Arbitration Act 1975 (UK)	1975 UK
Arbitration Act 1979 (UK)	1979 UK

Draft Legislation	Abbreviated Reference
Draft Arbitration Act, Part III, Item A	Draft Act
Draft Amendment to the Limitation of Actions Act, Part III, Item B	Draft amendment to the Limitation of Actions Act

Book or report	Abbreviated reference
Mustill, Sir Michael J., & Boyd, Stewart C., Commercial Arbitration, Butterworths, 1982	Mustill and Boyd
Russell on the Law of Arbitration, 20th edition, Anthony Walton, Stevens & Sons, 1982	Russell
Report on Arbitration, Law Reform Commission of British Columbia, LRC 55, 1982	BC Report
Principles for the Enactment of Arbitration Legislation, a draft prepared by David Elliott, barrister and solicitor, and adopted by the Board of Directors of the Arbitrators' Institute of Canada on June 18, 1987	AIC Draft
Departmental Advisory Committee and Scottish Advisory Committee on Arbitration Law (UK), The UNCITRAL Model Law on International Commercial Arbitration, A Consultative Document, October 1987	UK Advisory Committee Report
Excerpts on the Model Law, from the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3 - 21, 1985), which appears at pages 2915 - 3031 of the Alberta Gazette, August 30, 1986	UNCITRAL Report

PART I - EXECUTIVE SUMMARY

A. Executive Summary

This report proposes that a new Arbitration Act be substituted for the Arbitration Act (Alberta). Part III contains the draft Act.

The draft Act would apply whenever parties agree to arbitrate. It would apply, unless excluded, to arbitrations under other statutes except labour and international commercial arbitrations.

The draft Act is patterned after the UNCITRAL Model Law of 1985 which, slightly modified, applies to international arbitrations in Alberta, by the International Commercial Arbitration Act (Alberta). The domestic draft differs in several significant respect to make it more suitable to arbitrations in Alberta and fit better with Alberta law, practice and terminology.

These proposals are intended to

- recognize party control
- ensure fairness
- strengthen the arbitration system
- make the arbitration system more efficient.

They are not intended to make radical changes in the arbitration system, but to rationalize and strengthen the system.

The draft Act would

- require fundamental fairness in arbitrations
- recognize the right of parties to manage arbitrations by agreement

- give arbitrators additional powers
  - to apply rules of equity
  - to make orders like injunctions and specific performance
  - to deal with parties who do not comply with the rules
  - to dismiss an arbitration for want of prosecution
  - to provide a set of procedures to govern service, including substitutional service
  - to give directions for conduct of arbitrations
  - to compel the giving of evidence

- require parties to raise objections to jurisdiction and arbitrators promptly

- require arbitrators, in the absence of an agreement, to decide according to law, and to give reasons for decisions.

The need for court intervention is recognised both to facilitate arbitrations and to ensure fairness.

The Court of Queen's Bench would have power to

- appoint an arbitrator when the agreed process fails

- stay a court action to allow an arbitration to proceed (A stay would be required unless the circumstances set out in the Act exist.)

- make preservation orders and enforce arbitrators' procedural orders

- decide upon questions of jurisdiction, including granting declarations of fundamental defects in arbitration agreements and arbitrations

- remove arbitrators in specified circumstances

- rule on a preliminary question of law brought with the consent of an arbitral tribunal

- set aside arbitral awards for reasons specified in the draft Act (e.g., a fundamental defect in the agreement to arbitrate, the reference to arbitration or the appointment of the tribunal, bias, serious procedural wrongs, or errors in law)

- allow an arbitral award to be enforced in the same manner as a Court judgment, or to give judgment in an action on an award.

PART II - PROPOSALS LEADING TO A NEW ARBITRATION ACT

CHAPTER 1 - INTRODUCTION

A. Form and Content of this Report

In this Chapter 1 of Part II of our report we describe our project, the reasons for adopting it, the way we have conducted it, and our approach to it. In Chapter 2 of this Part II, we describe our general proposals, some parts of the present law, and some problems of the present law and issues which arise from it, and we will describe and give reasons for our major policy proposals.

In Part III, we give a Summary of Proposals, which is an overview in summary form of our specific proposals and, where appropriate, the reasons for specific proposals. The Summary also gives cross-references into the draft legislation which constitutes Part IV of this report.

That draft legislation is the embodiment of our specific proposals for the reform of the Arbitration Act. It consists of a draft Arbitration Act (Part IV, Item A) and a draft amendment to the Limitation of Actions Act (Part IV, item B).

The reader who wishes to see our specific proposals should therefore read the draft legislation. He or she may find it more efficient to read the Summary of Proposals and to follow the cross-references through into the draft legislation. The Comparative Chart, Appendix C, will help the reader to compare the draft Arbitration Act with the present Act and the UNCITRAL Model Law of 1985, as adapted by the International Commercial Arbitration Act.

This report is unlike previous Institute reports. These have customarily contained an extensive discussion of the existing law, its problems (if any), the range of practicable solutions with reasons for choosing one, and recommendations interspersed through the text. Draft

legislation has been explanatory and supplementary. Readers who are accustomed to our reports should note that Part II is more in the nature of background information and discussion.

B. Reasons for this Report

The Arbitration Act (Alberta) governs private arbitrations to which Alberta law applies, excepting most labour arbitrations and all international commercial arbitrations. It is based upon the United Kingdom's Arbitration Act of 1889. Users find two principal difficulties with it. The first is that it leaves many practical problems unsolved. The second is that the scope for discretionary intervention by the courts is unduly broad and defeats the desire of many arbitrating parties to avoid the litigation system. The Act is outdated.

On a number of occasions over a number of years, the Arbitrators' Institute of Canada and the Alberta Arbitration and Mediation Society have suggested to us that a revision of the Arbitration Act should be undertaken. We undertook a study, and this report is the result of the study.

C. Scope of this Report

The Arbitration Act applies to arbitrations carried on under private agreements to arbitrate which are subject to Alberta law. It also applies to arbitration under provincial statutes which provide for arbitration under the Arbitration Act. These are the arbitrations which are the subject of this report.

The Arbitration Act may apply to some arbitrations which have international aspects but are not "international commercial arbitrations" under the International Commercial Arbitrations Act (Alberta). It may apply to some arbitrations which are interprovincial in nature. Its predominant application, however, is to "domestic" arbitrations, that is, arbitrations which pertain only to Alberta because they are carried on in Alberta between

residents of Alberta or concerns which carry on business in Alberta. This report therefore focusses on domestic arbitrations, though an international or interprovincial arbitration could be carried out efficiently under our proposals.

D. Conduct of the Institute's Project

In July, 1987, we published our Issues Paper No. 1, *Towards a New Arbitration Act for Alberta*. We did so in order to elicit informed comment and advice about what an improved Arbitration Act should do. We sent the Issues Paper to our usual mailing list, which includes the Members of the Legislature, the media, law firms, judges and libraries. We also sent it to all government departments. The Alberta Arbitration and Mediation Society sent it to the Society's members and have had it reviewed by a committee struck for that purpose. We held two full-day Workshops in Edmonton and Calgary respectively, which were attended by arbitrators, lawyers, and others. This process yielded much useful comment.

We have worked in close co-operation with the Alberta Arbitration and Mediation Society, and, through it, with the Arbitration Institute of Canada, and we have looked to them for much information about the needs of the users of the arbitration system, including arbitrators and parties to arbitrations. We have circulated our materials to them throughout our project, and we have benefited by their comments and criticisms, though this report is our own responsibility.

E. Approach to the Project

Our proposals are intended to serve the interests of those who agree to submit their disputes to arbitration. We believe that by serving those interests, the law will serve the public interest.

We see no need for a root and branch transformation of arbitration law or of the arbitration system. We do see a need for adjustment in many matters

of important detail. That is what this report recommends.

One broader public interest should be mentioned. Concern about the cost of court facilities and the clogging of those facilities has suggested that some litigants be compelled to go to arbitration or that they be induced to do so by a requirement that they be required to pay the cost of operating the court system if they insist on using it. While it is likely that improving the efficiency of the arbitration system will keep more cases out of the courts, we do not make any recommendations for compulsory or induced arbitration, something which we think should be considered, if at all, only in the context of a study of the litigation system.

CHAPTER 2 - PRESENT LAW AND PROPOSALS

A. Introduction to Proposals

(1) General structure of arbitration law

(a) Contract law as the foundation of arbitration law

An arbitration occurs because the parties to it have agreed to have a dispute decided by an arbitrator or arbitrators rather than by a court. By agreeing to arbitration, the parties have, expressly or, more often, by implication, agreed to participate in the arbitration and to honour the arbitrator's award. The foundation of an arbitration is a contract, and for that reason, arbitration law is based upon contract law.

The underlying agreement to arbitrate is governed entirely by the law of contract. The Arbitration Act does not say anything about it, nor does the Model Law or the draft Act. The courts will interpret it on the same principles as they interpret other legally binding contracts and will apply all the rules of contract law to it. Our proposals will not change this basic legal situation.

An agreement to arbitrate may be an agreement to submit an existing dispute to arbitration. Such an agreement is a contract which stands by itself. More often, an agreement to arbitrate is an agreement to submit to arbitration disputes which arise under a larger contract of which the agreement to arbitrate is one clause. A court may treat such a clause as having an existence of its own which can survive the termination of the larger contract. We think this treatment desirable, and section 16(2) would extend the scope of its application, as a dispute will quite often survive the termination of the contract.

An arbitration provided for by another statute is not based on a contract. However, the basic principles of justice and party control apply equally to a statutory arbitration. Our proposals will not differentiate between arbitrations based on contract and arbitrations based on statute.

Parties sometimes agree to "non-binding arbitration". Valuable as such a process may be, there is then no agreement to arbitrate in any real sense because there is no adjudication which affects the legal rights of the parties. The law of arbitration does not, in our view, apply to a "non-binding arbitration" nor an agreement to have one.

(b) Party control and the principle of justice

If parties to an agreement have agreed to participate in an arbitration and to honour the arbitrators' award, the notion that contracts should be enforced suggests that the courts should lend their assistance to compel parties to carry out the agreement but should not otherwise interfere with the arbitration. However, an arbitrator may be unfair or incompetent or may misunderstand the law. The notion that justice should be done according to law suggests that the courts, as the traditional guardians of justice and supervisors of tribunals, should intervene to correct wrongs and errors.

Everyone agrees that there are some circumstances in which court intervention is necessary for the protection of arbitration litigants. The present law, however, leaves the Court of Queen's Bench with broad undefined discretionary powers under which it may allow lawsuits to pre-empt arbitrations, remove arbitrators, and set awards aside. We think that the arbitration statute should identify the kinds of circumstances in which intervention is permissible and that the areas of court intervention should be somewhat more limited than they now are. The draft Act would give effect to these views.

(2) Draft Act

The draft Act which appears as item A in Part III of this report, if enacted, would give effect to the views which we have formed. It is patterned on the UNCITRAL Model Law on International Commercial Arbitration of 1985, which has been adopted as part of the International Commercial Arbitration Act (Alberta). The reasons for patterning the draft Act on the Model Law are (a) that this will keep Alberta law about domestic arbitrations in as much harmony as circumstances permit with the Alberta law about international commercial arbitrations; (b) the Model Law is, in general, a good model; and (c) there is some value in keeping Alberta law in as much harmony as circumstances permit with the developing international mainstream of arbitration law. We note in passing that the Attorney General, the Minister of Consumer and Corporate Affairs and the Minister of Energy jointly recommended to us that the Model Law be followed.

There are, however, many differences between the draft Act and the Model Law, and many of the differences are significant. We have examined each provision of the Model Law and have recommended different provisions (a) where the needs of domestic arbitrations appear to us to be different from those of international commercial arbitrations, and (b) where following the Model Law would do unnecessary violence to existing Alberta practices, Alberta legal concepts, or even Alberta terminology. In the result, while we think that it is correct to say that the draft Act is patterned upon the Model Law, it certainly is not the Model Law.

There is another kind of legal harmony which is desirable. We would like to see the law of domestic arbitrations much the same from province to province. The common law provinces have had fairly uniform statutes governing local arbitrations because they all copied the Arbitration Act 1889 (UK), but that model is now outdated and the need to update it outweighs the need for interprovincial uniformity. British Columbia has already departed from it by enacting its Commercial Arbitration Act of 1986.

We do not see any real likelihood that interprovincial harmony in arbitration law will be restored in the near future. We have therefore concluded that it is more productive to seek internal harmony in Alberta's arbitration law, and we note in passing that this will result in harmony with federal arbitration law, which is based on the Model Law. We hope that the adoption of the UNCITRAL Model Law across the country for international commercial arbitrations and federal arbitrations may lead more provinces to use it as a model, though not to follow it slavishly, so that inter-provincial harmony may re-assert itself.

We should say here that we are much indebted to the 1982 Report on Arbitration of the Law Reform Commission of British Columbia, on which the British Columbia Commercial Arbitration Act is based. While we have, for the reasons which we have given, patterned the draft Act on the Model Law (which was not in existence when the B.C. Report was prepared), the B.C. Report is a storehouse of research and ideas of which we have made liberal use, not always with attribution. We are also indebted to the Arbitrators' Institute of Canada's Principles for the Enactment of Arbitration Legislation, which are Appendix D to our Issues Paper. The Principles are a useful guide to the Model Law and much of the substance of our proposals can be found in them.

B. General Proposals

(1) Enactment of new arbitration legislation

Our proposals are, as we have said earlier in this report, embodied in the draft Arbitration Act and the draft amendment to the Limitation of Actions Act which together constitute Part III of this report. Our principal recommendation is that the Legislature enact legislation which will give effect to the substance of the two pieces of draft legislation.

As a general matter, it is not important that the new legislation follow the form of our drafts. We do, however, think it important that a new Arbitration Act follow, as closely as policy and local drafting considerations

permit, the structure and form of the Model Law, so that users will be able to move easily and efficiently between the new Act and the International Commercial Arbitrations Act, and between both Alberta statutes and statutes in other jurisdictions which are based on the Model Law.

(2) Functions of the proposed Arbitration Act

(a) Making the law more accessible and comprehensible

The existing Arbitration Act includes some of the law which applies to arbitrations and provides for some procedure. However, it tells the user very little of what is needed to conduct an arbitration, most of which must be ascertained by intuition or from the great body of judge-made law.

We think that a new Arbitration Act should tell the user much more of what is needed, and our draft Act would do so. It does not include all the law. Judicial decisions would still be important both to fill in the surrounding areas and to interpret the new Act. Institutional rules would still be desirable. But we think that the draft Act would tell the user all the law that is needed for ordinary purposes. If that is too optimistic an assessment, the draft Act would certainly fill in many of the blanks left by the present Act.

(b) Promoting party control, efficiency and fairness

An arbitration should be carried on in accordance with the agreement of the parties. It should be carried on efficiently. It should be carried on fairly. These considerations may come into conflict; for example, a process which is efficient, or a process agreed to by the parties, may lead to an unfair result. The draft Act tries to achieve the best balance among them.

Arbitration agreements do not provide for all eventualities and many provide for none. Arbitration agreements often do not lay down procedures for arbitrations (though more sophisticated agreements may adopt rules prescribed

by institutions such as the International Chamber of Commerce or the Arbitration Institute of Canada). If arbitrations are to be carried on efficiently, the law must provide an efficient structure and rules. The draft Act is intended to do so, and most of its provisions are directed towards that end.

However, the parties may make an agreement about some aspects of an arbitration (the adoption of institutional rules mentioned above being an example). There is no reason for the law to impose a structure or rules upon contracting parties who do not want them. The draft Act (section 4(2)) accordingly provides that, except for a small number of provisions, everything in the draft Act is subject to an agreement of the parties to the contrary, that is, that the agreement of the parties prevails. Most of the draft Act would therefore apply only in default of agreement.

But no one would go into an arbitration unless he thought it would be conducted fairly - or at least in a way which is fair to him or her. The draft Act (section 4(1),(2)) therefore entrenches three provisions[1] so that they will apply no matter what the parties may agree to. One (section 18) is that the parties must be treated with equality and that each must be given fair opportunities to make his or her case. The other two (sections 34 and 35) are the powers of the Court of Queen's Bench to set aside awards and to enforce them.

This balancing of the principles of party control, efficiency and fairness is, we think, consistent with the spirit of the present law. It is our hope that the draft Act will serve to clarify the law and make it coherent and comprehensible.

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[1] Section 4(1) of the draft Act also gives overriding effect to two other provisions. This is done for other reasons and is irrelevant to this discussion.

C. Specific Proposals

(1) Appointment of arbitral tribunal

As part of party control, the parties can agree on the number of arbitrators and the qualifications of the arbitrators. They can agree on specific arbitrators, or they can agree on how and by whom the arbitrators are to be appointed: see sections 10 and 11 of the draft Act.

Sometimes an agreement to arbitrate does not provide for the appointment of an arbitral tribunal. Sometimes the machinery which an agreement provides does not work. It is undesirable that an agreement to arbitrate should fail merely because the parties have not made adequate provision for the appointment of arbitrators. Section 5 of the present Arbitration Act accordingly provides a statutory procedure by which, in most cases, the Court of Queen's Bench can, in default of an appointment and after notice to anyone who can make the appointment, make the appointment itself. This applies both to a first appointment and to the appointment of a substitute arbitrator if one becomes necessary.

Sections 11 and 15 of the draft Act follow much the same pattern. They are, however, framed more broadly. They are intended to cover every case in which there is an agreement to arbitrate but in which either the agreement has not made any provision for the appointment of arbitrators or some provision which it has made has failed to work.

There is one special problem. Suppose that in the agreement to arbitrate the parties name an arbitrator. Suppose further that that person cannot or will not arbitrate. Should it be assumed that there is an intention to arbitrate in any event, or only under the named arbitrator? The answer given by section 15(5) of the draft Act is that the Court's power to appoint a substitute arbitrator would not apply if an arbitration agreement makes the reference to arbitration conditional upon the arbitration being conducted by an arbitrator named in the agreement. Otherwise, the Court will be able to

appoint a substitute.

(2) Commencement of arbitration

A party to an arbitration agreement sometimes experiences difficulties in getting an arbitration going if the other side engages in obstruction and delay. Our proposals would do something to ease the difficulties and to make the process more efficient. Section 21 gives instructions on how to start an arbitration. Section 3 gives instructions on how to give the necessary notices. Section 11 provides for the appointment of arbitrators, and, as we have already mentioned, would confer a general power on the Court of Queen's Bench to make any necessary appointments which are not otherwise provided for.

(3) Conduct and qualifications of arbitrators

(a) Qualifications

Like the Arbitration Act and the Model Law, the draft Act would not require an arbitrator to have any prescribed qualification other than independence and impartiality. Under all of them, the parties may prescribe qualifications in the arbitration agreement. A party who appoints an arbitrator may insist upon specific qualifications before making the appointment. Those to whom parties delegate the power of appointment may insist upon specific qualifications. Under sections 11 and 15 of the draft Act, the Court of Queen's Bench would have a broad discretion in the qualification of an arbitrator. The law does not prescribe qualifications for arbitrators, and we think that the question of qualifications should be left to the parties, their delegates and, when making appointments, the Court.

(b) Impartiality and independence

It is fundamental to justice, however, that a person who adjudicates a dispute must be impartial as between the contestants and independent of each of them. The present law recognizes this, as the courts have classified real

or reasonably apprehended bias of an arbitrator as "misconduct". So does the draft Act. Section 12 would impose upon an arbitrator a continuing duty to disclose to the parties circumstances likely to give rise to a reasonable apprehension of bias, commencing before his appointment and continuing throughout the proceedings. Section 13 would make a reasonable apprehension of bias grounds for the removal of an arbitrator, and section 34 would make it grounds for the setting aside of an award.

One rather vexing question is whether, in the common situation in which each party to an arbitration names one arbitrator and the arbitrators so named name a third arbitrator, the two party-nominated arbitrators should be held to the same standards of independence and impartiality as other arbitrators. We have had differing views expressed to us on the question.

One view is that it is unrealistic to expect a party-nominated arbitrator to be fully impartial. A party is likely to name an arbitrator whom he thinks likely to look on his case favourably, and an arbitrator is likely to feel closer to, though not necessarily identified with, the party who appoints him. If impartiality cannot be assured, that fact should be recognized and an unrealistic standard should not imposed. Otherwise, a party who plays by the rules is likely to find that, although the arbitrator named by him is impartial, his opponent starts with the advantage of one arbitrator who is biased in favour of the opponent.

The view that the law should not require a party-nominated arbitrator to be free of bias is supported by another and different argument. It is that there is positive merit in an arbitral tribunal composed of two arbitrators, each of whom is well-disposed to a different side, and a third, who is the chairman and who is truly independent and impartial. The two "sidesmen", as they are sometimes called, ensure that the opposing cases are fully put before the tribunal, and they can perform useful functions such as encouraging settlement without compromising the integrity of the tribunal. This model functions successfully in the labour arbitration field in Alberta.

Most of those whom we consulted, however, took the view that, in consensual arbitrations which do not have the special characteristics of labour arbitration, a party whose rights are being adjudicated upon is entitled to an independent and impartial adjudicator; that it is possible to find arbitrators who will be independent and impartial; and that it is enough protection for a party that a biased arbitrator can be removed by the Court. We agree with this view. It reflects a long-time policy of the law, and we have not heard of any evil arising from that policy which would outweigh the considerations we have just mentioned. We think that a party-nominated arbitrator should be held to the same standard of independence and impartiality as an arbitrator appointed by another means. Sections 12, 13 and 14 of the draft Act would accordingly allow a party to challenge an arbitrator on the grounds that there is a reasonable apprehension of bias on the part of the arbitration; and section 34(1)(h) would make a reasonable apprehension of bias grounds for setting aside an award.

The right to an impartial and independent arbitrator is not, however, absolute. A party to an arbitration can lose it by taking part in the arbitration with knowledge of circumstances which affect an arbitrator's impartiality and independence. That is true under the present law. Section 13 of the draft Act, following the Model Law, would deprive a party of the right to complain about such circumstances unless he does so within 15 days of becoming aware of the facts, and section 12 would prevent a party who has participated in the appointment of an arbitrator from raising afterwards facts which he knew at the time of the appointment. The reason is fairness: it would be unfair to allow a party to sit back and see how an arbitration is going before raising an objection which will stultify it.

(c) Should arbitrators be regulated?

It is obvious that the qualifications of arbitrators and the way in which they conduct themselves are of vital importance to the fairness and justice of arbitrations, just as the qualifications of judges and the way in which they conduct themselves are of vital importance to the fairness and

justice of adjudication in litigation. This consideration might suggest that some form of legal regulation of arbitrators should be adopted to ensure that arbitration litigants get what they have a right to expect.

It would be possible to legislate codes of ethics and conduct for arbitrators, either in the arbitration statute or in rules made under it. We doubt the usefulness of this. It would be possible to require arbitrators to belong to a professional association with power to regulate the conduct of its members. We doubt that the point has been reached at which this would be desirable.

The Alberta Arbitration and Mediation Society has an accreditation programme, and the Arbitrators' Institute of Canada is in the process of establishing a certification programme. This work, together with the work which the two bodies are doing on codes of ethics, will provide useful guidance for parties who want to find experienced and ethical arbitrators. We doubt that anything further is desirable at the present time.

(4) Conduct of arbitrations

(a) Control by parties and arbitrators

Generally speaking, under the draft Act the parties could agree about anything in the conduct of an arbitration. They are limited only by the fairness and equality provisions of section 18. If the parties did not agree on something, generally speaking the arbitrators could decide how the arbitration is to be conducted and give necessary directions. The arbitrator's powers would be limited by section 18, by party agreements, and by some provisions of the draft Act.

At an early stage in our project, we considered providing for discovery of documents before a hearing and for examinations for discovery. Strong representations were made that such provisions would give an undesirable impetus to making arbitrations more like lawsuits, and we withdrew the

proposal, leaving arbitrators with general powers such as those in section 19. We also thought about providing for preliminary conferences to arrange for exchange of information, but, while such things are likely to be useful in matters of any complication, we think that it is better for the statute to be silent and leave them to the discretion of parties and arbitrators, acting under the general powers in the draft Act.

(b) Should model rules be provided?

We considered providing, either as a schedule to the draft Act or by suggested regulations, rules for the conduct of arbitrations which would apply in the absence of both contrary agreement by the parties to an arbitration and contrary directions by the arbitral tribunal. We thought that such model rules might be helpful. There are, however, countervailing considerations.

First, the draft Act includes much of what would otherwise go in a set of rules. Examples are: service of documents (section 3); preservation orders (sections 9(1) and 17); challenge procedure (section 13); commencement of proceedings (section 21); consolidation of arbitrations (section 9(6)); statements of the parties' positions (section 23); holding of hearings (section 24); dismissal for want of prosecution and other provisions about default of a party (section 25); appointment of experts (section 26); obtaining evidence (Section 27); form, contents and time of award (section 31); termination of proceedings (section 32); correction and interpretation of award (section 33); application for setting aside an award (section 34); enforcement of awards (section 35); and taxation of costs (sections 37 and 38).

It may be questioned whether so much procedural material should go into the proposed Act. Generally speaking, the Legislature should enact substance and leave procedure to rules and regulations where it is easier to correct and where it will not clutter up the substantive law. We think, however, that the procedure in the draft Act is sensible and will stand the test of time. More important, it appears to us -- and our consultation suggests that it appears

to other interested persons as well -- that the draft Act, within a reasonable compass and without being too complex and legalistic, will give arbitrators and parties enough guidance to carry on an arbitration (though no doubt institutions which administer arbitrations will continue to provide more elaborate sets of rules). We think that it is useful to have this procedural material in the draft Act.

A second reason why we decided not to recommend providing rules is that many of our consultants thought that arbitrators and parties would be likely to find them confusing, to think they were bound by them, and to find the volume of written material intimidating.

A desire for simple and informal procedures is one reason why some parties prefer arbitration to litigation. We think that simplicity and informality could be achieved under the draft Act. We believe that the draft Act could also be used by those who need extensive and formal hearings, though in such cases the rules of arbitration institutions will often be used to supplement the statutory provisions. We therefore believe that the draft Act is suitable for arbitrations at varying levels of sophistication.

(c) Natural justice

An arbitrator must observe "the rules of natural justice". If he does not, the Court of Queen's Bench may remove him or set aside the arbitral award on the grounds that he has "misconducted himself". In Alberta, this is judge-made law. Under the British Columbia Commercial Arbitration Act, failure to observe natural justice is "arbitral error" which has similar consequences.

As we have said earlier, section 18 of the draft Act would require that the parties be treated with equality and that each must be given a fair opportunity to make a case. Section 34(1)(g) would empower the Court to set aside an award because the arbitral procedure was not in accordance with the Act or because there has otherwise been a serious departure from a fundamental rule of procedure, and section 34(1)(h) would make similar provision where

there has been corrupt or fraudulent practice or a reasonable apprehension of bias. Section 14 would empower the Court to remove an arbitrator for bias.

The draft Act does not mention "natural justice". That may be a disadvantage for a lawyer who uses the legislation. However, we think that it does mandate procedures which are consistent with natural justice and does so in terms which, though they leave much room for the application of judgment, will be more intelligible to non-lawyer users.

Under the draft Act, parties could contract out of, or waive breaches of, rules other than the rules that the parties must be treated equally and that each must be given a fair opportunity to make a case. The draft Act would restrict the powers of the courts to intervene on procedural grounds, but that is for the purpose of minimizing opportunities for obstruction and delay and would not deprive a party of an ultimate remedy. We think that the parties would be well enough protected by the draft Act.

(d) Obstruction and delay

An important policy of the draft Act is to minimize opportunities for obstruction and delay. The limitations placed on Court intervention, which will be discussed below, would help to implement this policy by making Court applications less attractive. So would the provisions about the commencement of arbitrations mentioned above. So would section 4(3), section 13 and section 16(6), which would require a party to raise at an early date objections to procedures, to jurisdiction, or to an alleged lack of impartiality of an arbitrator: if a party were not to object promptly he would lose his right to object. So would section 25 of the draft Act, which, as well as making some specific provisions for dealing with specific delays, would give an arbitrator power, to dismiss a claim for want of prosecution.

(5) Application of law to arbitrations

The law about arbitration presupposes that arbitrators must decide disputes in accordance with the law which applies to the rights of the parties. Failing to understand and apply the law is "misconduct" for which the Court of Queen's Bench will set aside an award under the Arbitration Act, though only if the failure is apparent on the face of the award. No doubt some parties go to arbitration rather than litigation because they would like to avoid the application of legal technicalities, but it is probably safe to say that most would agree that what they want from arbitration is their legal rights. Section 28 of the draft Act, like article 28 of the Model Law, provides for the application of law to the arbitration of disputes, though the drafting is changed somewhat from that of the Model Law because the law applicable to most domestic Alberta arbitrations is Alberta law.

Occasionally, someone may want an arbitral tribunal which does not have to follow the law. The Model Law accommodates such wishes by providing that an arbitral tribunal "shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so," which makes it clear that they can so authorize it. Section 28 is not one of the provisions listed in section 4(1) of the draft Act, so that section 4(2) would apply and the parties could agree that a dispute is to be decided on principles other than law.

Whether parties would ever be wise to dispense with law is doubtful. If an arbitrator's sense of fairness proves capricious or wrong-headed, there will be little that can be done about it if he is not obliged to follow the law, and an arbitrator might well feel uncomfortable about undertaking to adjudicate by anything so vague as his own subjective feelings. However, there does not seem to be any public interest which will be injured if parties agree to dispense with law.

Section 28 would leave it open to the parties to choose the law which will apply. If they make no specific choice, the arbitral tribunal will apply

whatever rules of law it thinks appropriate. In domestic Alberta arbitrations, tribunals will apply the law of Alberta unless there is a stronger connection with some other system of laws.

(6) Application of limitations law to arbitrations

(a) Bringing of claim

A court action in which a claim for a judicial remedy is made must be brought within a period of time specified in the Limitation of Actions Act (Alberta). If an action is brought at a later time, the defendant is entitled to have it dismissed. The reasons for this, broadly speaking, have to do with the tendency of evidence to deteriorate or be lost and the consequent unfairness to defendants of allowing old claims to be raised; and with the undesirability of allowing claims to hang over the heads of prospective defendants indefinitely.[2]

The Limitation of Actions Act does not mention arbitrations. Under English law, it was settled that if an arbitration agreement provides that the completion of an arbitration is a condition precedent to a right to bring an action (a "*Scott* v. *Avery*" clause), the limitation period does not start to run until the completion of the arbitration, so that limitations law is effectively excluded: *Board of Trade* v. *Cayzer, Irvine & Co.* [1927] AC 610 (HL).[3] In the case of an ordinary agreement to arbitrate, however, English courts imply a term, at least in mercantile references, that every defence open in a court of law is open in an arbitration: *Ramdutt Ramkissen Das* v. *Sassoon & Co.* (1929) All ER Rep. 225 (PC, India). This includes a limitations

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[2] Limitations law is analysed in our Report for Discussion No. 4, *Limitations*. We propose to make recommendations for improvements in the law of limitations, but the discussion in this report applies equally to the current law or to any improved law which may result from our later recommendations.

[3] This decision has been reversed in its own country by statute (see Limitations Act 1980 (UK) s. 34(2)), but this, of course, does not apply in Canada.

defence. These cases were decided at a time when decisions of the Judicial Committee of the Privy Council were binding on Canadian courts.

The Canadian situation is not entirely clear. McLaren on Arbitration accepts the proposition that under the law of contract there is an implied term in an arbitration agreement that limitations law applies. There are, however, three Canadian decisions in which limitations law has not been applied: *Hanna* v. *City of Victoria* (1916) 27 DLR 213 (BC CA); *Re Province and Central Properties Limited* (1965-1969) 2 NSR 221 (NS CA); and *Suburban Construction* v. *Nfld. and Labrador Housing Corporation* (1985) 54 Nfld & PEIR 91 (Nfld. SC). While it seems likely that it would ultimately be held that limitations law applies to an arbitration, it is not necessary to reach a firm conclusion about the question.

We think that limitations law should apply to the bringing of a claim to arbitration, whether the arbitration is under a *Scott* v. *Avery* clause or under an ordinary agreement to arbitrate. The considerations which have to do with the deterioration and loss of evidence and the considerations which have to do with wiping the slate clean apply to stale claims which are brought before an arbitrator in the same way as they apply to stale claims which are brought before a court. For this purpose, there is no reason to differentiate: if limitations law should apply to the bringing of actions, it should apply to the bringing of claims to arbitration. The parties to an arbitration agreement, like parties to any other kind of contract, can, of course, agree that limitations law will not apply, but unless they do so, they should be taken to have accepted the law which applies to the enforcement of rights under all contracts.

We think that it is limitations law in its entirety which should apply to the bringing of a claim to arbitration. This includes such things as provisions of limitations law dealing with acknowledgments and part payments, incapacity of a party, fraud and concealment, and amendments to claims, including adding parties. The draft amendment to the Limitation of Actions Act which is item B of Part III would give effect to this view.

(b) Running of time during an arbitration

It can be argued that the arbitration process and the making of an award simply quantifies the amount of an existing claim and does not change it. If so, it could follow the limitation period which applied to the original claim for relief continues to apply, and that if a claim is not arbitrated and brought to the courts for enforcement before that original limitation period expires, the defendant will be entitled to claim immunity from it. We think that such a state of the law would be clearly wrong. The commencement of an arbitration, like the commencement of an action in court, should stop the limitation period from running.

(c) Limitation period on enforcement of award

The parties to an arbitration agreement agree to have a dispute decided by an arbitrator and to honour an award made by the arbitrator. The award thus confers a claim or claims which parties may enforce through the Court of Queen's Bench, either by obtaining leave to have the award enforced or by bringing an action on it. We think that such claims based on awards should have to be brought to the court within a reasonable time, and that limitations law should apply to them.

What should the time be? A judgment of a court remains in force for ten years. However, an arbitrator's award is not a state-backed decree publicly made and recorded and enforceable without more by state machinery, and we think that it is better to require it to be brought to court within a shorter time. We think that 2 years is a reasonable time. When the Court of Queen's Bench makes an order for enforcement or gives judgment on the award, the order or judgment would be an order or judgment of the Court and would be subject to the ten year period with right of renewal.

(d) Limitation period when arbitration aborted

If an action in court is for some reason aborted, for example by dismissal for want of prosecution or because it has been brought before a court which has no jurisdiction, it is likely that the defendant, if the plaintiff sues again after the end of the limitation period which applies to the original claim, is entitled to have the new action dismissed. On the face of it, it might seem that that should be the case if, for some reason, an arbitration is aborted. This would include a case in which it is found that the arbitral tribunal is without jurisdiction, a case in which an arbitrator is removed and there is no power of substitution or substitution is refused, and a case in which an award is set aside and it appears that the arbitration is no longer on foot.

We think, however, that this is a point on which the considerations which apply to arbitrations are different from the considerations which apply to lawsuits. All that a plaintiff need do in order to avoid having an action aborted is to bring it in the right court and pursue it diligently. An arbitration claimant is subject to having his arbitration shot from under him for many more reasons, some of which are beyond his control, and we do not think that it is right that if the respondent can find something sufficiently wrong to have the arbitration proceedings aborted after the end of the original limitation period the claimant will be without remedy.

Section 34(5) of the Limitations Act 1980 (UK) gives the High Court power, when it sets aside an award, to order that the period between the commencement of the arbitration and the date of the order shall be excluded in computing the time prescribed by the Limitations Act or any other Act dealing with the commencement of arbitration proceedings. On the one hand, this provision makes it possible for a claimant to avoid being deprived of his ability to pursue his claim by the setting aside of an award. On the other, the need for a court order means that the respondent will not be exposed to a later claim if, under the circumstances, the claimant should be barred from bringing one.

We think that Alberta law should have a provision like the United Kingdom section 34(5). We think, however, that the provision should apply whenever an arbitration is ended other than by a valid award, and not only when an award is set aside. We recommend that, whenever the Court makes an order which has the effect of terminating an arbitration proceeding or declaring that an arbitration proceeding or award is invalid, it should be able to make an order that the period between the commencement of the arbitration or purported arbitration and the date of the order shall be excluded in computing the relevant limitation period or periods.

(e) Legislative form of limitations provision

We think that the general limitations statute should be as comprehensive as possible and that the limitation provisions which we recommend for arbitrations should therefore appear in the Limitation of Actions Act. The provisions in Item B of Part III, if inserted in the present Limitations Act, would give effect to our views. If a new Limitations Act is enacted as we expect to recommend at a later date, similar provisions for arbitrations should appear in it, though different in form.

We do not think that any attempt should be made to prepare a complete code of limitations law for arbitrations. The general provisions of the limitations statute should be used as far as possible.

(f) Effect of delay within a limitation period

An arbitration claimant may delay bringing a claim to arbitration or in getting on with an arbitration once it has started. Even before a limitation period for bringing a claim has expired, delay may cause inconvenience and prejudice to the other side.

A party against whom a claim has been made or may be made is not likely to complain while the claim or the arbitration is left asleep. He is likely,

however, to complain vigorously when it is ultimately brought or pursued, and to try to have it dismissed on the grounds of delay, sometimes including prejudice by reason of the delay. A number of ingenious suggestions have been made: (i) that delay amounts to abandonment or repudiation of the right to arbitrate; (ii) that delay has frustrated the arbitration agreement; (iii) that there is an implied term in the arbitration agreement that a claimant will go to arbitration within a reasonable time; and (iv) that the Court should grant leave to revoke a submission on grounds of delay.[4] A Canadian court has held that the equitable doctrine of laches applies.[5] However, attempts to obtain dismissals on grounds of delay, though successful in the *Suburban Construction* case, have generally been unsuccessful.

The prevailing view is that an arbitral tribunal cannot dismiss an arbitration for want of prosecution in the way in which a court can dismiss an action for want of prosecution. The House of Lords, in the *Food Corporation of India* case, appealed for the enactment of legislation conferring such a power. This appears to us to be an appropriate tool for use in dealing with the problem of delay, and section 25(2) of the draft Act would confer the power. We do not think that legislation should deal with the other grounds for dismissal which we have mentioned in the preceding paragraph, particularly as the power to dismiss for want of prosecution should solve the problems towards which the other proposed grounds are directed.

A dismissal of a claim for want of prosecution could have any one of three results: (i) the loss of the claim; (ii) the loss of the right to arbitrate but not the loss of the claim itself; or (iii) the mere termination of the arbitration without prejudice to the right of the claimant either to renew the arbitration or to bring an action. We think that the claimant should be precluded from bringing the claim again, whether through arbitration or through the courts, that is, that the claim itself should be dismissed for

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4 These proposals are listed in *Food Corporation of India* v. *Antclizo Shipping Corporation* [1988] 1 W.L.R. 603 (H.L.).

5 *Suburban Construction Ltd.* v. *Newfoundland and Labrador Housing Corporation* (1985) 54 Nfld and PEI R and 160 APR 91 (Nfld SC).

want of prosecution and not merely the arbitration. This flows from the fact that the parties are under a contractual obligation to pursue the arbitration.

(7) Court intervention in arbitrations

(a) Court assistance for arbitrations

No agreement to arbitrate provides for all eventualities, and many provide for none. If agreements to arbitrate are to be honoured, it is necessary for the law, acting through the courts -- that is, the Court of Queen's Bench -- to supply deficiencies in machinery and procedures. This the Court does. It appoints arbitrators if the machinery for appointment is deficient; it enforces final awards; it gives some procedural assistance during an arbitration, for example, in compelling witnesses to attend; and it answers questions of law in order to give guidance to arbitrators and arbitration parties. Our proposals would continue these powers, though not necessarily in the same form, and would extend them somewhat, particularly in the area of procedural orders and directions.

Court assistance, particularly in connection with the enforcement of awards, is often necessary for the effective working of the arbitration process. Denial of necessary assistance could have the same stultifying effect on the process as undue interference. That might suggest that the Court's discretions to give or withhold assistance should be limited or done away with. We do not think so. We do not think that private individuals should be able to set the machinery of state in motion against other private individuals without the considered intervention of a state judicial institution, and we think that the Court will in general make the state machinery available in support of the arbitration process when that machinery should be made available.

(b) Court control and supervision of arbitrations

(i) Powers under present law

As we have said earlier, under the present law, the Court of Queen's Bench has broad discretionary powers to intervene in arbitrations. The principal powers are as follows:

(a) the power to refuse a stay of an action brought in court by one party in respect of a claim which the parties have agreed to submit to arbitration, and thus to allow the action to pre-empt the arbitration.[6] On an application for a stay, it is for the applicant to show that there is no sufficient reason why the matter should not be arbitrated, and the courts have found a number of reasons sufficient. A party applying for a stay of an action must also show that he is and always has been ready and willing to do all things necessary to the proper conduct of the arbitration, and he loses his standing to apply for a stay if he takes a step in the action.

(b) the power to remove an arbitrator who has "misconducted himself". "In Canada...the word 'misconduct' is given a very wide meaning going beyond any sense of moral culpability and including an error in law on the face of the award. That which would be mere regrettable error, if done by a judge, earns for the arbitrator the opprobrium of 'misconduct' with whatever double standard that may involve."[7] The word also includes procedural error and bias, as well as morally culpable conduct such as fraud.

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6 Any court in which an action is brought has this power, so that the Small Claims Division of the Provincial Court has it. It is, however, the Queen's Bench which is usually faced with the question.

7 Per Laycraft JA, *Mijon Holdings* v. *Edmonton* (1980) 12 Alta LR 88, 94.

(c) the power to set aside an award. The grounds for the exercise of this power is again "misconduct" in the broad technical sense mentioned above.

(ii) General proposal for intervention by Court

We think that the approach which a revised Arbitration Act should take is (a) to identify the specific kinds of circumstances in which intervention by the Court is necessary in the interests of justice, (b) confer upon the Court the powers necessary for effective intervention in those kinds of circumstances, and (c) remove discretionary powers to intervene in other kinds of circumstances. This is the method followed in the draft Act.

In particular, the draft Act provides, in effect, that only if the Court is shown that circumstances of certain specified kinds exist may it (a) refuse to stay an action on a claim which is subject to arbitration (section 8), (b) remove an arbitrator (section 14), or (c) set aside or remit an award on grounds of procedural error or unfairness (section 34(1),(5)). In addition, our proposals would substitute a limited appeal to the Court of Queen's Bench on a question of law for the power to set an award aside for error on the face of the award (section 34(6) to (8)).

Section 5(1) of the draft Act would provide the other pillar for the structure, by providing that the no court is to intervene in a matter or proceeding governed by the Act except where so provided by the Act.

(iii) Power of Court to remove arbitrator

Under the Model Law, Court intervention can result in the termination of an arbitrator's powers and function in two ways:

(a) a decision under article 13 upholding a challenge to independence, impartiality or qualification, and

(b) a decision under article 14 that an arbitrator (i) has either become *de jure* or *de facto* unable to perform his functions or has failed to act without undue delay, and (ii) has resigned or has been removed by the parties.

In neither case does the Model Law talk of removal of an arbitrator by the Court. It must be inferred from articles 12 and 13 that the positive result of a challenge is to terminate the mandate. Under article 14, the Court's function seems to be to decide whether termination has already occurred. In both cases, however, what the Court does is much what it would do under a power to remove on the same grounds, and its intervention has the same effect.

Section 14 of the draft Act gives effect to similar policies, but talks in terms of removal of an arbitrator. In the case of resignation by an arbitrator or removal of an arbitrator by the parties, section 14 does not require as a necessary condition that the arbitrator has become incapable or has failed to act, as does article 14 of the Model Law.

(iv) Court powers where arbitration is a nullity

There are circumstances in which what appears to be an arbitration is not, legally speaking, an arbitration. The alleged agreement to arbitrate on which it is founded may never have been a valid agreement, or may have ceased to have a legal existence. A valid agreement to arbitrate may not cover the dispute which is allegedly being arbitrated. A purported appointment of an arbitral tribunal may not have been properly carried out, so that the tribunal has no legal existence.

At present, the Court of Queen's Bench can grant a declaration that an arbitral tribunal has no jurisdiction in any of these cases. This is part of the inherent jurisdiction of the Court.

The Model Law takes a different approach, in an attempt to have matters decided by arbitrators and to avoid the use of applications to the Court for

purposes of obstruction and delay. Under article 16, an arbitral tribunal can decide on its own jurisdiction, and a party who wants to contest a tribunal's jurisdiction must do so before the tribunal and must do so promptly or be held to have waived his right. The Court has the ultimate power to decide whether or not the arbitral tribunal has jurisdiction, but a party dissatisfied with the tribunal's own ruling must apply to the Court within 30 days. If the tribunal does not make a preliminary decision, the party contesting jurisdiction may apply to the Court to set aside the award when it is made. Article 5 of the Model Law may be read as precluding any other form of Court intervention on these kinds of grounds, including intervention under the Court's inherent declaratory power.

We have some difficulties in fitting the Model Law provisions into Alberta common law and Alberta practice:

(a) Article 5 of the Model Law prohibits court intervention other than as provided in the Model Law "in matters governed by this Law". A court might well hold that a purported arbitration which is really a nullity is not a matter governed by a law which deals with arbitrations. If a fatally defective arbitration is not governed by the Model Law, the Court's inherent powers with respect to it will survive article 5. This is not, however, clear, and we think that something needs to be done to fit the Model Law into the surrounding common law for the purposes of domestic arbitrations.

(b) Article 34 of the Model Law empowers the Court to set aside an award on grounds which make the arbitration a nullity, and article 36 excuses the Court from enforcing an award on the same grounds. It is not clear whether the right to apply to set aside and the right to resist enforcement would survive the deemed waiver of a jurisdictional objection under article 16. Some of the discussion in the UNCITRAL Report at pages 2940 - 2942 suggests that "instant control" by the Court (under a party's right to

request the Court to decide the question of jurisdiction) is an exclusive remedy, but the discussion is not conclusive. Some of the discussion at pages 2930-2931 suggests that a party could raise the same objection at four different stages. Either article 16 or articles 34 and 36 could be read as controlling. We find here a difficulty in the Model Law itself.

(c) A majority of us think that a person who takes the position that what appears to be an arbitration is a nullity and is therefore not an arbitration at all should be entitled to ignore it and deal with it only when enforcement of an award is threatened. A person takes such a position at his peril, but we do not think that he should be compelled to appear before a tribunal which he says has no jurisdiction over him. We therefore think that a deemed waiver of a right to object to jurisdiction should apply only to a party who takes part in an arbitration.

There is a strongly-held minority view that the deemed waiver should apply even to a person who does not take any part in purported arbitral proceedings. That view is based on two policies: (i) the policy of strengthening the arbitration system by requiring all questions to be resolved by the arbitral tribunal, at least in the first instance, and (ii) the policy of avoiding obstruction and delay through withholding until a later stage objections which could be raised and dealt with sooner.

Given the present state of the law and past practice in common law jurisdictions, we think that the policy should be as follows:

(a) the Court of Queen's Bench should continue to be able to declare a fatally flawed arbitration proceeding to be a nullity, and there should be no formal time limits on the declaratory power;

(b) an arbitral tribunal should have power to rule on its own jurisdiction, but, when it does, a party should have an immediate right to apply to the Court to decide the question;

(c) by a majority, that where a tribunal has decided that it has jurisdiction, a party who takes part in the arbitration thereafter should be deemed to have waived any currently existing objection to jurisdiction unless, within a stated time period, he applies to the Court to decide the question. (The minority view being that the deemed waiver should apply even to a person who takes no part in the arbitration proceedings.)

The draft Act gives effect to these views as follows:

(a) section 34(11) would preserve the Court's power to declare a purported arbitration to be a nullity on grounds of the kinds of fatal flaws under discussion;

(b) section 16(1) and section 16(8) and (9) would empower an arbitral tribunal to rule on its own jurisdiction either as a preliminary matter or in the award, and would permit a party who wants to contest an ruling made on a preliminary basis to do so within 30 days by application to the Court;

(c) section 9(3) would allow a party to apply to have the Court determine a preliminary question of law, which would be an alternative way of dealing with a question of jurisdiction, but this could be done only with the agreement of all parties or on the application of one party with the agreement of the arbitral tribunal;

(d) section 16(6) would provide that taking part in an arbitration after a preliminary ruling that the arbitral tribunal has jurisdiction constitutes a waiver of the plea unless the

tribunal permits the question to be raised later;

(e) an objection deemed to have been waived under section 16(6) would not be grounds for setting aside under section 34 (see section 34(2)).

We should note that UNCITRAL rejected an article which was numbered 17 in an earlier draft of the Model Law and which would have performed much the same office as section 34(11) of the draft Act (see UNCITRAL Report pages 2940 - 42). Our proposals are therefore a significant departure from the Model Law, but we think that they fit better into the whole pattern of the common law and, on balance, contribute to a better solution to the problem of fatally flawed proceedings.

(v) Court powers where jurisdiction exceeded during an arbitration

If an arbitral tribunal which has properly entered upon an arbitration undertakes later to do something which is in excess of its powers, section 16(5) and (6) of the draft Act would require a party to object as soon as the matter is raised in the arbitral proceedings, upon pain of being taken to have waived the objection if he does not do so. Then, if the tribunal ruled as a preliminary matter that it had jurisdiction, the party could apply to the Court to determine the matter. Section 34 would allow the Court to set aside an award on grounds that jurisdiction had been exceeded, but not if there is a waiver under section 16.

(vi) Court powers where procedural improprieties

Under section 34, the Court would have power to set aside an award for failure to comply with the requirements of the Act. This would include a failure to treat parties equally, a failure to give a party a fair opportunity to present his or her case or to respond to another party's case, and so on. The draft Act does not mention the rules of natural justice, but section 34

would empower the Court to set aside an award for breach of the principal rules included in that term.

(8) Enforcement of arbitral awards

A judgment of the Court of Queen's Bench for the payment of money entitles the judgment creditor to use machinery provided by the state for the enforcement of debts. Other orders of the Court entitle the judgment creditor to use other machinery provided by the state. An arbitral award is made by a private individual or individuals and does not confer a right to use the state machinery.

The International Commercial Arbitration Act is in force in Alberta with respect to international commercial arbitration agreements. By adopting article 35 of the Model Law, the ICAA provides that an arbitral award in an international commercial arbitration shall be recognized as binding and shall be enforced by the Court of Queen's Bench, subject to meeting some minimal procedural requirements and subject to a number of grounds on which the Court may refuse to enforce it. These grounds, except for one addition, are the same as the grounds upon which the Court may set aside an arbitral award under article 34 of the Model Law.

Under the present Arbitration Act and common law, there are two ways of enforcing an arbitral award. First, section 12 of the Act provides that "an award may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect." The leave is obtained by an application to the Court. Second, a party may bring an action in court to enforce his rights under an award.

Under AA section 12, the Court has a discretion whether or not to give leave to enforce an award, and enforcement is to be in the same manner as a judgment or order. However, the Court must, and does, recognize that the award is (in the absence of agreement to the contrary) "final and binding", and it can be expected to lend its assistance to the enforcement of final and binding

rights. This is the usual method of enforcement because it is quicker and easier than bringing an action on the award.

An action on the award may be brought when there is some real doubt about the validity of the award, as the summary procedure under section 12 is not too well suited to such a case. It may also be brought where an award itself does not establish the whole of the claimant's case, e.g., if an arbitrator has been asked to deal with liability but not damages, or vice versa. We are not aware that such actions are in fact brought in Alberta, section 12 being the usual route followed, but we do not doubt the availability of the action in Alberta.[8]

We have no doubt that Alberta law, in order to make arbitration effective, must provide effective ways to enforce arbitral awards. We do not, however, think that it should, in effect, make machinery of the state automatically and unquestioningly available for the enforcement in accordance with its terms of every arbitral award which does not suffer from certain fundamental flaws. That is more than the law does for persons in whose favour judgments or orders of the courts have been made. We think that, in the rather unusual cases in which parties do not honour arbitral awards, a judicial mind should be applied before the state applies its force to the recalcitrant party. We therefore think that the general approach of the Arbitration Act and the common law is more appropriate than the apparently automatic enforcement -- if, under interpretation, it turns out to be automatic -- contemplated by the Model Law.

Section 35 of the draft Act therefore follows section 12 of the present Arbitration Act, but it goes on to do two things. First, it provides for the entry of judgment and making of orders in the terms of the award. This comes from section 29 of the British Columbia Commercial Arbitration Act, which adopted a recommendation of the British Columbia Law Reform Commission. Second, it goes on to give the Court power to make such orders as are

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[8] See Mustill & Boyd, *Commercial Arbitration*, page 370.

necessary for giving effect to the award. This comes from a recommendation of the Commission. We think that both provisions would be useful.

(9) Protection of arbitrators

(a) Introduction

An arbitrator, like a court, necessarily functions in an area of controversy. An arbitrator's duty, like that of a court, is to adjudicate justly. Some arbitration litigants, like some court litigants, no doubt feel that they have not been given justice, and some may want to attack the arbitrator, either for revenge or in order to invalidate the arbitration.

This raises a question as to what protection, if any, the law should give to arbitrators. We will discuss successively the most likely claims which litigants might make against arbitrators.

(b) Lack of good faith

There is a dearth of reported decisions about actions against arbitrators for fraud, taking bribes, or other forms of bad faith. Judicial statements in English and Canadian cases, by saying that an arbitrator is immune from action if he acts "honestly and faithfully to the best of his judgment"[9] or "in the absence of fraud or bad faith",[10] imply that an arbitrator may be subject to liability if he acts in bad faith. The judgment of the British Columbia Court of Appeal in *Montgomery* v. *Atmore*[11] suggests that such an action might lie.

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[9] See *Badgley* v. *Dickson* (1886) 13 OAR 494 (Ont CA) and *McLaren on Commercial Arbitration*, page 5.

[10] Per LeBel J., *Sport Maska Inc.* v. *Zittner* [1985] RDJ 520, rev'd on other grounds SCC No. 19660, March 24, 1988.

[11] Unreported. CA 007383, *Vancouver Registry*, January 14, 1988.

A judge cannot be sued even on grounds of fraud or bad faith. We do not think, however, that the law should give such extreme protection to an arbitrator: the fundamental requirement of protecting the independence of the courts does not apply to arbitrators.

It is true that an unfounded action might be taken against an arbitrator out of vindictiveness. The lack of reported cases suggests that this is not a serious risk. In any event, we do not think that a new arbitration statute should protect an arbitrator who does not act in good faith.

(c) Negligence, incompetence, lack of diligence, and bias

We think that the law is clear that an arbitrator cannot be sued by an arbitration litigant on grounds of negligence or want of diligence. That proposition has not been the foundation of a decision by the Supreme Court of Canada. It is, however, the foundation of the decision of the Quebec Court of Appeal (the common law and the civil law apparently being interchangeable on the point) in the Sport Maska case,[12] and it is strongly implied to be the law by the judgment of the Supreme Court of Canada in the same case. The Supreme Court reversed the Quebec Court of Appeal on other grounds, namely, that what had taken place was not an arbitration at all, and did not disapprove the Court of Appeal's statement of the law about the liability of arbitrators. Further, Madam Justice L'Heureux-Dube at page 18 of the Supreme Court's decision quoted a statement from an English House of Lords decision,[13] which, while denying immunity because the case before the House was one of valuation and not one of arbitration, implied that if it had been one of arbitration, the decision-maker would have been immune from action.

While Mustill & Boyd on Commercial Arbitration[14] think that the *Arenson* case and another in the House of Lords leave it open to the House to decide

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12 *Supra*, note 10.

13 *Arenson* v. *Casson Beckman* [1975] 3 All ER 901, 914-915, per Lord Wheatley.

14 Pages 190-196.

that an arbitrator does not have immunity against a claim for negligence, we think it highly unlikely that a Canadian court will do so. We think it right that there should be immunity, but we think that the question is one which should be left to the courts and that any attempt to legislate about it is likely to cause more difficulties than it will alleviate. We think that the new statute should be silent on the point.

It is also possible that an arbitrator may be sued for bias which falls short of bad faith. There is no authority on the point of which we are aware. It seems likely that a court would hold an arbitrator immune from such a claim. Again, we think that the statute should be silent. The dearth of claims suggests that there is not a problem in practice, and any solution which might be prescribed for a problem in theory is likely to cause difficulty.

(d) Defamation

An arbitrator may well make a statement in the course of arbitration proceedings or in an award which is defamatory of a person and would, if made elsewhere, render him liable in damages to the person defamed. An adverse statement about the credibility of a witness is one kind of example.

No action can be brought against a judge who makes a defamatory statement in court or in a judgment. The law confers an absolute immunity upon judges. One judge in the House of Lords has said that the immunity which an arbitrator enjoys "relates to all kinds of civil claims including, e.g., claims for damages for defamation".[15] It is by no means clear that that statement is in accordance with the law of Alberta, but, if it is not, it seems clear that an arbitrator will at least enjoy a qualified privilege under which he is protected from liability unless he speaks maliciously.

We think that the question should be left to the courts and that the new statute should be silent. Even a qualified privilege is, we think, sufficient

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[15] *Arenson* v. *Casson Beckman* [1975] 3 All ER 901, 924, per Lord Salmon.

protection for an arbitrator who acts properly, though we see no objection to the courts holding that there is an absolute immunity. We do not perceive a problem which legislation should try to solve.

D. Conclusion

We reiterate here that our proposals for change are embodied in the draft Arbitration Act and the draft amendment to the Limitation of Actions Act which follow as Part III of this report. The foregoing discussion in this Chapter 2 has dealt with a number of the issues, but, except for some issues about which we make no proposals, has been merely by way of explanation of the treatment of the issues in the draft legislation. We reiterate also that, though it does not matter whether or not legislation enacted to give effect to our recommendations is in the precise form of the draft legislation in Part IV, we think that a new Arbitration Act should be patterned after the Model Law.

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ACTING CHAIRMAN

DIRECTOR

October 1988

PART III - SUMMARY OF PROPOSALS

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A. Introduction

Our specific proposals are in the form of draft legislation, which is Part IV of this report. The Summary of Proposals which is item B of this Part III provides an overview of those specific proposals and a map by which the draft legislation can be more easily understood. Where appropriate, a brief statement of our reason for a proposal is given in bold faced type.

The section numbers which follow most of the items in the Summary are the section numbers of the draft Arbitration Act, which is item A of Part IV, except under the heading of Limitation of Actions, where the references are to the draft amendment to the Limitation of Actions Act, which is item B of Part IV.

The reader will find further assistance in the Comparative Chart which is Appendix C and which compares in summary form the provisions of the draft Arbitration Act, the existing Arbitration Act, and the UNCITRAL Model Law as adapted by the International Commercial Arbitration Act.

For convenience of expression, the Summary talks as if the draft legislation were in force.

B. Summary of Proposals

1. Scope of the draft Arbitration Act

(a) The draft Arbitration Act applies to every arbitration to which Alberta law applies unless an agreement of the parties or an Alberta statute excludes it (s. 1(1)(a)). For the most part, labour relations statutes exclude it for labour arbitrations, and it does not apply to international commercial arbitrations (s. 1(1)(b)).

We think that the draft Act is an improvement on existing law and should therefore apply to all arbitrations unless the parties or

the Legislature think another scheme more appropriate for special circumstances.

(b) The draft Act binds the Crown in right of Alberta (s. 36).

If the Crown agrees to arbitrate, there is no reason for it to be able to back out of the agreement. If a statute prescribes arbitration, there is no reason to treat the Crown differently from other parties.

(c) Under the draft Act, an agreement to arbitrate may be oral or written (s. 7(1)(b)), and it may be a separate agreement or a part of a larger agreement.

To make an unwritten agreement to arbitrate void would defeat the intention of the parties. To make the draft Act inapplicable to an unwritten agreement without making it void would throw the parties back onto the old common law. This provision avoids both results.

(d) A "*Scott* v. *Avery*" clause, which prevents a party going to court until an arbitration has been completed, is treated as if it were merely an agreement to arbitrate (s. 7(2)).

Section 8 of the draft Act requires the court to stay an action unless certain specified circumstances are present. This balances the interests of the parties better than a rigid Scott v. Avery clause.

2. UNCITRAL Model Law

The draft Act is patterned upon the UNCITRAL Model Law, which was adopted with some variations by the International Commercial Arbitration Act (Alberta) (see Appendix B). There are, however, many significant differences

between the Model Law and the draft Act (see the Comparative Chart, Appendix C), and the draft Act is not the Model Law.

Much of the Model Law is suitable for Alberta domestic arbitrations and using it as a pattern (with adaptations for domestic arbitrations and to fit in with Alberta law, practice and terminology) will tend to harmonize Alberta law dealing with domestic and international arbitrations.

3. Contracting out of draft Arbitration Act and waiver

The following provisions of the draft Act apply despite an agreement of the parties to the contrary and cannot be waived: section 18 (treatment with equality and opportunity to make case); section 34 (recourse against awards); section 35 (enforcement of awards); section 7(2) (effect of a Scott v. Avery clause); and section 31(3) (extension of time for making award).

The parties can make an agreement which overrides any other provision of the draft Act, and a party can waive any breach of any other provision of the draft Act.

Fairness is one fundamental principle of arbitration. Sections 18, 34 and 35 are intended to ensure fairness and therefore cannot be contracted out of or waived. Party control is another fundamental principle. With two minor exceptions, party agreement can therefore override everything else in the draft Act, and a party can waive any other provision of the draft Act.

4. Interpretation of these proposals

If one of the proposals summarized below is intended to apply despite any agreement of the parties to the contrary and despite any waiver, it will say so.

For convenience of exposition, we will not repeat every time that a proposal is subject to contrary agreement or waiver. The reader should remember that every proposal which is silent on the point applies only on default of agreement.

5. Specific provisions of the draft legislation

(1) Waiver

A party who proceeds with an arbitration without objecting to non-compliance with the arbitration agreement or the draft Act is taken to have waived the objection (s. 4(3)), even if it goes to jurisdiction (s. 16(6)). The protection of section 18 (equality of treatment and fair opportunity to make case) cannot, however, be waived. An award may not be set aside on the basis of an objection which has been waived (s. 34(2)).

A party should make objections promptly and not hold them back for tactical reasons.

(2) Time for commencement of arbitration and enforcement proceedings

(a) A party who wants to bring a claim to arbitration must do so within the time allowed for bringing a similar claim to a court. (Draft amendment to the Limitation of Actions Act, Part IV, item B, s. 62(1)).

The evidence and repose reasons for requiring claims to be brought to court within a reasonable time apply equally to claims brought to arbitration.

(b) If the Court of Queen's Bench sets aside an award or makes an order which has the effect of terminating an arbitration or declaring it ineffective, it may order that the time between the commencement of the arbitration and the date of the Court order is to be excluded in computing time under the Limitation of Actions Act (so that the claimant could renew the

arbitration or bring an action (Draft amendment to the Limitation of Actions Act, Part IV, item B, s. 62(2)).

Limitations law is satisfied when a claim is brought to arbitration. If the arbitration is aborted, the claimant should not necessarily be precluded from commencing another proceeding.

(c) A party who wants to enforce an award will have 2 years to bring an action or application to enforce it (draft amendment to the Limitation of Actions Act, Part IV, item B, s. 62(3)).

For the usual evidence and repose reasons, a party should be required to enforce an award within a reasonable time.

(3) Commencement of arbitration and appointment of arbitral tribunal

(a) An arbitration may be commenced by a notice to appoint an arbitrator or a notice demanding arbitration (s. 21(1)). If a third party is empowered to appoint an arbitrator, the notice must be given to the third party and served on the other parties to the arbitration. Every matter referred to in the notice is referred to the arbitration. If the notice does not specify the matters being referred, every matter which the party giving the notice is entitled to have arbitrated under the arbitration agreement is referred (s. 21(2)).

Section 21(1) is intended to instruct a claimant how to get his arbitration started properly.

(b) The parties may agree on the number of arbitrators. Failing agreement, there shall be 1 arbitrator (s. 10). If there are more arbitrators than 1, the arbitrators may elect one of themselves as chairman (s. 11(2)).

Failure to agree on the number of arbitrators should not abort an arbitration. Providing for one arbitrator in default of agreement rather than a larger number will promote informality, efficiency, cheapness and dispatch.

(c) The parties may agree on an arbitrator or chairman or on a procedure for appointing an arbitrator or chairman. If there is no agreement on the appointment of an arbitrator, or if a person empowered to appoint an arbitrator does not do so after 7 days' notice, the Court of Queen's Bench may appoint the arbitrator, with no appeal from the appointment (s. 11(3),(4)). The same provisions apply to the appointment of a substitute arbitrator, unless the arbitration agreement makes the reference to arbitration conditional upon the arbitration being conducted by an arbitrator who is specifically named in the agreement, in which case no substitute can be appointed and no arbitration can be held. (s. 15(4)).

A lack or failure of machinery for appointing arbitrators should not stultify an agreement to arbitrate.

(d) An arbitral tribunal may exercise its powers after every member has accepted appointment (s. 21(3)).

(4) Challenges to jurisdiction

(a) In the first instance an arbitral tribunal may rule on its own jurisdiction, whether as a preliminary question or in its award (s. 16(1),(7)). It may even rule on the existence or validity of the arbitration agreement (s. 16(1)(a)), which must be treated as independent of a larger contract in which it appears (s. 16(1)(b)), and which is not necessarily invalidated by a decision that the larger contract is invalid (s. 16(1)(c)).

Giving jurisdiction to an arbitral tribunal to rule on its own jurisdiction is efficient and will improve the credibility of the arbitration system.

(b) A party must raise an objection to an arbitral tribunal's jurisdiction to enter upon or conduct an arbitration as soon as possible and no later than the opening of the hearing or the first representations from the objecting party (s. 16(3)). A party must raise an objection that an arbitral tribunal is exceeding its authority as soon as the matter alleged to be beyond its authority is raised in the arbitral proceedings (s. 16(5)). Failure to raise an objection in time is a waiver (s. 16(6)) unless the arbitral tribunal allows it to be made later (s. 16(7)).

See under "Waiver" above (item 5(1)).

(c) If a tribunal makes a ruling on jurisdiction, a party may apply to the Court of Queen's Bench within 30 days for a decision about jurisdiction (s. 16(9)) and there is no appeal from the Court's decision (s. 16(10)). Unless the Court otherwise directs, the arbitration may continue and an award may be made while the application is pending (s. 16(11)).

A party should be able to get court protection against an arbitration being carried on without jurisdiction but should be required to do so promptly in order to avoid obstruction and delay.

(5) Pre-emption of arbitration by action in court

If a party to an arbitration agreement brings an action in a court about a matter which is agreed to be submitted to arbitration, the court in which the action is brought must stay the action, except in specific listed circumstances which render the arbitration void, unless the application for a stay is unduly delayed or the case is one in which the court would grant a summary or default judgment (s. 8(1),(2)). The arbitration may be carried on while the application to the court is pending (s. 8(3)). There is no appeal from the order of the court staying an action or refusing a stay (s. 8(4)).

A court action should not preempt an arbitration unless there is fundamental defect in the arbitration or the arbitration itself is being used for purpose of delay and obstruction.

(6) Procedure in an arbitration

(a) Detailed provision is made for the effective delivery of communications, including notices, with provision for substituted service in case of need (s. 3).

These provisions give guidance and ensure that an arbitration claimant cannot be defeated by evasion of service.

(b) The parties to an arbitration must be treated equally, and each must be given a fair opportunity of presenting his own case and of responding to the case of the other parties (s. 18). As mentioned above, this provision applies despite any agreement to the contrary.

Fairness is fundamental to arbitration.

(c) The parties must be given sufficient notice of proceedings (s. 24(4)); and all statements, documents and information supplied by one party must be communicated to the others, and expert reports relied on by the arbitral tribunal must be communicated to the parties (s. 24(5)).

These provisions are also designed to promote fairness.

(d) Except as mentioned above (item 3, Contracting out of draft Arbitration Act and waiver), the parties are free to agree on the procedure to be followed (s. 19(1)). Failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate (s. 19(2)).

Party control governs. In default of agreement, efficiency requires that the arbitral tribunal be able to decide what procedure will be followed.

(e) An arbitral tribunal may make orders for the detention, preservation or inspection of property which is the subject-matter of, or involved in, the dispute, and it may require a party to provide security in connection with any such measure (s. 17). The Court of Queen's Bench has the same powers, and in addition, it has the same powers with respect to interim injunctions and the appointment of receivers as it has in an action in the Court (s. 9).

Sometimes, a claimant, if successful, will not be able to realize on the award unless property is preserved and held available.

(f) An arbitral tribunal may direct that within a specified time a claimant must state the facts supporting his claim, the points at issue, and the relief claimed. It may also direct a respondent to state his defence within a specified time. A claimant or a respondent may amend a statement later unless the tribunal considers an amendment inappropriate because of delay. Oral statements may be permitted. (S. 23(1) and(2).)

If a claimant does not make his statement within the specified time, the arbitral tribunal may dismiss his claim (s. 25(1)(a)). If a respondent does not state his defence, or if a party does not appear or fails to produce documentary evidence, the tribunal may continue the proceedings and make an award (s. 25(1)(b),(c)). An arbitral tribunal may dismiss a claim for want of prosecution (s. 25(2)).

An arbitral tribunal must be able to ensure that the arbitration is carried on with efficiency and dispatch.

(g) With the agreement of the parties, an arbitral tribunal may try mediation, conciliation or other procedures and is not thereby disqualified from continuing the arbitration (s. 30(1)).

Alternate means of resolving disputes should be encouraged.

(h) On the application of the parties, the Court of Queen's Bench may order consolidation of arbitrations or provide for the order in which arbitrations will be held, and may appoint an arbitral tribunal for the consolidated proceeding (s. 22(3),(4)).

Efficient disposition of linked arbitrations should be encouraged.

(7) Preliminary questions of law

Subject to an appeal to the Court of Appeal with leave of that court, the Court of Queen's Bench may determine any question of law that arises during the course of an arbitration. It may do so only with the consent of all parties or on the application of one party with the consent of the arbitral tribunal. (S. 9(3).)

A binding answer to a question of law may dispose of a dispute or avoid having an arbitration carried through on a wrong premise.

(8) Hearings

(a) The parties to an arbitration may agree whether oral hearings should be held (s. 24(1)). If there is no agreement, any party may require a hearing to be held (s. 24(2)). Otherwise, it is for the tribunal to decide whether a hearing or hearings should be held (s. 24(3)).

Any party should be entitled to a hearing unless he has agreed otherwise. If no party insists on a hearing, the arbitral tribunal should have power to decide how to conduct the

arbitration.

(b) The parties may agree on the time and place of arbitration (s. 20(1)). If they do not, the tribunal may determine the time and place, having regard to the circumstances, including the convenience of the parties (s. 20(2),(3)).

(c) The parties to an arbitration must submit to being examined before the arbitral tribunal under oath or affirmation, must produce documents, and must do all other things which the tribunal may require (section 23(3)). The Court of Queen's Bench has the same power to enforce a tribunal's orders as it has to enforce a similar order of its own in a court action (section 23(4)).

Information and documents which parties have are likely to be necessary to a proper adjudication, and the parties have by implication agreed to co-operate in an arbitration.

(d) A party to an arbitration may compel the attendance of witnesses to give evidence under oath or affirmation, together with documents which witnesses could be compelled to produce at the trial of an action, by serving notices to attend (s. 27(1),(2),(4)). The Court of Queen's Bench may give the same orders and directions for the taking of evidence for an arbitration as for an action in the Court (s. 27(5)).

Third parties can be required to give evidence and produce documents in a private dispute before a court. The same considerations apply before an arbitrator.

(e) An arbitral tribunal may appoint an expert to report to it and, if requested, to attend at a hearing for cross-examination and rebuttal (s. 26)).

(f) An arbitral tribunal is not bound by rules of evidence and has power to determine the admissibility, relevance, materiality and weight of any evidence (s. 19(3)).

Many people choose arbitration in order to avoid the trappings of litigation, including the technical rules of evidence.

(9) Termination of mandate and removal of arbitrators

(a) An arbitrator, before accepting appointment and during the proceedings, must disclose to all parties circumstances likely to give rise to a reasonable apprehension of bias (s. 12(1),(2)). A party may challenge an arbitrator only if such circumstances exist or if the arbitrator does not have qualifications agreed to by the parties (s. 12(3)). A party who has appointed or joined in the appointment of an arbitrator may challenge that arbitrator only for reasons of which he becomes aware later (s. 12(4)).

A party should be able to challenge an arbitrator for bias or lack of agreed qualifications, but not otherwise, and he should not be able to raise an objection of which he was aware when he joined in an arbitrator's appointment.

(b) A party who wants to challenge an arbitrator must within 15 days after becoming aware of the circumstances which give rise to the challenge send a written statement of reasons to the arbitral tribunal. Unless the arbitrator resigns or the parties agree to the challenge (s. 13(1),(2),(3)), the tribunal must decide on the challenge. A party may within 30 days of the tribunal's decision apply to the Court of Queen's Bench to decide on the challenge and, if the challenge is successful, to remove the arbitrator (s. 13(3)). The arbitration may continue and an award be made while the application is pending, unless the Court otherwise directs (s. 13(5)). There is no appeal from the Court's decision on the challenge (s. 13(7)).

A party should have a reasonable opportunity to challenge an arbitrator for bias or lack of agreed qualification but should have to give the tribunal a chance to deal with the challenge and should not be able to use challenges for obstruction and delay.

(c) An arbitrator may resign, or the parties may agree to terminate his mandate (s. 14(1)). A party may not unilaterally revoke the appointment of an arbitrator (s. 14(4)).

An arbitration belongs to the parties, and they should be able to remove an arbitrator, but only if they all agree. An arbitrator who is unwilling to arbitrate is not likely to be a good arbitrator and should be able to resign.

(d) The Court of Queen's Bench may remove an arbitrator who (i) is successfully challenged under sections 12 and 13, (ii) becomes unable to perform his functions, (iii) fails to carry on the arbitration without undue delay, or (iv) fails to take proper steps to ensure that the arbitral proceedings are carried on in accordance with the Act (s. 14(2)). There is no appeal from a decision of the Court on the question of removal (s. 14(3)).

A party should be protected against an arbitrator who is biased, who lacks an agreed qualification, who delays, or who carries on proceedings improperly. The courts are the logical protectors.

(10) Making of award and termination of proceedings

(a) An arbitral tribunal must decide a dispute in accordance with the rules of law chosen by the parties, or, failing such designation, in accordance with the rules of law which the tribunal considers appropriate (section 28(1),(3)). The tribunal may apply doctrines and rules of equity and may make orders in the nature of specific performance and injunctions (s. 28(4)). It must make its decision in accordance with the terms

of the arbitration agreement and the contract under which the dispute arose, and it must take into account applicable usages of trade (section 28(1)(b),(c)).

Parties usually want their legal rights, so that arbitrators should usually follow law, including equity; but parties' agreements should govern, and so should trade usages which the parties would have had in mind when they made their bargain. Arbitration being an alternative form of dispute resolution, the same remedies should be available in arbitration as in court.

(b) A majority decision of an arbitral tribunal is sufficient, and, if there is no majority, the chairman's decision is sufficient (s. 29(a),(b)). The parties or the tribunal may delegate to the chairman the power to decide questions of procedure (s. 29(c)).

It is best, in the interests of arbitrating parties generally, that arbitrations end with decisions and not have to be repeated.

(c) An arbitral tribunal may make an interim award (s. 17(3)), and it may make more than one final award dealing with different questions (s. 31(2)).

Flexibility of procedure will promote efficiency in disposing of arbitrations.

(d) An award is final and binding except for the powers of the Court of Queen's Bench under section 34 to set aside or remit it to the arbitral tribunal or to allow an appeal on a question of law (s. 6).

The parties have agreed, in words or by implication, to honour an award and should be bound by it. However, they have not agreed to accept an award which comes from an improperly conducted arbitration or which is contrary to law, so that there must be

room for court intervention in such cases.

(e) If the parties to an arbitration settle the dispute, the arbitral tribunal must terminate the arbitration, and, if it does not object to doing so, may be requested to make a consent award which has the same effect and status as any other award (s. 30(2),(3),(4)).

Settlements are to be encouraged.

(f) An award must be made in writing, signed by at least a majority of the arbitral tribunal, dated, and a copy delivered to each party (s. 31(1)).

Requirements of writing, signature and delivery will ensure that (a) an award tells the parties what their rights are, (b) the time for an application to set an award aside can be determined, and (c) the award can be taken to the Court of Queen's Bench for enforcement.

(g) An award, other than a consent award, must give reasons, and if it does not give sufficient reasons, the Court may order the arbitral tribunal to deliver sufficient reasons (s. 31(1)(c),(d)).

It is important that a party know why a decision was made.

(h) The Court may extend an agreed time limit for the delivery of an award (s. 31(3)).

The failure of an arbitrator to deliver an award by a deadline should not necessarily stultify arbitration proceedings and require them to be repeated.

(i) The death of a party does not terminate an arbitration or the authority of an arbitral tribunal (s. 32). This provision does not

affect any rule of law under which death extinguishes a cause of action)(s. 32(5)).

Rights and obligations, including a right or obligation to go to arbitration, are not affected by the death of a party unless there is a specific provision of substantive law which says so.

(j) An arbitral tribunal must terminate an arbitration if the claimant withdraws his claim. An exception is made for a case in which another party objects to the termination and has a legitimate interest in having the dispute settled. A tribunal must also terminate an arbitration if the parties so agree or if it finds that the continuation of the arbitration has become unnecessary or impossible (s. 32(2)).

The withdrawal of the claim referred to arbitration will usually remove the basis of an arbitration. Other circumstances may do the same. The arbitral tribunal should have power to decide whether this has happened.

(k) An arbitral proceeding is terminated by a final award or awards which dispose of all questions referred to arbitration or by an order of the arbitral tribunal terminating the arbitration or dismissing the claim under one of the various powers conferred by the Act.

(l) However, under section 33, an arbitral tribunal may make certain changes in its award. It may (i) within 30 days, or on application made within 30 days, correct mathematical, clerical, typographical or similar errors; (ii) make an additional award covering an omitted question; (iii) if so requested by the parties, give an interpretation of part of the award; and (iv) on application made within 30 days, change the award to correct injustice caused by an oversight of the tribunal.

The power to correct injustice caused by oversight recognizes human fallibility. A court can correct its order until the order

is entered, and at present the Court of Queen's Bench can set aside an award if the arbitral tribunal says that it was made in error.

(m) An arbitral tribunal may award interest. It may award costs, which it may fix or which may be taxed by the clerk of the Court of Queen's Bench, and which may take into account any offer made by one of the parties before the award. Failing an order for costs, each party must bear his own costs and pay half of the costs of the arbitral tribunal, clerks, secretaries and reporters, which can be taxed by the clerk of the Court on the basis of fair value of services and reasonable expenses (see s. 37,38).

Going to an alternative form of dispute resolution should not change the relative rights of the parties with respect to interest and costs.

(11) Recourse against the arbitration or the award

(a) The recourse provisions in section 34 of the draft Act override an agreement of the parties and cannot be waived.

Supervision by the Court of Queen's Bench is the guarantee of fair treatment.

(b) The Court of Queen's Bench may at any time grant a declaration (i) that the arbitration agreement is invalid or entered into by a party under a legal incapacity; (ii) that the dispute was not contemplated by the agreement or was not referred to arbitration; (iii) that the composition of the tribunal was not in accordance with the agreement of the parties or the Act; or (iv) that the subject matter was not capable of being the subject of arbitration under Alberta law (s. 34(11)). Such a declaration would have the effect of invalidating an arbitration. It may be complemented by an injunction.

If there is no legal foundation for an arbitration, the Court of Queen's Bench should have power to say so.

(c) The Court of Queen's Bench may set aside an award on any of the grounds mentioned in item (b) above, with two exceptions. First, if the parties have agreed that the arbitral tribunal has power to decide what disputes have been referred to it, the Court may not set aside the award on the grounds that the dispute was not referred. Second, the Court may not set aside an award because of an objection which the objecting party is deemed to have waived (s. 34(2)).

If there is no legal foundation for an arbitration, the Court of Queen's Bench should, except in some unusual circumstances, have power to set aside an award made in the arbitration.

(d) The Court of Queen's Bench may also set aside an award if (i) the procedure was not in accordance with the Act, including the provisions requiring equal treatment, notice, and an opportunity to present a case and respond to the cases presented by others; (ii) an arbitrator has engaged in corrupt or fraudulent practice or there is reasonable apprehension of bias; or (iii) the award was obtained by fraud (section 34(1)(f) to (i)).

A party should be able to attack an award made by an arbitral tribunal which includes a biased or fraudulent arbitrator, an award obtained by fraud, or an award obtained in a proceeding which was not fairly conducted.

(e) The Court of Queen's Bench may not set an award aside on the application of a party who is deemed to have waived his right to object (s. 34(2)).

A party should not be able to hold back an objection for tactical reasons.

(f) Upon setting an award aside, the Court of Queen's Bench may remove an arbitrator or the arbitral tribunal and give directions for the future conduct of the arbitration. Alternatively, instead of setting an award aside, the Court may remit it to the arbitral tribunal for further consideration and give directions about the future conduct of the arbitration (s. 34(4),(5)).

If an award is, or could be, set aside, the Court of Queen's Bench should have power to see that the arbitration is continued as efficiently as possible and without loss of rights.

(g) A party may appeal an award to the Court of Queen's Bench on a question of law arising out of the award, but only if either (i) all parties agree or, (ii) the Court is satisfied that the importance of the arbitration to the parties justifies the intervention of the Court and that the determination of the point of law is likely to substantially affect the rights of one or all of the parties. If it allows an appeal, the Court may confirm, vary or set aside the award or remit it to the arbitral tribunal with the Court's opinion on the question of law and directions about the future conduct of the arbitration (s. 34(6),(7),(8)).

An application to set aside an award, or an appeal on a question of law, must be commenced within 30 days of the publication of the award (s. 34(9)).

An appeal from the Court of Queen's Bench lies to the Court of Appeal with leave of that court (s. 34(10)).

If an award is wrong in law, a party should be able to appeal against it to the Court of Queen's Bench, but, in order to minimize the use of appeals for delay and obstruction, he should be required to move promptly, and a further appeal should be available only by leave.

(12) Enforcement of award

An award may, by leave of the Court of Queen's Bench, be enforced in the same manner as a judgment or order of the Court to the same effect (s. 35(1)). The Court may direct that judgment may be entered, or may make orders, in terms of the award, and may make such orders as are necessary to give effect to the award (s. 35(2),(3)).

The Court retains its jurisdiction to allow an action to be brought on the award (s. 35(4)).

The machinery of the Court of Queen's Bench should be available to enforce an award, but should be under the control of the Court.

(13) Powers of the Court of Queen's Bench

The Court of Queen's Bench has the following powers to assist in the conduct of an arbitration (all of which are mentioned above): interim measures (s. 9); appointment of arbitrators (s. 11,15); determination of preliminary question of law (s. 9(3),(4)); consolidation of arbitrations (s. 9(5),(6)); enforcement of arbitral tribunal's directions (s. 23(4)); orders for taking evidence (s. 27(5)); extension of time for award (s. 31(3)); and enforcement of award (s. 35).

The Court of Queen's Bench has the following powers to exercise in supervising an arbitration: the power to refuse to stay an action in the Court (s. 8); the power to decide upon a challenge to arbitrator's impartiality and independence (s. 13); the power to remove an arbitrator (s. 14); the power to determine whether an arbitral tribunal has jurisdiction (s. 16); the power to order an arbitral tribunal to give reasons (s. 31); the power to set aside or remit an award; the power to allow an appeal on a question of law (s. 34); the power to make a declaration of a fundamental flaw in an arbitration agreement or in a reference to arbitration or appointment of an arbitral tribunal (s. 34(11)).

Except for these specific provisions, the Court is precluded from intervening in the arbitration process (s. 5(1)).

The assistance of the Court of Queen's Bench will in many cases make arbitrations effective and avoid stultification. Its supervisory intervention will help to ensure lawfulness and fairness. The integrity of the arbitration system will be advanced by restricting the Court's intervention to specified circumstances and grounds.

PART IV - DRAFT LEGISLATION

A. DRAFT ARBITRATION ACT

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PART 1

SCOPE, INTERPRETATION AND SPECIAL RULES

Section 1 - Scope of Application

1(1) This Act

(a) applies where parties enter into an arbitration agreement and the application of the Act is not excluded by the agreement or by law, but

(b) does not apply to an arbitration to which Part 2 of the International Commercial Arbitration Act applies.

[Source: New.]

Comment:

1. Subsection (1)(a) would bring under the Act all arbitrations initiated by agreement of the parties other than those covered by the International Commercial Arbitration Act. It would however, permit parties to opt out of the Act entirely.

2. Subsection (1)(b) would ensure that an arbitration will fall under either the ICAA or the revised Arbitration Act but not both.

1(2) When

(a) an Act directs that a person or persons appoint arbitrators or proceed to arbitration or makes any similar direction with respect to arbitration, and

(b) does not exclude the application of this Act,

the direction shall be deemed to be an arbitration agreement for the purposes of this Act.

[Source: AA section 16 significantly varied; UK 1979 section 31.]

Comment:

1. Under AA section 16, the Arbitration Act applies if another Act says that it does apply. However, we think that the new Act will be beneficial to most kinds of arbitration and should therefore apply except where the Legislature has decided that there should be a different scheme or a different specific provision. Section 1(2) would therefore apply the Arbitration Act to an arbitration under another Act unless the other Act

excludes the Arbitration Act. Because of special characteristics of labour arbitrations, most Alberta legislation specifically excludes the Arbitration Act.

Section 2 - Definitions and rules of interpretation

2(1) In this Act,

(a) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

[Source: ML article 2(b).]

(b) "arbitration" means any arbitration to which this Act applies, whether or not it is administered by a permanent arbitral institution;

[Source: ML article 2(a).]

(c) "arbitration agreement" means an agreement by two or more parties to submit to arbitration a dispute or all or certain disputes which has or have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not;

[Source: ML article 7.]

(d) "Arbitrator" includes an umpire;

[Source: New.]

Comment:

The system under which two arbitrators try to agree on an award and, upon failure to do so, name an umpire who then makes the award, is not commonly used in Alberta, but section 2(1)(d) will ensure that it can be adopted by an appropriately drafted arbitration agreement.

(e) "award" includes

(i) an interim award, and

(ii) an award as amended or varied under this Act,

and the reasons for an award given by a tribunal are part of the award.

[Source: New.]

(f) "Court" means the Court of Queen's Bench of Alberta.

[Source: AA section 1(b).]

2(2) Where a provision of this Act, except section 28, leaves the parties free to determine a certain issue, the parties may authorize a third party, including an institution, to make that determination.

[Source: ML article 2(d).]

2(3) Where a provision of this Act 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.

[Source: ML article 2(e).]

Section 3 - Delivery of documents and notices

3(1) Unless otherwise agreed by the parties

(a) a document is deemed to have been received and any notice given by it is deemed to have been given if the document is delivered

(i) to the addressee personally, or

(ii) at the addressee's place of business, habitual residence or mailing address or address for service furnished to the arbitral tribunal, and

(b) the document is deemed to have been received and the notice is deemed to have been given on the day the document is so delivered.

3(2) If none of the places referred to in subsection (1)(a) can be found after reasonable inquiry, a document is deemed to have been received, and any notice given by it is deemed to have been given, if the document is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

3(3) Where the delivery of a document is required in order to commence an arbitration or to proceed towards the appointment of an arbitral tribunal and it appears to the Court that it is impractical for any reason to effect prompt delivery of the document, the Court has the same power to make an order for substituted service of the document and to dispense with service as it has under the Alberta Rules of Court to make such orders with respect to documents which must be personally served.

3(4) This section does not apply to documents and notices in respect of court proceedings.

[Source: Section 3(1), (2), (4): ML article 3, varied, and BC ICAA section 3. Section 3(3): new.]

Comment:

1. The rules in section 3 are intended to ensure that an arbitration litigant cannot obstruct the arbitration by evading service of documents. This is particularly important in connection with the giving of an initial notice to get the arbitration started and the giving of notices to get the arbitral tribunal appointed.

2. Section 3 goes beyond article 3 of the Model Law by referring to a "document" rather than a "written communication", by referring to the effect of a "notice" contained in a document, and by providing for substitutional service of an initiating document. These changes do not appear to be in conflict with the intentions of UNCITRAL (see UNCITRAL Report, pages 2921-2922).

Section 4 - Contracting out and waiver of right to object

4(1) The following have effect notwithstanding an agreement of the parties to the contrary

(a) section 7(2) (effect of a clause prohibiting court action before an adjudication by arbitration),

(b) section 18 (treatment with equality and opportunity to present and rebut cases),

(c) section 31(6) (extension of time for making award),

(d) section 34 (powers of Court with respect to awards and defective proceedings), and

(e) section 35 (enforcement of awards).

4(2) Any provision of this Act not mentioned in subsection (1) applies only if the parties to an arbitration do not agree to the contrary, unless such an agreement derogates from a provision mentioned in subsection (1).

4(3) Except as otherwise provided in this Act, a party who knows that

(a) a provision of this Act other than a provision mentioned in subsection (1), or

(b) any requirement of or under the arbitration agreement

has not been complied with and yet proceeds with an 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.

Comment:

1. One principal purpose of an arbitration statute is to provide a structure and rules for arbitrations to the extent that the parties cannot or do not provide it for themselves. In those areas, the principle of party control applies. Section 4(2) recognizes this principle by providing, in effect, that all but a few provisions of the Act may be overridden by agreement of the parties. As a drafting matter, the subsection makes it unnecessary to insert "subject to an agreement of the parties to the contrary" in many following sections.

2. There are a few provisions which should apply to any arbitration under the arbitration statute, no matter what the parties say. The principal ones are those intended to ensure that arbitrations are fairly and properly conducted: section 18 (treatment with equality and a fair opportunity to make a case); section 34 (Court's powers over awards); and section 35 (Court's powers to enforce awards). Ones of lesser importance are those which would override *Scott* v. *Avery* clauses (section 7(2)) and allow the Court to extend the time for making an award (section 31(6)).

3. The principal purpose of section 4(3) is to avoid obfuscation and obstruction and to prevent a party holding an objection in abeyance until he sees whether he likes an award or whether the arbitration is proceeding favourably.

[Source: Section 4(1) and (2): new. Section 4(3): ML article 4, redrafted and varied.]

Section 5 - Extent of court intervention

5 In a proceeding or other matter governed by this Act, no court shall intervene except where this Act so provides.

[Source: ML article 5, varied.]

Comment:

1. Section 5 states an important policy: court intervention is to be restricted to the specific kinds of cases and specific circumstances set out in the Act. The subsection leaves the application of that policy to be determined by the later provisions of the Act which provide for some kinds of court intervention and not for others.

2. If a court finds that an arbitration is for some reason a complete nullity, it may hold that the purported arbitration is not a "matter governed by this Act" and is therefore subject to court intervention by way of declaration and, in a proper case, injunction. However section 34(11) would preserve the declaratory and injunctive powers of the Court of Queen's Bench in cases of nullity anyway, so that this question of interpretation is not likely to arise.

3. The principal powers of intervention mentioned in the Act are: section 8 (stay of action); section 9 (procedural powers, including preliminary questions of law); sections 11 and 15 (appointment of arbitrators); sections 13 and 14 (challenges to and removal of arbitrators); section 16(9) (ruling on jurisdiction); section 27 (assistance in obtaining evidence); section 34 (recourse against award and declarations and injunctions in the case of nullities); and section 35 (enforcement of awards).

4. Under article 5 of the Model Law it is "in matters governed by this Law" that a court is not to intervene. The Court of Queen's Bench Act uses "matter" to include any proceeding in the Court (which we think is proper Enlgish usage), and we would have interpreted "matters" to mean all proceedings to which the Model Law applies. The discussion in the UNCITRAL Report at pages 2924-2925 indicates that the Commission may have had something different in mind, and the UK Advisory Committee Report at pages 19-21 treats "matters" as including remedies. All this suggests to us that the meaning of "matters" in article 5 is uncertain.

The UNCITRAL Report says at page 2925, that "the purpose of article 5 was to achieve certainty as to the maximum extent of judicial intervention...by compelling the drafters to list...all instances of court intervention". We agree with that approach. That being so, we think that it should be made clear that it is intervention in a *proceeding* which should be precluded, and not merely intervention in some aspects of the proceeding or intervention by some means. Section 5 of the draft Act therefore talks of a "proceeding or other matter governed by this Act", which we hope will be clear. It may well be that a nullity is outside the draft Act, because a nullity is not an arbitration, but anything of any intrinsic validity should be covered by section 5.

Section 6 - Effect of award

6 Except as provided in section 34, an award made in an arbitration to which this Act applies is final and binding on the parties and persons claiming through or under them.

[Source: AA Schedule, section 8.]

Comment:

1. Section 6 states a fundamental proposition: the parties having agreed to honour an award, are bound by it.

2. The courts have devised a test to determine when a statutory delegate has committed an error in law which is jurisidictional in nature and therefore cannot be immunized from judicial review by a privative clause. The test is whether or not the decision of the statutory delegate is "patently unreasonable". There is a question whether that test applies to an award made in a private consensual arbitration under the Arbitration Act. Section 6 is made subject to section 34, which does not prescribe such a test, and the test will accordingly not apply to an award under the proposed Act.

Section 7 - Form and effect of arbitration agreement

7(1) An arbitration agreement

(a) may be a separate agreement or part of an agreement which includes other terms, and

(b) need not be in writing.

[Source: ML article 7, substantially varied. AIC section 3, slightly revised.]

7(2) Notwithstanding an agreement of the parties to the contrary, an agreement (including a clause referred to as a Scott v. Avery clause), which has the effect of precluding a party from bringing or defending an action on a claim until the claim or defence has been adjudicated by arbitration has the effect of an arbitration agreement.

[Source: New. Cf BC CAA section 19.]

7(3) An arbitration agreement may not be revoked except in accordance with the ordinary rules of contract law.

[Source: new. Cf AA section 2(a).]

Comment:

1. Section 7(1)(b) reflects a change in policy from both the existing Arbitration Act and the Model Law.

Most of the Arbitration Act deals with a "submission", which is a "written agreement". As the Act does not prohibit the making of an unwritten agreement, such an agreement is presumably subject to the common law and possibly to those parts of the Arbitration Act which are not restricted to "submissions". This is unsatisfactory, as the common law on the subject is not up to date and is hard to find.

The Model Law says that an arbitration agreement "shall be in writing". This wording, which is, of course, adopted by the ICAA, may be interpreted as depriving an oral arbitration agreement of any legal effect.

Opinion is divided on whether writing should be required. A strong minority view is that the law should require writing because of the importance of an agreement to arbitrate and the need for a firm legal foundation for an arbitration. The majority view, however, is that an arbitration agreement is merely a contract like other contracts and that if the parties want to make such a contract orally they should not be precluded from doing so, and section 7(1)(b) gives effect to that view. It would also avoid the risk perceived by Mustill and Boyd (Mustill page 8), that, where a written submission is, by oral agreement, waiver or estoppel, enlarged to include additional disputes, the Act does not apply to the additional disputes.

2. Section 7(2) deals with "*Scott* v. *Avery*" clauses, which make arbitration a condition precedent to action in court, and which have been recognized by the courts. Under section 7(2), they would be treated as agreements to arbitrate, so that bringing an action before the conclusion of an arbitration would not be prohibited. Section 8 would require the court to stay an action except in circumstances in which the action should be stayed, and we think that is a better way, in the interests of the parties, of guarding against the inappropriate pre-emption of an arbitration by action in court.

3. Under AA section 2(a), "a submission...is irrevocable except by leave of the Court". This was probably intended to mean that the authority of an arbitrator is irrevocable except by leave of the Court (See Re Smith and Nelson & Sons (1890) 25 QBD 545,550 (CA)), and both the BC and UK Acts deal with revocation of authority and not with revocation of a submission.

The reason for AA section 2(a) (assuming that it deals with revocation of authority) is that at common law a party could revoke the authority of an arbitrator whom that party had appointed: section 2(a) was intended to limit that existing legal power.

Section 7(3) would make it clear that an arbitration agreement is no more revocable than any other agreement. It would reverse the underlying assumption of AA section 2(a) if the latter means what it says (i.e., that a submission is revocable with leave of the Court of Queen's Bench). Section 14(4) of this draft Act provides that a party cannot revoke the appointment of an arbitrator and would thus reverse the underlying assumption of AA section 2(a) if, instead of meaning what it says, it means what it has been held to say (ie., that the appointment of an arbitrator can be revoked with leave of the Court).

PART 2

COURT ASSISTANCE

Section 8 - Stay of action

8(1) Subject to subsection (2), if a party to an arbitration agreement commences an action in a court about a matter which is agreed to be

submitted to arbitration, the court in which the action is brought shall, upon application by another party, stay the action.

8(2) A court may refuse to stay an action under subsection (1) if

(a) the arbitration agreement upon which the application is based

(i) was made by a party who was under a legal incapacity,

(ii) was not a valid agreement to arbitrate,

(iii) does not cover the dispute, or

(iv) does not bind all parties to the dispute,

(b) the subject matter of the dispute is not capable of being the subject of arbitration under the law of Alberta,

(c) the application is unduly delayed, or

(d) the case is a proper one for a default or summary judgment.

8(3) Unless the court in which the action is brought otherwise directs, an arbitration of the dispute may be commenced and continued while the action is before the court.

8(4) There is no appeal from a decision of a court under this section.

[Source: Section 8(1) and section 8(2)(a) and (b): cf. ML article 8(1). Section 8(2)(c) and (d) and section 8(4): new. Section 8(3): ML article 8(2).]

Comment:

1. The basic principle of arbitration law is that a party to an arbitration agreement is entitled to arbitration. Section 3 of the existing Arbitration Act recognizes that basic principle by providing that a party may apply for a stay of an action in court about a matter agreed to be referred to arbitration. However, AA section 4, under which the court may stay the proceedings, is hedged about with difficulties: the court has a broad discretion to refuse to stay the action; the applicant must satisfy the court that there is no good reason why the matter should not go to arbitration and that he is and always has been ready and willing to do whatever is necessary to get on with the arbitration; and the stay must be refused if the applicant has taken a "step" in the action.

Section 8 also recognizes the basic principle of entitlement to arbitration, and goes much further in giving effect to it. Under it, the court would be required to stay the action unless there is a fundamental defect in the foundation of the arbitration or undue delay in its prosecution, or unless the applicant's defence to the claim made in the action is patently spurious;

and it is for the person objecting to a stay to prove that grounds exist for refusing it. The stay is not to be refused on the grounds of a "step" in the action, but only on grounds of "undue delay". There would be no appeal from an order which grants or refuses a stay, and the fact that an action has been brought would not automatically stop the arbitration.

2. A court might not be able to decide in a simple application whether or not grounds for refusal of a stay exist: e.g., if it is alleged that an arbitration agreement is not valid, a trial may be needed to determine that question. That is as much a problem under the present Arbitration Act as it would be under the draft Act. Under section 8, the court would be able to decide whether the arbitration or the action, or neither or both, should be allowed to proceed while the question of grounds for refusal is resolved.

3. The UK Advisory Committee Report at pages 22-23 says that section 1 of UK 1975, which gives the High Court power to stay an action if there is in fact no dispute between the parties, "is of great value in disposing of applications for a stay by a defendant who has no arguable defence". Section 8(2)(d) is intended to serve the same purpose. It would prevent a defendant with no arguable defence from requiring that time-consuming and expensive arbitration procedures be gone through when his only objective is delay, by allowing the court to refuse the stay and grant summary or default judgment.

Section 9 - Powers of Court relating to preservation, questions of law and consolidation

9(1) The Court has for and in relation to an arbitration the same powers as it has for and in relation to an action in the Court in respect of

(a) the detention, preservation or inspection of any property or thing which is the subject of the arbitration or as to which any question may arise therein, and

(b) interim injunctions and the appointment of a receiver.

9(2) Subsection (1) does not affect any power of an arbitral tribunal.

9(3) The Court, upon the application of a party to an arbitration, with the consent of the other parties or of the arbitral tribunal, may determine any question of law that arises during the course of the arbitration.

9(4) An appeal lies to the Court of Appeal, with leave of that court, from a decision of the Court under subsection (3).

9(5) The Court, on the application of all the parties to 2 or more arbitrations, may order

(a) the arbitration proceedings to be consolidated, on terms that 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.

9(6) Where the Court orders arbitration proceedings to be consolidated pursuant to subsection (5)(a) and all of the parties to the consolidated arbitration proceedings are in agreement as to the choice of the arbitral tribunal for the consolidated arbitration proceeding, the arbitral tribunal shall be appointed by the Court, but if not all the parties agree, the Court may appoint an arbitral tribunal for the consolidated arbitration proceeding.

9(7) Nothing in subsection (5) or subsection (6) shall be construed as preventing the parties from agreeing to consolidate those arbitration proceedings and to take such steps as are necessary to effect that consolidation.

[Source: Section 9(1) and (2): ML article 9, varied, and UK 1950 section 12(6). Section 9(3): BC CAA. Section 9(4): new. Section 9(5) to (7): ICAA section 8.]

Comment:

1. Section 9(1) has no counterpart in the present Arbitration Act. It would allow the Court of Queen's Bench to preserve a situation pending an arbitration. It is more extensive than ML article 9, which merely says that it is not inconsistent with an arbitration agreement to ask the Court for an interim measure of protection. It is less extensive than UK 1950 section 12(6), which deals with such matters as security for costs and discoveries. (Note that section 23(6) of the draft Act would confer an additional power on the Court to enforce an arbitral tribunal's procedural orders and directions.)

2. The powers conferred on an arbitral tribunal by section 17 include some of the powers which section 9(1) would confer on the Court. It is likely that the Court would exercise a concurrent power only to assist the arbitration process and that it would require that an application be made to the tribunal first. It is also likely that a party would go first to the tribunal in any event unless the additional powers of the Court are required.

3. Section 9(3) provides for referring a preliminary question of law to the Court. Under the present Act, an arbitrator may, and must if so required by the Court, state a special case for the opinion of the Court, a provision which parties to arbitrations in other jurisdictions have been able to use for purposes of obstruction and delay. Section 9(3), which is patterned on the British Columbia and United Kingdom statutes, is intended to make available the benefits of being able to get a question of law settled in cases in which it would be unfortunate if an arbitration had to be carried through

to completion before the answer to an underlying legal question could be obtained.

Unlike the BC and UK Acts, section 9(3) does not require the Court to be satisfied that time and costs are likely to be saved, as it seems to us that the requirement of agreement of the parties or the arbitral tribunal is a sufficient safeguard against abuse. Section 9(4), by requiring leave to appeal to the Court of Appeal, would also help to avoid abuse of the procedure.

4. Section 9(5) to (7), which deal with the consolidation of arbitrations, may be unnecessary because the parties to an application to consolidate could do by agreement what they would be applying to the Court to do under the subsections. These provisions, however, appear in the International Commercial Arbitrations Act as section 8 and we see no reason why the law relating to domestic arbitrations should on this point be any different from the law relating to international commercial arbitrations.

PART 3

COMPOSITION OF ARBITRAL TRIBUNAL

Section 10 - Number of arbitrators

10(1) The parties to an arbitration are free to determine the number of arbitrators.

10(2) Failing such determination, there shall be one arbitrator.

[Source: ML article 10, varied as to number of arbitrators in default of agreement, and AA Schedule section 1.]

Comment:

Model Law article 10(2) calls for 3 arbitrators if the parties do not agree on a number. International commercial arbitrations are likely to involve large sums of money and facts of considerable complexity, and each litigant is likely to want to have at least one arbitrator of his own nationality. These considerations do not apply to domestic arbitrations. We think that it is better to provide for a tribunal of one, which is likely to be cheaper, less formal and more expeditious, unless the parties decide that they want a larger tribunal.

Section 11 - Appointment of arbitrators and chairman

11(1) The parties to an arbitration are free to agree

(a) on a person who is to be appointed as an arbitrator or as chairman of the arbitral tribunal, and

(b) on a procedure for appointing an arbitrator or chairman.

11(2) Unless the parties otherwise agree under subsection (1), the arbitrators may elect a chairman from among themselves.

11(3) Where

(a) the parties have not agreed on who is to be appointed as an arbitrator or on a procedure for appointing an arbitrator, or

(b) a person or persons who is or are empowered to appoint an arbitrator has or have not done so after a party has given him or them 7 days' notice to do so, and no other means for securing the appointment is provided,

the Court, upon the application of a party, may appoint the arbitrator.

11(4) There shall be no appeal from an order made under subsection (3).

[Source: ML Article 11, AA section 5, varied.]

Comment:

1. Section 11 implements a policy of leaving the parties in control of the choice of the arbitrators while providing machinery for appointment if their agreement does not provide adequate machinery or if the machinery which has been provided does not work.

2. Both the Model Law and the Arbitration Act itemize the cases in which the Court can appoint an arbitrator. In the case of article 11 of the Model Law, the detailed provision for the appointment of 3 arbitrators would not apply to any other plural number of arbitrators (uncommon though that may be) and would not work if there are more than 2 parties to the arbitration. Section 11 of the draft Act is intended to confer on the Court of Queen's Bench, by a generalized statement, power to appoint arbitrators in all cases in which the need for an initial tribunal has not been met.

3. Section 11 does not supply any machinery for the appointment of a chairman of an arbitral tribunal if the arbitrators do not agree who is to be chairman.

Section 12 - Grounds for challenge

12(1) Before accepting an appointment as arbitrator, a person shall disclose to all parties to the arbitration any circumstance or set of circumstances likely to give rise to a reasonable apprehension that he is subject to bias.

12(2) Unless he has already disclosed the circumstance, an arbitrator shall without delay, at any time during the arbitral proceedings, disclose to all parties any circumstance or set of circumstances likely to give rise to a reasonable apprehension of bias.

12(3) A party may challenge an arbitrator only if

(a) circumstances of a kind referred to in subsection (1) or (2) exist, or

(b) the arbitrator does not possess qualifications agreed to by the parties.

12(4) A party may challenge an arbitrator who was appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after he has made or participated in the appointment.

[Source: ML article 12, using BC ICAA section 12 drafting, slightly varied.]

Comment:

1. The Arbitration Act does not expressly require an arbitrator to be independent or impartial. Judicial decisions, however, require both independence and impartiality, and make it clear that an arbitrator who is not independent or impartial is guilty of misconduct which will justify his removal and the setting aside of an award.

2. The Model Law requires independence or impartiality, though only by implication. It does, however, do so by implication. Article 12 provides for challenge on grounds of lack of impartiality or independence, and article 34 provides for setting aside awards on the same grounds. The draft Act does much the same: an arbitrator could be challenged for bias under section 12 and 13 and removed under section 14, and a reasonable apprehension of bias is grounds for setting aside an award under section 34.

3. The draft Act refers to circumstances "likely to give rise to a reasonable apprehension of bias". The words in the Model Law are "justifiable doubts as to his impartiality or independence".

Section 13 - Challenge procedure

13(1) The parties are free to agree on a procedure for challenging an arbitrator.

13(2) Failing any agreement referred to in subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in section 12(1) or

(2), send a written statement of the reasons for the challenge to the arbitral tribunal.

13(3) Unless the arbitrator challenged under subsection (2) withdraws from his office or the other parties agree to the challenge, the arbitral tribunal shall decide on the challenge.

13(4) Within 10 days after receiving notice of the decision of the arbitral panel under subsection (3), a party may apply to the Court to decide on the challenge and, if the application is made by the challenging party, to remove the arbitrator.

13(5) The Court may decide on the challenge and its decision is final and not subject to appeal.

13(6) Unless the Court otherwise directs, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an arbitral award while an application under subsection (4) is pending.

13(7) An award made under subsection (6) while an application is pending under subsection (4) is subject to section 34.

[Source: ML article 13, clarified and varied as to form; BC ICAA section 13.]

Comment:

1. Section 13 does not provide for a challenge before the aribitral tribunal is fully constituted. This leaves open a possible difficulty if a party nominates an obviously biased arbitrator, but we think that any cure for this evil would be more detrimental to arbitrations than the evil itself, which we think can be dealt with by the court's powers of removal and appointment of arbitrators.

2. Section 13, in conjunction with section 14, would permit the Court of Queen's Bench to remove an arbitrator on grounds of bias during the arbitration. A party could use an application to remove the arbitrator as a means of obstruction and delay. The danger is minimized by requiring that the challenge be first raised and decided in the arbitration proceedings and by allowing the arbitration to continue while the application for removal is pending, unless the Court otherwise directs. The draft Act also allows only 10 days to apply to the Court instead of the Model Law's 30 days, as the time necessary in domestic arbitrations is less than in international arbitrations.

3. The Model Law provides for an application to the Court only if the tribunal rejects the challenge. The draft Act would also allow an application if the tribunal upholds the challenge.

Section 14 - Termination of mandate and removal of arbitrator

14(1) **The mandate of an arbitrator terminates if**

(a) he withdraws from office or resigns,

(b) the parties agree to terminate his mandate,

(c) the arbitral tribunal upholds a challenge under section 13 and no application is made to the Court under section 13(4); or

(d) the Court removes him under subsection (2).

14(2) **Upon the application of a party, the Court may remove an arbitrator who**

(a) is successfully challenged under sections 12 and 13,

(b) becomes unable to perform his functions,

(c) fails to conduct the arbitral proceedings without undue delay, or

(d) fails to take proper steps to ensure that the arbitral proceedings are carried on in accordance with this Act,

and, upon doing so, may give directions about the future conduct of the arbitration.

14(3) **A decision of the Court under subsection (2) is final and is not subject to appeal.**

14(4) **A party may not revoke the appointment of an arbitrator.**

14(5) **If, under this section or section 13(3), 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 section or section 12(1) or (2).**

[Source: ML article 14, varied and substantially added to.]

Comment:

1. We think that an arbitrator should be legally able to resign at any time and that the parties should be legally able to agree to remove an arbitrator at any time. Section 14(1) gives effect to this view. This may be a policy departure from ML article 14, which provides for resignation or removal taking place only "if an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay", though the Model Law does not make this clear. (A party who suffers loss because of a resignation or removal might still have a remedy in contract.)

2. Section 14(2)(d) reflects an important policy departure from the Model Law, under which the Court has no power to remove for procedural unfairness. Section 14(2)(a) merely clarifies the effect of a successful challenge and is in accordance with the Model Law.

3. The challenge procedure under sections 12, 13 and 14(2)(a) covers cases of bias and lack of prescribed qualifications. Cases of inability to act, undue delay and procedural injustice would be dealt with by applications under section 14(2)(b), (c) and (d).

4. A dishonest arbitrator would be able to obstruct proceedings by resigning before an award is made. We think that the appropriate remedy is to give the Court a default power (see section 15) to appoint a substitute arbitrator and give directions about the future conduct of the arbitration. Denial of the right to resign would not, we think, be helpful.

Section 15 - Appointment of substitute arbitrator

15(1) **Except as provided in subsections (2) and (5), where the mandate of an arbitrator terminates or is terminated, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.**

15(2) **Except as provided in subsection (5), where**

(a) the parties have not agreed on who is to be appointed as a substitute arbitrator or on a procedure for appointing a substitute arbitrator, or

(b) a person or persons who is or are empowered to appoint a substitute arbitrator has or have not done so after a party has given him or them 7 days' notice to do so,

and no other means for securing the appointment is provided, the Court upon the application of a party, may appoint a substitute arbitrator.

15(3) **Where a substitute arbitrator is appointed, the Court may give directions about the future conduct of the arbitration.**

15(4) **There shall be no appeal from an order made under subsection (2) or (3).**

15(5) **This section does not apply if an arbitration agreement makes the reference to arbitration conditional upon the arbitration being conducted by an arbitrator named in the agreement.**

[Source: ML article 15 amplified by subsections (2) and (3). Section 15(4) is new.]

Comment:

1. Section 15 is intended to ensure that an arbitration is not stultified by the death, resignation or removal of an arbitrator, except in a case in which the identity of the arbitrator is fundamental to the agreement to arbitrate. It does so by providing for the appointment of a substitute arbitration, either under the machinery in the arbitration agreement or by the Court of Queen's Bench, in all other circumstances.

2. ICAA section 6 requires hearings to be repeated upon the replacement or removal of an arbitrator unless the parties otherwise agree. Repeating the hearings will often be the only appropriate course to follow. However, there may be cases in which it is not necessary, and section 15(3) would therefore allow the Court, when a substitute arbitrator is appointed, to give directions about the future course of the arbitration.

PART 4

JURISDICTION OF ARBITRAL TRIBUNAL

Section 16 - Objection to jurisdiction

16(1) **An arbitral tribunal may rule on its own jurisdiction to enter upon and conduct the arbitration, including any objections with respect to the existence or validity of the arbitration agreement;**

16(2) **for the purpose of a ruling under subsection (1),**

(a) **an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and**

(b) **a decision by the arbitral tribunal that a contract is null and void shall not entail as a matter of law the invalidity of an arbitration agreement which forms part of it.**

16(3) **A plea that an arbitral tribunal does not have jurisdiction to enter upon or conduct the arbitration shall be raised as soon as is reasonably possible and in any event no later than the opening of the hearing or, if there is no hearing, no later than the first occasion on which the party who sets up the plea makes a representation to the tribunal.**

16(4) **A party is not precluded from setting up a plea under subsection (3) by the fact that he has appointed, or participated in the appointment of, an arbitrator.**

16(5) **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.**

16(6) Subject to subsection (7), a party who does not raise a plea as required by subsection (3) or subsection (5) and who yet proceeds with the arbitration waives the plea.

16(7) The arbitral tribunal may admit a later plea under subsection (3) or subsection (5) if it considers the delay justified.

16(8) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5) either as a preliminary question or in an award on the merits.

16(9) If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may apply to the Court, within 30 days after having received notice of that ruling, to decide the matter.

16(10) A decision of the Court under subsection (9) is final and is not subject to appeal.

16(11) Unless the Court otherwise directs, while an application under subsection (9) is pending, the arbitral tribunal may continue the arbitral proceedings and make an arbitral award.

[Source: ML article 16, varied.]

Comment:

1. Section 16 is intended to regulate challenges to jurisdiction so that, on the one hand, they can be disposed of efficiently and cannot be used to obstruct and delay, and so that, on the other, they can be brought before the Court of Queen's Bench for decision. It does this by

(a) making it clear that an arbitral tribunal can rule on its own jurisdiction no matter what kind of objection is taken;

(b) providing for an ultimate Court ruling if a party wishes it, normally by application to the Court after the tribunal has ruled;

(c) compelling a party to raise an objection to jurisdiction as soon as possible -- no later than the opening of the hearing if the objection is to original jurisdiction, and as soon as a matter is raised if the objection is that the tribunal is going beyond a jurisdiction which it has -- on pain of being held to have waived his objection if he does not do so.

2. Note, however, that section 34(11) would leave it open to a party, rather than to raise before an arbitral tribunal a fundamental objection to jurisdiction based upon the invalidity of the arbitration agreement, the lack of authority in the arbitration agreement for the reference of the particular dispute to arbitration, or the invalidity of the appointment of the tribunal, to sue for a declaration of the Court that there is a fundamental lack of jurisdiction. This is intended to avoid compelling a

party to appear before an arbitral tribunal to argue that it has no legal existence, which might put him into a difficult position.

3. Under section 16(6), the statutory waiver of a right to object to jurisdiction would apply only if a party proceeds with an arbitration without raising the objection. Our majority view is that a "party" should, if he wishes, be able to refuse to have anything to do with something which appears to be an arbitration but which, because a fatal flaw in the arbitration agreement or in the proceedings, is not an arbitration at all. He would, of course, ignore the proceedings at his peril. If an award is made, and if, where enforcement proceedings are taken, the Court finds that the proceedings were valid, he would have no defence and would suffer the consequences of non-participation.

There is a strong minority view that even a party who refuses to participate in an arbitration should be obliged to raise his objection to jurisdiction, either before the tribunal, or by taking action for a declaration that the arbitral tribunal has no jurisdiction. This view is based upon the desirability of promoting and maintaining the integrity of the arbitral process by requiring an attack upon an arbitration to be brought before the arbitral tribunal for adjudication. In this view, the Court should have the ultimate power of decision, but only after the arbitral process has functioned.

4. By permitting an arbitral tribunal to rule on the very existence of an agreement to arbitrate, section 16 might go further than the present law permits (the state of the law being somewhat uncertain), and it may seem illogical to allow a tribunal to make a ruling which might establish that it has no authority to make any ruling. However, we think that the Model Law is right in permitting the tribunal to do so, on grounds of efficiency and getting on with the disposition of the arbitration.

5. It is possible under the present law to have a situation in which a contract which contains an arbitration clause is not valid or does not exist, while the arbitration clause is still valid. Section 16(2)(b) carries this possibility forward.

6. It is not necessary to provide for an application to the Court under section 16(9) if an arbitral tribunal rules that it does not have jurisdiction. Such a ruling would be a final award which the Court, if it finds that the tribunal did have jurisdiction, could remit under section 34(5) to the tribunal for further consideration: see *MacDonald* v. *P.P.F., Loc. 488* [1988] 4 WWR 92 (Alta. CA).

Section 17 - Interim measures

17(1) Upon request by a party, an arbitral tribunal has power to make orders for the detention, preservation or inspection of any property or thing which is the subject of the arbitration or as to which any question may arise therein.

17(2) An arbitral tribunal may require any party to provide appropriate security in connection with a measure ordered under subsection (1).

17(3) Unless otherwise agreed by the parties, an arbitral tribunal may make an interim award.

[Source: Section 17(1) and (2): ML article 17, varied. Section 17(3): new.]

Comment:

1. Section 17(1) and (2) confer powers similar to those conferred by Model Law article 17, but follow more customary Alberta wording.

2. Section 9(1) would give the Court powers concurrent with those which section 17(1) would give the arbitrators. See the comments under section 9.

3. Section 17(3) does not come from the Model Law. It is intended to settle doubts about the validity of a decision by an arbitral tribunal which does not deal with the whole of the dispute which has been referred to arbitration. Examples of possible interim awards would be an award which decides liability without deciding the amount of damages, or an award which directs a party to do something and leaves it open to the other party to come back to the tribunal for further relief in the event of non-compliance.

PART 5

CONDUCT OF ARBITRAL PROCEEDINGS

Section 18 - Equality of treatment of parties

18(1) The parties to an arbitration shall be treated with equality.

18(2) Each party shall be given an opportunity of presenting his case and of responding to the case of the other parties which is fair under all the circumstances of the case.

18(3) This section applies notwithstanding an agreement of the parties which is to the contrary or which is inconsistent with it.

[Source: ML article 18, varied.]

Comment:

1. Section 18(1) and (2) lay down fundamental rules of fairness which, under section 4(1) and section 18(3), would apply to every arbitration under the proposed Act. Parties would not be able to contract out of this protection (except by contracting out of the proposed Act altogether), nor

could they waive the protection of the section. Under section 34(1)(g) of the draft Act, a failure to comply with section 18(1) and (2) would be grounds for setting aside an award.

2. Section 18(1) and (2) are, however, flexible. A requirement that the parties be treated "with equality" does not require parties to be treated exactly the same, and it may require them to be treated differently. What is a fair opportunity to present or respond to a case will vary from case to case.

The Model Law requires that a party be given a "full" opportunity to present his case. This appears to us to be too rigid. Parties may quite properly agree, for example, that an arbitrator is to decide a dispute by looking at their files or by inspecting goods to see whether they correspond to a description: this might be perfectly fair, but one party may afterwards argue that it deprived him of a "full" opportunity to present his case. Section 18(2) of the draft Act would allow the Court to decide whether the opportunity was "fair", and could take the agreement into account as one of the circumstances of the case.

Section 19 - Rules of procedure and evidence

19(1) Subject to this Act, the parties are free to agree on the procedure to be followed by an arbitral tribunal in conducting arbitration proceedings.

19(2) Failing any agreement referred to in subsection (1), an arbitral tribunal may, subject to this Act, conduct the arbitration in such manner as it considers appropriate.

19(3) An arbitral tribunal is not bound by the rules of evidence or any other law applicable to judicial proceedings and has power to determine the admissibility, relevance and weight of any evidence.

[Source: Section 19(1),(2) and (3): ML article 19, BC ICAA 19., varied.]

Comment:

1. Section 19(1) reflects the policy of control of arbitral proceedings by the parties. It is "subject to this Act", so that any agreement about procedure would have to conform to section 18.

2. Section 19(2) leaves the conduct of proceedings to be decided by the arbitral tribunal, subject to whatever the parties have decided, and subject also to all provisions of the draft Act which the parties have not agreed to make inapplicable.

3. The Alberta Evidence Act now applies to arbitrations, because "action" is defined to include "arbitration" and "court" is defined to include

an "arbitrator". Subsection (3) would allow an arbitral tribunal to apply a provision of the Act but would not compel it to do so.

Section 20 - Time and place of arbitration

20(1) The parties to an arbitration are free to agree on the time, date and place of the arbitration.

20(2) Failing any agreement under subsection (1), the time, date and place of arbitration shall be determined by the arbitral tribunal, having regard to the circumstances of the case, including the convenience of the parties.

20(3) Notwithstanding subsection (1), 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.

[Source: ML article 20.]

Section 21 - Commencement of arbitration

21(1) An arbitration proceeding is commenced by

(a) a notice given by one party to another requiring that other to appoint, or to join in the appointment of, an arbitrator under an arbitration agreement,

(b) where a third party is empowered to appoint an arbitrator, a notice to appoint an arbitrator under the arbitration agreement, given by one party to the third party and served on another party,

(c) a notice given by one party to another party that the party giving notice demands arbitration under an arbitration agreement, or

(d) any other means recognized by law.

21(2) An arbitral tribunal may exercise its powers when every member has accepted appointment.

[Source: section 21(1): ML article 21, much expanded. Section 21(2): AIC draft 11.]

Section 22 - Matters referred to arbitration

22(1) Subject to subsection (2), a notice under section 21 shall state that a dispute or disputes described in the notice is or are referred to arbitration.

22(2) A notice which does not comply with section 21 refers to arbitration all disputes which the party giving the notice is entitled to refer to arbitration under the arbitration agreement.

[Source: New.]

Comment:

Model Law article 21 merely says that arbitral proceedings start on the date on which a request for a dispute to be referred to arbitration is received by the respondent. Sections 21 and 22 of the draft Act are intended to allow more latitude, applying as they would to some domestic Alberta arbitrations in which the parties would not have access to legal advice. The arbitral tribunal would have power under section 23(1) to ensure that a dispute is narrowed down by written or oral statements, so that a failure to specify in the notice commencing an arbitration could be cured.

Section 23 - Procedural orders and directions

23(1) An arbitral tribunal may direct that, within the periods of time directed by the tribunal,

(a) the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and

(b) the respondent shall state his defence in respect of these particulars.

23(2) 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.

23(3) Either party may amend or supplement his statement of his claim or his statement of his defence during the course of the arbitral proceedings, unless the tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

23(4) The arbitral tribunal may permit a party to make a statement under subsection (1) orally.

23(5) The parties to an arbitration and all persons claiming through or under them shall, subject to any legal objection,

(a) submit to be examined by or before the arbitral tribunal on oath or affirmation in relation to the matters in dispute,

(b) produce before the arbitral tribunal all books, deeds, papers, accounts, writings and documents within their possession or power which may be required or called for by the tribunal, and

(c) do all other things which the arbitral tribunal may require.

23(6) The Court has the same powers to enforce an order made by an arbitral tribunal under this section as it has to enforce a similar order made by the Court in an action.

[Source: section 23(1)-(3): ML article 23. section 23(4): new. Section 23(5): AA Schedule section 6. Section 23(6): UK 1950 section 12(5).]

Comment:

1. Usually, an arbitral tribunal should insist on having a statement of what it is the claimant claims and why the respondent does not think that the claimant is entitled to the relief claimed. Section 23(1) gives the tribunal a discretionary power to order the giving of such statements. Model Law article 23(1) makes the giving of statements mandatory, and UNCITRAL thought that the article expresses a principle from which the parties should not be allowed to derogate (Report, page 2949), but we think that the discretionary power is sufficient. It may exist without the section, but we think it useful to have it there.

2. Section 23(4) would permit oral statements of a claim and defence. This is consistent with Model Law article 23, as UNCITRAL said that it did not intend that the statements should always be in writing (Report, page 2949), and it is consistent with leaving it open to have informal procedures.

3. Section 23(5) has no counterpart in the Model Law. It is taken from section 6 of the Schedule to the present Arbitration Act, and we think that it performs a useful function and should be carried forward. It provides a statutory foundation for compelling the parties to give evidence and produce documents, and it confirms their obligation to carry out procedural directions given by the arbitral tribunal.

4. Section 23(6) has no counterpart either in the Model Law or the present Arbitration Act. Under principle 14 of the AIC Principles (Issues Paper page 191), upon a party failing to comply with a procedural order or direction of the arbitral tribunal, the other party could file the order or direction with the Court so that it could then be considered as an order or direction of the Court. We think that it would be useful to have the Court's powers available to back up an arbitral tribunal, but we do not think that a tribunal's order should be treated as a Court order, and would accordingly make enforcement discretionary. This power would be in addition to the Court's direct powers under section 9 of the draft Act.

Section 24 - Hearings and written proceedings

24(1) The parties may agree whether oral hearings shall be held for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials.

24(2) In the absence of an agreement under subsection (1), a party may require the arbitral tribunal to hold such hearings at appropriate stages of the proceedings.

24(3) In the absence of both an agreement under subsection (1) and a requirement under subsection (2), the arbitral tribunal shall decide whether to hold a hearing or hearings.

24(4) 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.

24(5) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other parties.

24(6) Any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

[Source: ML article 24.]

Comment:

1. A hearing at which every party can appear, make his own case, and test the cases of other parties, is usually the fairest way to conduct an adjudication, and it is often the only fair way. However, there are exceptions. If, for example, parties are content to send files and written statements to an arbitrator in order to obtain a quick and cheap adjudication, we see no reason why they should not be able to agree to do so. Or, if the sole question is whether goods are up to sample or description, there is no reason why they should not agree to allow an arbitrator who is an expert to look at the goods and the sample or description and make a decision.

Failing such agreement, any party should be entitled to a hearing if he wants one. If there is no agreement, and no party feels strongly enough to demand a hearing, then it should be for the arbitral tribunal to decide how to deal with the arbitration, though we would expect that it will almost invariably decide to hold a hearing.

Section 24(1), (2) and (3) come directly from ML article 24(1). We have restated them in an attempt to make them more readable.

2. Section 24(4), (5) and (6), which come from Model Law article 24(2) and 24(3), lay down important rules intended to ensure that the parties are given equal opportunities to deal with information and documents.

Section 25 - Default of a party

25(1) If, without showing sufficient cause,

(a) the claimant does not, within the period of time directed by the arbitral tribunal under section 23, state the facts supporting his claim, the points at issue and the relief or remedy sought, the arbitral tribunal may terminate the proceeding and make an award dismissing the claimant's claim,

(b) the respondent does not, within the period of time directed by the arbitral tribunal under section 23, state his defence, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations, or

(c) a 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.

25(2) Unless otherwise agreed by the parties to an arbitration, where there has been delay the arbitral tribunal may terminate the arbitration for want of prosecution and may dismiss the claimant's claim or give directions for the speedy determination of the arbitration and may impose terms.

[Source: Section 25(1): ML article 25, varied in (a); Section 25(2): Alberta Rule 244.]

Comment:

1. In *Food Corporation of India* v. *Antclizo Shipping Corporation* [1988] 1 WLR 603, Lord Goff, speaking with the concurrence of most of the members of the Appeals Committee of the House of Lords, noted that, under English law, an arbitrator has no power to strike out a claim for want of prosecution. He went on to associate himself with concerns expressed by the Court of Appeal and felt generally in the City of London about the law as it stands with regard to arbitrations which have been allowed to go to sleep for many years, and suggested that the sooner corrective legislation is passed, the better. Presumably the same legal situation obtains in Alberta, as the present Arbitration Act confers no power to dismiss for want of prosecution.

The enactment of Model Law article 25(a) would go some way towards meeting the problem, but not all the way: it provides for termination of proceedings for the claimant's failure to deliver a statement of his case, but it would not permit dismissal for failure to proceed thereafter. Article 25(c) would also be helpful, as it permits an arbitral tribunal to proceed on the

evidence before it if a party fails to appear, but that requires a hearing at which the other party would have to appear and give evidence, which seems to be an unnecessary step if a claimant does nothing to advance a claim, and it is a step which is not required in a court action.

We think that a thoroughgoing power to dismiss for want of prosecution should be available. In court proceedings, it is not a power which is frequently used, but it is sometimes useful in itself and it is more often useful to have it in the background. We have accordingly adapted Rule 244 of the Alberta Rules of Court as section 25(2) of the draft Act.

2. Model Law article 25(a) provides that an arbitral tribunal "shall" dismiss a claim if the claimant, without showing sufficient cause, fails to communicate his statement of claim in accordance with article 23. Section 25(1)(a) of the draft Act says "may". This is a policy difference: we do not think that a party should necessarily lose a claim for failure to meet a time requirement, though it should be open to the tribunal to impose that result.

3. Model Law article 25(a) does not say what effect the termination of proceedings will have on the claimant's right to bring the claim again. We think that that point should be clarified one way or the other.

In the comparable case of dismissal of a court action for want of prosecution, Stevenson & Cote, *Alberta Rules of Court*, page 285, say that dismissal is no bar to a later suit, and cite *Mayzel* v. *Sturm* (1957) 10 DLR (2d) 642 (Ont. HC). In *J.L.O. Ranch Ltd.* v. *Logan's Estate and Logan* (1988) 81 AR 261 (Alta QB), Madam Justice Trussler, while saying that the inordinate delay and prejudice to the defence for which a counterclaim had been dismissed were *res judicata*, pointed out that there had been no finding on the merits of the counterclaim and said that "the case does not fall within the concept of issue estoppel as the second cause of action is not different from the first", which suggests agreement with the result of *Mayzel* v. *Sturm*, though she went on to hold that the new action was barred by the Limitation of Actions Act.

We think, however, that in the case of an arbitration, a dismissal under section 25(1)(a) or section 25(2) of the draft Act should prevent a party from taking further proceedings under the claim, and the subsection accordingly provides for dismissal of the claim. The difference is that a claimant in an arbitration is under a contractual obligation to have his claim adjudicated upon in the arbitration.

4. Section 25(1)(b) and (c) of the draft Act, following the Model Law, give effect to a somewhat different principle where a defendant does not state his defence or a party does not appear at a hearing or provide documentary evidence: despite the lack of a defence, the proceedings are to be continued. Under section 25(1)(b), a claimant would therefore have to prove his claim and the arbitral tribunal would have to make an award, and under section 25(1)(c), a party would be relieved of the burden of adducing evidence only if the decision would otherwise go against him.

Section 26 - Expert appointed by arbitral tribunal

26(1) An arbitral tribunal

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

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

26(2) If a party so requests or if the arbitral tribunal thinks it necessary, an expert appointed under subsection 1(a) 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 point at issue.

26(3) No person shall be compelled under subsection 1(b) to give an expert information or a document that he could not be compelled to give or produce on the trial of an action.

[Source: Section 26(1), (2): ML article 26. Section 26(3): new.]

Section 27 - Obtaining evidence

27(1) In order to procure the attendance of a person as a witness at an arbitration, a party may serve the person with a notice requiring the person to attend and give evidence at the arbitration at the time and place named in the notice.

27(2) The notice shall be served in the same way and has the same effect as a notice requiring the attendance of a witness and the production of documents by him at the hearing or trial of an action.

27(3) An arbitral tribunal

(a) may require a witness to testify under oath or affirmation, and

(b) may administer an oath or affirmation.

27(4) No person shall be compelled under this section to give evidence or produce a document which he could not be compelled to give or produce in the trial of an action.

27(5) The Court may, at the request of the arbitral tribunal or of a party, make any orders and give any directions for the taking of evidence for an arbitration under this Act which it has power to make or give in an action.

[Source: Section 27(1), (2) and (4): AA section 8, varied. Section 27(3): AA section 7(a). Section 27(5): ML article 27.]

Comment:

1. Section 27(1) to (4) have no counterparts in the Model Law. Subsections (1) to (3) come from section 8 of the Arbitration Act, and subsection (4) comes from section 7. We think it useful to make it clear that witnesses can be subpoenaed and oaths administered without reference to the Court.

2. Section 27(5) is in substance the same as Model Law article 27, though differently drafted.

PART 6

MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Section 28 - Application of law

28(1) **An arbitral tribunal shall decide a dispute**

(a) **in accordance with law,**

(b) **in accordance with the terms of the arbitration agreement and of a contract under which the dispute has arisen, and**

(c) **taking into account usages of trade applicable to a transaction which has given rise to the dispute.**

28(2) **The parties may designate the rules of law which shall apply to the substance of the dispute.**

28(3) **Any designation of the law or legal system of a given State under subsection (2) shall be construed, unless otherwise expressed, as referring to the substantative law of that State and not to its conflict of laws rules.**

28(4) **Failing any designation by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances respecting the dispute.**

28(5) **An arbitral tribunal**

(a) **may apply doctrines and rules of equity as well as law, and**

(b) **may make orders in the nature of specific performance, injunctions, and other equitable remedies.**

[Source: Section 28(1),(2),(3) and (4): Model Law article 28(1) and (2) as varied by ICAA section 7. Section 28(5): new.]

Comment:

1. Section 28 reflects a fundamental policy, namely, that arbitrators must apply the law. This policy, however, would not override an even more fundamental policy, namely, that of control by the parties, because under section 4(2), the parties could contract out of section 28.

2. Section 28 would allow the parties to designate what legal rules they want to apply, and in default of designation, would allow the tribunal to choose the rules of law it thinks appropriate. Usually, Alberta law would apply as between Alberta residents going to arbitration about a dispute which has arisen in Alberta, but there will be occasional cases in which a dispute is more closely connected with some other system of law.

3. Section 28(5) would confer on arbitrators powers to order parties to do things and powers to order parties not to do things. The making of an order of either kind would impose a legal obligation to conform to the order. The draft Act would not make the machinery of the state available to enforce such an order, but in most cases parties are likely to conform to such an order, and it could be taken to the Court for enforcement under section 35.

4. Section 28(5) would also confer power to grant other equitable remedies. If there is any doubt after the Alberta Court of Appeal's judgment in *MacDonald* v. *P.P.F., Loc. 488* [1988] 4 WWR 92 that an arbitral tribunal can grant rectification of an agreement under a sufficiently broad arbitration clause or reference, the subsection should remove it.

Section 29 - Decision of panel

29 If an arbitral tribunal is composed of more than one member,

(a) a decision of a majority of members of an arbitral tribunal is a decision of the arbitral tribunal,

(b) unless all or a majority of members of an arbitral tribunal agree on a decision, a decision of the chairman is a decision of the arbitral tribunal, and

(c) questions of procedure may be decided by the chairman or presiding arbitrator if so authorized by the parties or, in the absence of agreement by the parties on the point, by all members of the arbitral tribunal.

[Source: Section 29(a) and (c): ML article 29. Section 29(b): new; Cf AIC Principle 23.]

Comment:

Section 29(a) would make clear what everyone would expect, namely, that a majority decision of arbitrators is binding unless the parties agree otherwise. Section 29(b), which goes on to provide that, if there is no majority the chairman's decision will govern, is intended to ensure as far as possible that an arbitration would not fail because of the lack of a majority decision.

Section 30 - Mediation and settlement

30(1) 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.

30(2) 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.

30(3) An award on agreed terms shall be made in accordance with section 31 and shall state that it is an award.

30(4) An award on agreed terms has the same status and effect as any other award on the substance of the dispute.

[Source: Section 30(1): ICAA section 5 section 30(2) to (4): ML article 30.]

Comment:

It is obvious that having an arbitrator change his role to that of mediator and back to arbitrator again, which section 30(1) contemplates, is fraught with danger. The subsection, however, is merely permissive and would apply only with the consent of all parties, who may attach whatever safeguards they wish to their consents. It does not appear in the Model Law, but was added to it by the Canadian legislation on international commercial arbitrations, and it appears in the ICAA.

Section 31 - Form, contents and time of award

31(1) Subject to subsection (2), an award shall be made in writing and shall be signed by or under the authority of the members of the arbitral tribunal, dated, and a copy delivered to each party.

31(2) If there is more than one arbitrator, the signatures of a majority of the members of the arbitral tribunal shall suffice, but the reason for the omission of any signature must be stated.

31(3) An award shall state the reasons upon which it is based unless it is an award on agreed terms under section 30.

31(4) If an award does not contain a sufficient statement of the reasons upon which it is based, the arbitral tribunal upon the application of a party may, and if so ordered by the Court shall, deliver a sufficient statement.

31(5) An arbitral tribunal may make one or more final awards, each of which disposes of one or more of the questions referred to arbitration.

31(6) Notwithstanding any agreement of the parties, where the parties have agreed on a time limit by which an award of an arbitrator shall be made, the Court may extend the time limit, whether or not the time has expired.

[Source: Section 31(1), (2) and (3): ML article 31. Section 31(4) and (5): new. Section 31(6): BC CAA section 13.]

Comment:

1. Section 31(1) requires an arbitrator to write out his decision, sign it and give a copy to each party. Since an award is the foundation for legal rights, and since it may have to be taken to the Court of Queen's Bench to enforce, it seems that this is the minimum of formality which the proposed Act should contemplate. Parties who do not want even this much formality would, however, be able to dispense with it by agreement.

2. Under Model Law article 31, the award must also state the place of the arbitration. For domestic Alberta arbitrations we think that this would be an unnecessary formality which would be likely to be overlooked, and we do not think that it should be required.

3. In most cases, parties to a dispute, particularly the loser, will be dissatisfied unless they are told why the dispute has been decided in a certain way. Section 31(3) would therefore require an arbitral tribunal to give its reasons, and section 31(4) would allow the Court to compel it to do so. On the other hand, we have been told of specific cases in which the giving of reasons would only have served to exacerbate undesirable feelings, and of general procedures under which one party, e.g., an airline which accepts arbitration of claims for damage to luggage, stipulates that there shall be no reasons. Section 4(2) would allow the parties to agree that there shall be no reasons.

4. Section 31(6) is intended to guard against an arbitration being aborted merely because an arbitrator misses a deadline.

Section 32 - Termination of proceedings

32(1) An arbitral proceeding is terminated by

(a) a final award or awards in conformity with this Act disposing of all questions referred to arbitration in the proceeding, or

(b) an order of the arbitral tribunal under subsection (2), section 25(1)(a), section 25(2), or section 30(2), or

(c) the termination of the mandate of an arbitrator where the Court determines under section 15(5) that the reference to arbitration is conditional upon the arbitration being conducted by that arbitrator.

32(2) An arbitral tribunal shall issue an order for the termination of the arbitral proceedings where

(a) the claimant withdraws his claim, unless the respondent objects to the termination 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 proceeding, or

(c) the arbitral tribunal finds that the continuation of the proceeding has for any other reason become unnecessary or impossible.

32(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings.

32(4) The arbitration proceedings and the mandate of the arbitral tribunal may be revived for the purposes of and in accordance with sections 33, 34(4), (5) and (8) and 38(3).

32(5) Unless the parties agree to the contrary, the death of a party to an arbitration does not terminate an arbitral proceeding or the authority of the arbitral tribunal.

32(6) Subsection (5) does not affect a rule of law or an enactment under which the death of a person extinguishes a cause of action.

[Source: Section 32(1),(2) and (3): ML article 32, varied. Section 32(4): ML article 34(3), expanded. Section 32(5) and (6): BC CAA section 3.]

Comment:

1. Section 32(1),(2) and (3) come from the Model Law with minor changes in detail, and provide useful clarification. A termination under section 32(2) would affect only the arbitration proceeding, not the underlying claim.

2. Section 32(5) and (6) come from the report of the British Columbia Law Reform Commission and section 3 of the BC CAA. The desirability of the result which they achieve is obvious.

Section 33 - Correction and interpretation of award; additional award

33(1) An arbitral tribunal may

(a) within 30 days after issuing an award, or

(b) upon application filed by a party with the tribunal within 30 days after receipt of the award

correct any errors in computation, any clerical or typographical errors or any errors of similar nature.

33(2) An arbitral tribunal may, if so requested by the parties, give an interpretation of a specific point or part of an award.

33(3) An arbitral tribunal may, upon application filed by a party with the tribunal within 30 days after the receipt of an award, change the award to correct injustice caused by an oversight of the arbitral tribunal.

33(4) An arbitral tribunal may reject an application under subsection (1), (2) or (3) without a hearing or a meeting.

33(5) An arbitral tribunal may, upon application or of its own motion, make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

[Source: Section 33(1), (2) and (5): ML article 33, varied. Section 33(3) and (4): new.]

Comment:

1. We think that a power in an arbitral tribunal to correct mathematical and clerical errors in an award is obviously desirable, and that a power to deal with a point not dealt with in the award is also desirable. We think that a provision allowing a tribunal to give an interpretation upon request of the parties is also desirable. Section 33(1),(2) and (4) cover these points in much the same way as does the Model Law.

2. Section 33(3) goes further, and would permit an arbitral tribunal to correct an oversight: overlooking a piece of evidence or a statutory provision put before it would be examples. There is room for argument both ways here, but we think that there should be some sort of safety valve for human error. At present, the safety valve is the power of the Court to set aside an award upon the admission of an arbitrator that an oversight has occurred, but there is no room for such a power under the Model Law. In matters in court, the safety valve is the power of a judge to vary his order at any time before it is entered, but there will be no counterpart to the varying power in arbitration without some provision such as section 33(3), and there will be no appeal based on a mere oversight of fact. We think that it is desirable to have such a provision.

A power to change an award militates against finality. A losing party may apply for change merely for purposes of delay and obstruction. In the case of a mathematical or clerical error, we think that the 30 day limit is adequate protection, as it will be apparent whether there is or is not an error and correction is simple. In the case of a change to correct an oversight, much the same is true, since it will usually be apparent to a tribunal whether it in fact overlooked something or not. We think that such danger as exists is met by the time limits, and by permitting the tribunal to reject an application for correction or interpretation without a hearing or a meeting.

PART 7

REMEDIES

Section 34 - Recourse against award

34(1) Subject to subsection (2), the Court may set aside an arbitral award on any of the following grounds:

(a) that a party to the arbitration agreement was under a legal incapacity when he entered into the agreement,

(b) that the arbitration agreement is invalid or has ceased to exist,

(c) that the award

(i) deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or

(ii) contains a decision on a matter beyond the scope of the submission to arbitration,

and the party seeking to set aside the award has not

(iii) agreed to the inclusion of the dispute or the matter in the arbitration or waived his right to object thereto, or

(iv) agreed that the arbitral tribunal has power to decide what disputes have been referred to it,

(d) that the composition of the arbitral tribunal

(i) was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Act from which the parties cannot derogate, or

(ii) if there was no agreement under clause (i), was not in accordance with this Act,

(e) that the subject matter of the dispute was not capable of being the subject of arbitration under the law of Alberta,

(f) that the party making the application

(i) was not treated with equality,

(ii) was not given an opportunity of presenting his case or of responding to the case of another party which was fair under all the circumstances of the case, or

(iii) was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings,

(g) that the arbitral procedure was not in accordance with this Act or there has otherwise been a serious departure from a fundamental rule of procedure,

(h) subject to section 13, that an arbitrator has engaged in corrupt or fraudulent practice or there is a reasonable apprehension of bias, or

(i) that the award was obtained by fraud.

34(2) The Court shall not set aside an award on the application of a party who is deemed under section 4 or section 16 to have waived his right to raise a plea.

34(3) If the decisions on matters submitted to arbitration can be separated from those not so submitted, only a part of the award which contains a decision on a matter not submitted to arbitration may be set aside under subsection (1)(c).

34(4) Upon setting aside an award, the Court may

(a) remove an arbitrator or the arbitral tribunal, and

(b) give directions about the future conduct of the arbitration.

34(5) Instead of setting aside an award, the Court may

(a) remit the award to the arbitral tribunal for further consideration, and

(b) give directions about the future conduct of the arbitration.

34(6) Subject to subsection (7), a party to an arbitration may appeal to the Court on any question of law arising out of the award.

34(7) No appeal lies under subsection (6) unless either

(a) all parties to the arbitration consent, or

(b) the Court is satisfied that

(i) the importance of the arbitration to the parties justifies the intervention of the Court, and

(ii) that the determination of the point of law is likely to substantially affect the rights of one or all of the parties.

34(8) Upon finding an error of law, the Court shall

(a) confirm, vary or set aside the award, or

(b) remit the award to the arbitral tribunal with the Court's opinion on the question of law and give directions about the future conduct of the arbitration.

34(9) Except in a case in which there is corruption or an award was obtained by fraud, an application to set aside an award or an appeal on a question of law under this section shall be commenced within 30 days after the receipt by the applicant of

(a) the award,

(b) a correction of the award under section 33(1),

(c) an interpretation of a specific point or part of an award under section 33(2),

(d) a change in the award under section 33(3), or

(e) a statement of reasons for the award under section 31(4).

34(10) An appeal from a decision of the Court under subsections (1) to (8) lies to the Court of Appeal with leave of that Court.

34(11) Nothing in this Act precludes the Court from granting a declaration that a fact mentioned in subsection (1)(a) to (e) exists or does not

exist, or, upon making a declaration that such a fact exists, from granting an injunction against the commencement or continuation of an arbitration or proposed arbitration.

[Source: ML article 34, BC CAA section 31 and UK 1950 sections 19 and 22 varied.]

Comment:

1. Section 34 is intended to give a complete list of the grounds upon which the Court may set aside an award or hear an appeal from an award. It does not start with a declaration to that effect as does Model Law article 34, but, read with section 5 of the draft Act, that is its effect, save for the declaratory power preserved by section 34(11).

2. Section 34(2) clarifies the effect of the statutory waivers under sections 4 and 16. Insofar as it refers to section 4, it is consistent with the intention of UNCITRAL (see UNCITRAL Report pages 2923-2924). Since the waiver under section 16 could not cover matters about which the parties have no power to agree, we do not think that section 34(2) is contrary to the intention of UNCITRAL (see UNCITRAL Report page 2966) insofar as it refers to section 16.

3. Section 34(1)(c)(iv) does not appear in the Model Law.

4. Section 34(1)(g) comes from Model Law article 34(2)(a)(iv), but we have added more comprehensive words at the end to satisfy the doubts expressed at pages 37-38 of the UK Advisory Committee Report as to whether the Model Law provision will cover all cases of serious procedural injustice.

5. Section 34(1)(h) and (i) do not appear in the Model Law unless they are included in article 34(2)(b)(ii).

6. Section 34(4) gives the Court consequential powers not found in the Model Law.

7. The Model Law article 34(4) allows the Court to suspend proceedings for setting aside an award to give the arbitral tribunal an opportunity to resume proceedings or to take other action to eliminate grounds for setting aside. Section 34(5) instead carries forward the more direct traditional power to remit the award for reconsideration, with the addition of ancillary powers.

8. Model Law article 34(2)(b)(ii), which provides that an award may be set aside if it is in conflict with the public policy of the State, has been omitted, as we find the term difficult to understand in relation to Alberta law and we think that section 34 provides a remedy where one is desirable.

Section 35 - Enforcement of awards

35(1) **An award may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect.**

35(2) **The Court may**

(a) direct that judgment may be entered, or

(b) make orders

in the terms of the award.

35(3) **The Court may make such orders as are necessary to give effect to the award and to a judgment under subsection (2).**

35(4) **Nothing in this section or in section 5 precludes the bringing of an action on an award.**

[Source: Section 35(1): Arbitration Act section 12. Section 35(2), (3) and (4): new.]

Comment:

1. Section 35 provides a summary procedure under which the Court of Queen's Bench can make its machinery and powers available for the enforcement of arbitral awards. This is discretionary, but the Court generally recognizes that an award is "final and binding" and that the party in whose favour it is made is entitled to its fruits. Section 35(1) is taken from AA section 12, and sections 35(2) and (3) come from recommendations of the British Columbia Law Reform Commission (B.C. Report pages 52-54).

2. Instead of applying under section 35(1), a party could bring an action on the award to obtain whatever the award entitles him to. This is not customarily done in Alberta, as the procedure under section 12 of the Arbitration Act, on which section 35(1) is based, is generally satisfactory. If there is serious doubt about the validity of the award, an action on it might be more appropriate than the summary procedure under section 35, and if the award does not settle all the issues necessary to perfect a claimant's claim, an action will be necessary.

3. Subsections (2) and (3) are added in order to flesh out the Court's powers.

PART 8

GENERAL

Section 36 - Crown

36 **This Act binds the Crown.**

[Source: new.]

Comment:

1. There is no reason why the Crown should not be bound by an Arbitration Act. If it does not want to arbitrate, it need not enter into an arbitration agreement. If it does enter into an arbitration agreement, there is no reason why it should be permitted to back out of it as did the Crown in right of Canada in Gauthier v. The King (1917) 56 SCR 176. The ICAA is binding on the Crown in right of Alberta, and there is no reason to differentiate between domestic Alberta arbitrations and foreign commercial arbitrations on this point.

2. Section 36 is likely to be effective only against the Crown in right of Alberta. However, arbitrations to which the Crown in right of Canada is a party will be brought under the federal statute, which is also binding upon the Crown.

Section 37 - Compensation and expenses of arbitrators

37(1) The fees and expenses of an arbitrator or of a clerk, secretary or reporter assisting in an arbitration shall not exceed the fair value of the services performed together with necessary and reasonable expenses incurred.

37(2) Where an arbitrator has delivered his account for fees and expenses, any party to the arbitration or the arbitrator may apply to the clerk of the Court or other taxing officer for a judicial district in which some part of the arbitration takes place for an appointment to tax the account, and the applicant shall deliver a copy of the appointment to the arbitrator or the parties, as the case may be.

37(3) A party may tax an arbitrator's account notwithstanding that the account has been paid.

37(4) A party to a taxation under subsection (2) may, within

(a) 30 days of the receipt of the certificate of the taxing officer,

(b) a period allowed by the Court, or

(c) a period specified by the taxing officer in his certificate,

apply to the Court for a review of the taxation, and the Court may review the taxation and make any order it considers just, including an order that the taxing officer amend his certificate.

37(5) Where a bill has been taxed under subsection (2), the certificate of the taxing officer may be filed with the clerk of the Court and, on the expiry of the time specified in subsection (4), the certificate

may be enforced as though it were a judgment of the Court against the parties jointly and severally.

[Source: BC CAA section 26.]

Section 38 - Costs and interest

38(1) Subject to 37,

(a) an arbitral tribunal may award costs, and

(b) if the arbitral tribunal

(i) directs that the costs be taxed, or

(ii) awards costs without stating the amount or providing a means of ascertaining the amount,

a party may apply to the clerk of the Court or other taxing officer for a judicial district in which some part of the arbitration took place for an order respecting costs, and the rules applicable to the taxation of costs under a judgment of the Court apply to the taxation.

38(2) An arbitral tribunal or taxing officer may take into consideration the fact that one party made to the other a bona fide offer

(a) to accept in settlement of a claim an amount equal to or less than the amount actually awarded to him by the tribunal under the claim, or

(b) to pay in settlement of a claim an amount equal to or greater than the amount actually awarded against him under the claim,

and may

(c) in the case of an offer under paragraph (a), award the offering party double the costs (excluding disbursements), or

(d) in the case of an offer under paragraph (b), award the offering party the costs

incurred in respect of all steps taken after the communication of the offer.

38(3) If an arbitral tribunal does not make any order as to costs in its award, a party may, within 30 days of receipt of the award, apply to the tribunal for an order respecting costs.

38(4) If an arbitral tribunal makes no order respecting costs,

(a) each party shall bear his own costs, and

(b) as between themselves, the parties shall bear equally the costs referred to in section 37.

38(5) An arbitral tribunal shall have the same powers with respect to interest as the Court has under the Judgment Interest Act, but the provision for payment into Court shall not apply.

38(6) An award is a judgment of the Court for the purposes of the Interest Act (Canada).

[Source: New. For section 38(1) to (4), cf. Alberta Rules 169, 170, 174.]

Comment:

1. Section 38 is intended to allow an arbitral tribunal to award costs to a party and either to fix an amount of costs itself or refer the taxation to the taxing officer who taxes costs in court matters. If the tribunal does not award costs, each party is as between the parties liable to pay half of the costs of the tribunal, though under section 37 each party is responsible to the tribunal for the whole of the tribunal's fees and expenses.

2. In an action in the Queen's Bench, a defendant can pay money into court or make an offer of judgment, either of which the plaintiff is entitled to accept, with the consequence that if the plaintiff does not accept it and obtains judgment for a lesser amount the defendant will usually be awarded costs incurred after the payment in or offer. Also, a plaintiff may offer to accept an amount in full satisfaction of his claim, with the consequence that if the defendant does not accept the offer and is afterwards ordered to pay more, the plaintiff may be given double costs from the date of the offer. Section 38(2) is intended to have similar consequences, though it does not provide for payment in.

Section 39 - Gas price arbitrations

39(1) In this section,

(a) "arbitrator" includes an umpire and referee in the nature of an arbitrator;

(b) "end user" means the buyer of gas under a gas contract who purchases the gas for the purpose of using or consuming it;

(c) "gas" means a gaseous mixture consisting primarily of methane;

(d) "gas contract" means a contract under which gas is sold and delivered by a seller to a buyer, and includes an agreement that varies or amends that contract and an arbitration award that relates to that contract.

39(2) Subject to subsection (3), this section applies to every submission, whether coming into existence before or after the coming into force of this section, that provides for the arbitration of present or future differences relating to

(a) the initial determination or a redetermination of the price of gas delivered under a gas contract,

(b) the creation, replacement or modification of a method or formula for the calculation of the price of gas delivered under a gas contract, or

(c) the determination of the price of gas delivered under a gas contract in place of a method or formula for the calculation of the price of gas delivered under the gas contract.

39(3) The buyer and seller under a gas contract may agree to vary or make inapplicable all or any of the provisions of this section in relation to a submission to which this section applies only if the agreement is made after [the date on which section 17 of the Arbitration Act came into force.]

39(4) In an arbitration under this section the arbitrator shall have regard to at least the following matters to the extent that evidence is adduced with respect to those matters:

(a) the prices of substitutable energy sources

(i) that compete with gas for the various end uses of gas in the markets served by the buyer, where the buyer is not the end user of the gas, or

(ii) that are available for use or consumption by the buyer in place of gas, where the buyer is the end user of the gas,

taking into account any differences in the efficiencies of gas and those substitutable energy sources;

(b) the prices of other gas

(i) that competes in the same markets as those being served by the buyer, where the buyer is not the end user of the gas, or

(ii) that is available for use or consumption by the buyer, where the buyer is the end user of the gas;

(c) the explicit or implicit prices of other gas produced in Alberta and delivered under other gas contracts;

(d) the prices for gas in markets outside Canada that could be served by gas produced in Alberta if there were no quantitative restrictions imposed on the export of gas from Canada by or under any law in force in Canada.

39(5) The arbitrator, in having regard to each of the matters enumerated in subsection (4), shall take at least the following matters into account to the extent that evidence is adduced with respect to those matters:

(a) differences in transportation costs;

(b) the times at which prices were agreed to between the respective sellers and buyers;

(c) similarities and dissimilarities between the provisions of the gas contract and the provisions of contracts for the purchase of the substitutable energy sources and gas referred to in subsection (4).

39(6) In an arbitration under this section,

(a) the arbitrator must be ordinarily resident in Alberta, if the arbitration is conducted by a single arbitrator, and

(b) at least half of the arbitrators must be ordinarily resident in Alberta, if the arbitration is conducted by 2 or more arbitrators.

[Source: Arbitration Act section 17.]

Comment:

This section appears as section 17 of the Arbitration Act. We raised as issue 5.11 in our Issues Paper the question whether the law should continue to make special provision for gas price arbitrations and we received some comment on that issue. We were than advised by the Attorney General, the Minister of Consumer and Corporate Affairs and the Minister of Energy that the retention of section 17 is a matter of government policy, and, since we do not wish to extend our project to consider government policies applicable to gas pricing, we merely include the section here as a reminder that it exists and without recommendation as to whether or not it should be carried through in the event that a new arbitration statute is enacted.

B. DRAFT AMENDMENT TO THE LIMITATION OF ACTIONS ACT

The Limitation of Actions Act is amended by adding the following after Part 9.

PART 10

62(1) This Act applies to a claim which is referred to arbitration as if

(a) the commencement of an arbitration under the Arbitration Act were the commencement or bringing of an action;

(b) a claim for relief in an arbitration were a cause of action; and

(c) a party against whom a claim is made in an arbitration proceeding were a defendant.

62(2) If the Court sets aside an award or makes any order which has the effect of terminating an arbitration proceeding or which declares it to be ineffective, it may order that the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing a time within which an action or proceeding may be brought under this Act.

62(3) An action upon or an application to enforce an award of an arbitral tribunal may be commenced within 2 years after the day on which the claimant receives the award.

APPENDIX A

THE ARBITRATION ACT

CHAPTER A-23
[as amended to 1986]

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

1 In this Act,

(a) "clerk" means the clerk of the Court for the judicial district in which the arbitration takes place:

(b) "Court" means the Court of Queen's Bench;

(c) "professional arbitrator" means an arbitrator who is by profession a barrister, solicitor, architect, Dominion land surveyor or Alberta land surveyor;

(d) "submission means a written agreement to submit present or future differences to arbitration whether an arbitrator is named in it or not.

2 A submission, unless a contrary intention is expressed in it,

(a) is irrevocable except by leave of the Court and has the same effect as if it had been made an order of the Court, and

(b) shall be deemed to include the provisions set out in the Schedule so far as applicable to the reference under the submission.

3 If a party to a submission or a person claiming through or under him commences legal proceedings in a court against another party to the submission or a person claiming through or under him in respect of a matter agreed to be referred, a party to the legal proceedings may at any time before delivering any pleadings or taking any other steps in the proceedings, apply to that court for an order staying the proceedings.

4 The court to which an application is made under section 3 may make the order on being satisfied

(a) that there is no sufficient reason why the matter should not be referred in accordance with the submission, and

(b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.

5(1) A party to a submission may serve on the other party or parties or on the arbitrators, as the case may be, a notice in writing requiring him or them to appoint an arbitrator, umpire or 3rd arbitrator

(a) when a submission provides that a reference shall be to a single arbitrator and after differences have arisen all the parties to the difference do not concur in the selection of the arbitrator,

(b) when an appointed arbitrator refuses to act or is incapable of acting or dies and the submission does not show that it was intended that the vacancy should not be filled and the parties do not fill the vacancy,

(c) when the parties or 2 arbitrators are at liberty to appoint an umpire or 3rd arbitrator and do not appoint him, or

(d) when an appointed umpire or arbitrator refuses to act or is incapable of acting or dies and the submission does not show that it was intended that the vacancy should not be filled and the parties or arbitrators do not fill the vacancy.

(2) If the appointment is not made within 7 clear days after the service of the notice, the Court may on application by the party who gave the notice appoint an arbitrator, umpire or 3rd arbitrator, as the case may be, who has the same powers to act in the reference and make an award as if he had been appointed by consent of all parties.

6(1) If a submission provides that the reference will be to 2 arbitrators, one to be appointed by each party, then unless the submission expresses a contrary intention,

(a) if either of the appointed arbitrators refuse to act or is incapable of acting or dies, the party who appointed him may appoint a new arbitrator in his place, or

(b) if one party fails to appoint an arbitrator either originally or by way of substitution for 7 clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment,

(i) the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in reference, and

(ii) the award of that arbitrator is as binding on both parties as if he had been appointed by consent.

(2) The Court may set aside an appointment made under this section.

7 The arbitrators or umpire acting under a submission may, unless the submission expresses a contrary intention,

(a) administer oaths or take the affirmations of the parties and witnesses,

(b) state an award as to the whole or part in the form of a special case for the opinion of the Court, and

(c) correct in an award a clerical mistake arising from an accidental error or omission.

8(1) In order to procure the attendance of a person as a witness at an arbitration, a party to a submission may serve him with a notice requiring him to attend at the time and place named in the notice.

(2) The notice shall be served in the same way and has the same effect as a notice requiring the attendance of a witness and the production of documents by him at the hearing or trial of an action.

(3) No person shall be compelled under the notice to produce a document that he could not be compelled to produce on the trial of an action.

9 Whether or not the time for making an award has expired, the time may be enlarged by order of the Court.

10(1) In all references to arbitration the Court may from time to time remit the matters referred or any of them for reconsideration by the arbitrators or umpire.

(2) When an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within 6 weeks after the date of the order.

11(1) If an arbitrator or umpire has misconducted himself, the Court may remove him.

(2) Notwithstanding subsection (1), if an award has been made after June 29, 1979 but prior to the commencement of this provision, an application to set aside that award under

section 11(2) shall be made within 45 days from the commencement of this action.

(3) Notwithstanding subsection (1) or (2), the Court, on an application made before or after the expiration of the 45-day period, may extend the time within which an application may be made under section 11(2).

12 An award on a submission may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect.

13 The Court may make an order in the nature of a writ of *habeas corpus ad testificandum* to bring up a prisoner for examination before an official, special referee, arbitrator or umpire.

14 A referee, arbitrator or umpire at any stage of the proceedings under a reference may, and if so directed by the Court shall, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

15 An order made under this Act may be on any terms in respect of costs or otherwise that the authority making the order considers just.

16 When

(a) an Act directs that a person or persons appoint arbitrators, or proceed to arbitration under this Act, or

(b) any similar direction is made with respect to arbitration under this Act,

the direction shall be deemed a submission.

17(1) In this section,

(a) "arbitrator" includes an umpire and referee in the nature of an arbitrator;

(b) "end user" means the buyer of gas under a gas contract who purchases the gas for the purpose of using or consuming it;

(c) "gas" means a gaseous mixture consisting primarily of methane;

(d) "gas contract" means a contract under which gas is sold and delivered by a seller to a buyer, and includes an agreement that varies or amends that contract and an arbitration award that relates to that contract.

(2) Subject to subsection (3), this section applies to every submission, whether coming into existence before or after the coming into force of this section, that provides for the arbitration of present or future differences relating to

(a) the initial determination or a redetermination of the price of gas delivered under a gas contract,

(b) the creation, replacement or modification of a method or formula for the calculation of the price of gas delivered under a gas contract, or

(c) the determination of the price of gas delivered under a gas contract in place of a method or formula for the calculation of the price of gas delivered under the gas contract.

(3) The buyer and seller under a gas contract may agree to vary or make inapplicable all or any of the provisions of this section in relation to a submission to which this section applies only if the agreement is made after the coming into force of this section.

(4) In an arbitration under this section the arbitrator shall have regard to at least the following matters to the extent that evidence is adduced with respect to those matters:

(a) the price of substitutable energy sources

(i) that compete with gas for the various end uses of gas in the markets served by the buyer, where the buyer is not the end user of the gas, or

(ii) that are available for use or consumption by the buyer in place of gas, where the buyer is the end user of the gas,

taking into account any differences in the efficiencies of gas and those substitutable energy sources;

(b) the prices of other gas

(i) that competes in the same markets as those being served by the buyer, where the buyer is not the end user of the gas, or

(ii) that is available for use or consumption by the buyer, where the buyer is the end user of the gas;

(c) the explicit or implicit prices of other gas produced in Alberta and delivered under other gas contracts;

(d) the prices for gas in markets outside Canada that could be served by gas produced in Alberta if there were not quantitative restrictions imposed on the export of gas from Canada by or under any law in force in Canada.

(5) The arbitrator, in having regard to each of the matters enumerated in subsection (4), shall take at least the following matters into account to the extent that evidence is adduced with respect to those matters:

(a) differences in transportation costs;

(b) the times at which prices were agreed to between the respective sellers and buyers;

(c) similarities and dissimilarities between the provisions of the gas contract and the provisions of contracts for the purchase of the substitutable energy sources and gas referred to in subsection (4).

(6) In an arbitration under this section,

(a) the arbitrator must be ordinarily resident in Alberta, if the arbitration is conducted by a single arbitrator, and

(b) at least half of the arbitrators must be ordinarily resident in Alberta, if the arbitration is conducted by 2 or more arbitrators.

18 In sections 19 to 26

(a) "arbitrator" includes umpire and referee in the nature of an arbitrator,

(b) "award" includes umpirage and a certificate in the nature of an award.

19 Subject to section 20, an arbitrator is not entitled to demand or take for his attendance and services as an arbitrator in addition to his necessary disbursements greater fees than are prescribed in the regulations.

20(1) The parties to a submission may, by writing signed by them or by making the agreement a part of the submission, agree to pay to the arbitrator or arbitrators for their taking on themselves the burden of the reference and making the award such fees or sums for each day's attendance, or such gross sums, as the parties see fit.

(2) The amounts agreed upon under subsection (1) shall be substituted for those prescribed in the regulations, and shall be taken and allowed by the clerk.

21 No greater fees shall be taxed and allowed to a person called as a witness before an arbitrator than would be taxed and allowed to the same person in an ordinary action before a court having jurisdiction over the subject of the reference.

22(1) When at a meeting of arbitrators of which due notice has been given no proceedings are taken, either because of the absence of a party, or because the arbitrators postponed the proceedings at the request of a party, the arbitrators

(a) shall make up an account of the cost of the meeting, including the proper charges for their own attendance and that of any witnesses, and of the counsel or solicitor of the party present and not desiring the postponement, and

(b) shall charge the amount thereof or of the disbursements against the party in default or at whose request the postponement is made, unless in the special circumstances they consider it unjust to do so.

(2) The party in default or at whose request a postponement is made shall pay the amount charged whatever may be the event of the reference and the arbitrators shall in the award make any direction necessary for the purpose of this subsection.

(3) If the amount referred to in subsection (2) is payable by the party in whose favour the award is otherwise made it may, unless previously paid, be set off against and deducted from an amount awarded in favour of that party.

23(1) A party to an arbitration may have the fees of the arbitrator or the costs of the arbitration, including those fees, taxed by the clerk.

(2) An appointment for the taxation of the fees or the costs mentioned in subsection (1) may be granted by the clerk to the party applying for it on the filing of an affidavit setting forth the facts.

(3) An appointment for the taxation of the fees may be granted by the clerk at the instance of the arbitrators upon filing of a similar affidavit.

24(1) Except when an agreement in writing to that effect has been entered into under this Act, the clerk shall not allow on taxation higher fees than those prescribed in the regulations.

(2) On reasonable grounds established by affidavit and having regard to

(a) the length of the arbitration,

(b) the value of the matter in dispute, and

(c) the difficulty of the question to be decided,

the clerk may on taxation reduce the amount of the fees allowed to professional arbitrators as prescribed in the regulations but not to an amount less than the fees allowed to non-professional arbitrators as prescribed in the regulations.

(3) The clerk shall not allow on taxation more than one counsel's fee for each party for any meeting of the arbitrators.

(4) The clerk may tax and allow a reasonable sum for the preparation and drawing up of the award.

(5) An appeal may be had from the taxation in the same manner as from the clerk's taxation in an action.

25(1) An arbitrator who after having entered on the reference refuses or delays after the expiration of one month from the publication of the award to deliver the certificate of award until a larger sum is paid to him for his fees than is permitted by this Act forfeits and shall pay to the party who has demanded delivery of the award treble the excess demanded by the arbitrator contrary to this Act.

(2) An arbitrator who after having entered on the reference receives for his award or for his fees as arbitrator a larger sum than is permitted by this Act forfeits and shall pay to the party who has paid to the arbitrator the larger sum in order to obtain the award or as consideration for having obtained the award treble the excess paid to the arbitrator and received by him contrary to this Act.

(3) The trebled excess may be recovered with costs by action in the Court.

26(1) Where an award is made the arbitrator may maintain an action for his fees on the award, after they have been taxed.

(2) In the absence of an express agreement the arbitrator may maintain an action under subsection (1) against all parties to the reference, jointly or severally.

27 The Lieutenant Governor in Council may make regulations prescribing the fees to be paid to arbitrators and may prescribe different fees for professional and non-professional arbitrators.

SCHEDULE

(Section 2)

Single Arbitrator

1 If no other mode of reference is provided, the reference shall be to a single arbitrator.

Umpire

2 If the reference is to 2 arbitrators, the 2 arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

Time and Manner of Award

3 The arbitrators shall make their award in writing

(a) within 6 weeks after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or

(b) on or before any later day to which the arbitrators by writing signed by them may from time to time enlarge the time for making the award.

Arbitrators Disagreeing; Umpire to Act

4 If the arbitrators have allowed their time or extended time to expire without making an award or have delivered to any party to the submission or to the umpire a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

Time for Umpire's Award

5 The umpire shall make his award

(a) within one month after the original or extended time appointed for making the award of the arbitrators has expired, or

(b) on or before any later day to which the umpire by writing signed by him may from time to time enlarge the time for making his award.

Examination of Parties

6 The parties to the reference and all persons claiming through them shall, subject to any legal objection,

(a) submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in dispute,

(b) produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power which may be required or called for, and

(c) do all other things which during the proceedings on the reference the arbitrators or umpire may require.

Oath or Affirmation

7 The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation.

Finality of Award

8 The award to be made by the umpire or arbitrator shall be final and binding on the parties and the persons claiming under them.

Costs of Reference

9 The costs of the reference and award are in the discretion of the arbitrators or umpire who may direct to and by whom and in what manner the costs or any part of them shall be paid.

APPENDIX B

Schedule 2 of the International Commercial Arbitration Act, which appears at pages 135 to 152, is the Model Law referred to in this report.

Part 2 of the Act, which appears at pages 126 to 128, applies and modifies the Model Law and its provisions are referred to in this report.

Part 3 of the Act, which appears at page 128, also applies to the Model Law.

The Model Law is referred to in Parts 2 and 3 as "The International Law" (see ICAA section 1(1)(b)).

THE INTERNATIONAL COMMERCIAL ARBITRATION ACT

CHAPTER I-6.6

(Assented to August 15, 1986)

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

1(1) In this Act,

(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;

(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.

(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.

PART 1

FOREIGN ARBITRAL AWARDS

2(1) Subject to this Act, the Convention applies in the Province.

(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.

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.

PART 2

INTERNATIONAL COMMERCIAL ARBITRATION

4(1) Subject to this Act, the International Law applies in the Province.

(2) The International Law applies to international commercial arbitration agreements and awards, whether made before or after the coming into force of this Part.

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.

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.

(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.

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 given all the circumstances respecting the dispute.

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.

9(1) The functions referred to in article 6 of the International Law shall be performed by the Court of Queen's Bench.

(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.

PART 3

GENERAL

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.

11 This Act binds the Crown.

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.

(2) In applying subsection (1) to the International Law, recourse may be had to

(a) the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3-21, 1985), and

(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.

SCHEDULE 1

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 or 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 matter 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 or 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 day 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.

SCHEDULE 2

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

(As adopted by the United Nations Commission on International Trade Law on 21 June 1985)

CHAPTER I

GENERAL PROVISIONS

Article 1. *Scope of application*

(1) This Law applies to international commercial 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, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(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:

(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 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

Article 7. *Definition and form of arbitration agreement*

(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. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or 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 another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

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 to 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 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 circumstances 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.

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

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

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 tribunal 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 an 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 paragraph (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.

(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 duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

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 matter submitted to arbitration can be separated from those not so submitted, that part of the ward 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.

APPENDIX C

COMPARATIVE CHART

Notes:

1. The following chart compares the following:

   (a) The UNCITRAL Model Law as adopted and modified by the International Commercial Arbitration Act (which are collectively referred to as "ICAA/Model Law"), page 125.

   (b) The draft Arbitration Act, which is Item A in Part IV, page 67.

   (c) The present Arbitration Act (Alberta), which is Appendix A, page 113.

2. The format of the chart is as follows:

   (a) The number and subject heading in Column 1 are the number and usually the subject heading of a draft Act section.

   (b) Column 2 summarizes the comparable provision, if any, of the Model Law as modified by the ICAA. If no number is given, the provision summarized is the Model Law article bearing the same number of the draft Act section. The ICAA section number is given if it has modified the Model Law.

   (c) Column 3 summarizes the draft Act section referred to in Column 1.

   (d) Column 4 summarizes the Arbitration Act provision, if any, which deals with the subject matter of the draft Act section.

3. Unless otherwise stated, a provision of the draft Act summarized in column 3 may be overridden by agreement of the parties.

4. The summaries are necessarily very much compressed and omit much detail. The reader who wishes to obtain a working knowledge of the provisions summarized should refer to the provisions themselves.

5. The comparison is between the legislative instruments themselves and does not take into account the judge-made law of arbitration.

Column 1 Section number and subject	Column 2 ICAA/Model Law	Column 3 Draft Act	Column 4 Arbitration Act
1. Scope of application.	Applies to international commercial arbitrations (ICAA s.4).	All contractual and statutory arbitrations unless excluded (labour relations and international commercial arbitrations are excluded).	Applies to (a) arbitrations under "submissions", i.e., agreements to refer to arbitration and (b) arbitrations under other statutes which refer to the Arbitration Act.
2. Court.	Court with jurisdiction is QB (ICAA s.9).	Same (s.2(1)(f)).	Same (s.1(b)).
3. Delivery of documents and notices.	(1) Written communications deemed received when delivery effected or attempted in prescribed ways.	(1) Same as Model Law, but refers to documents and notices.	(1) No provision.
	(2) No provision.	(2) Provision for substitutional service.	(2) No provision.
4. Contracting out and waiver.	(1) No provision. Some provisions in language which may be mandatory.	(1) Certain provisions apply despite agreement to contrary and cannot be waived.	(1) No provision.
	(2) No general provision. Several provisions stated to be subject to agreement.	(2) All other provisions can be varied or waived.	(2) Some provisions apply unless parties otherwise agree.
	(3) Proceeding with arbitration with knowledge of a breach agreement or Act waives the right to object.	(3) Similar to Model Law, except that parties cannot waive breaches of provisions mentioned in (1) above.	(3) No provision.
5. Extent of court intervention.	No court can intervene "in matters governed by this Law" except as provided.	Same as Model Law, except no court can intervene "in a matter or proceeding governed by this Act", except as provided.	No comparable provision.

Column 1 Section number and subject	Column 2 ICAA/Model Law	Column 3 Draft Act	Column 4 Arbitration Act
6. Effect of award.	No comparable provision, but see articles 34, 35 and 36.	Final and binding unless otherwise agreed, but stated subject to s.34 (court's powers to set aside, remit, or allow appeal).	Final and binding unless otherwise agreed (Schedule s.8)
7. Form and effect of arbitration agreement.	(1) "Shall be in writing".	(1) "Need not be in writing".	(1) "Submission" means agreement in writing (s.1(d)).
	(2) No provision.	(2) "Scott v. Avery" clause has effect of arbitration agreement notwithstanding agreement of parties to contrary.	(2) No provision.
	(3) No provision.	(3) Arbitration agreement may not be revoked except under contract law.	(3) Submission revocable only with leave of Court unless contrary intention (s.2(a)).
8. Stay of action.	Any court must refer to arbitration if party requests no later than first statement, unless agreement null and void, inoperative or incapable of being performed.	Any court must stay action unless (a) agreement was made by party under incapacity, is invalid, does not cover dispute, or does not bind all parties to dispute, (b) dispute is not arbitrable under Alberta law, (c) application was unduly delayed, or (d) case is a proper one for default or summary judgment.	Court may stay if no auffficiant reason why matter should not go to arbitration and if application made before applicant's first step and applicant has always been ready, willing and able to arbitrate.
9. Powers of Court relating to preservation, questions of law and consolidation.	(1) QB may grant interim measure of protection.	(1) QB has same powers for detention, preservation and inspection of property involved and for interim injunctions and receivers.	(1) No provision.

Column 1 Section number and subject	Column 2 ICAA/Model Law	Column 3 Draft Act	Column 4 Arbitration Act
9. Powers of Court relating to preservation, questions of law and consolidation. (CON'T)	(2) No provision.	(2) On application of party with consent of others or tribunal, QB may determine question of law arising in arbitration.	(2) Arbitrator may, and if so directed by QB, state question of law in special case form (s.14).
	(3) On application of all parties, QB can consolidate arbitrations (ICAA, s.8).	(3) Similar to ICAA.	(3) No provision.
10. Number of arbitrators.	(1) Parties may determine number.	(1) Same as Model Law.	(1) Same as Model Law (Schedule s.1).
	(2) If no determination, 3 arbitrators.	(2) If no determination, 1 arbitrator.	(2) Same as draft Act (Schedule, s.1).
11. Appointment of arbitrators and chairman.	(1) Parties can agree on arbitrators. Procedures provided for appointment of 3 arbitrators and one arbitrator, with QB or authority designated by agreement having default power of appointment, with no appeal from QB appointment.	(1) Parties can agree on arbitrators and chairman. Failing other means, QB can appoint after notice, with no appeal.	(1) In listed cases, failing other means, QB can appoint after notice (s.5).
	(2) No provision.	(2) Unless otherwise agreed, arbitrators can elect chairman.	(2) No provision.
12. Grounds for challenge.	(1) Arbitrator must disclose circumstances likely to give rise to justifiable doubts about impartiality or independence.	(1) Same as Model Law, substituting "reasonable apprehension of bias" for "justifiable doubts", etc.	(1) QB may remove for misconduct (s.11(1)).
	(2) May be challenged only for such circumstances or lack of agreed qualifications.	(2) Same as Model Law.	(2) No provision.

Column 1 Section number and subject	Column 2 ICAA/Model Law	Column 3 Draft Act	Column 4 Arbitration Act
12. Grounds for challenge. (CON'T)	(3) Party may challenge arbitrator in whose appointmant he has participated only for reasons of which he becomes aware after appointment.	(3) Same as Model Law.	(3) No provision.
13. Challenge procedure.	(1) Unless otherwise agreed, party must send challenge to tribunal within 15 days of becoming aware of circumstances and must request QB to rule within 30 days of tribunal's ruling.	(1) Same as Model Law.	(1) No provision.
	(2) Tribunal must decide challenge unless arbitrator withdraws or parties otherwise agree.	(2) Same as Model Law.	(2) No provision.
	(3) If challenge unsuccessful, party may within 30 days request ruling from QB.	(3) Whether or not challenge is successful, a party may apply to QB to decide and remove arbitrator.	(3) No provision.
14. Termination of mandate and removal of arbitrator.	(1) If arbitrator becomes unable to act, arbitrator may resign. Under ICAA s.6(2) parties may terminate at any time before award.	(1) Mandate terminates if arbitrator resigns or parties agree.	(1) Silent about effect of resignation or removal by parties, but contemplates refusal, inability or death (s.5,6).
	(2) QB, with no appeal, can decide whether termination has occurred.	(2) QB, with no appeal, may remove for successful challenge to impartiality or independence, inability, undue delay, or not ensuring proceedings comply with Act.	(2) QB can remove for misconduct (s.11(1)).
	(3) No provision.	(3) Unless otherwise agreed, a party may not revoke the appointment of an arbitrator.	(3) Not clear whether party can revoke the authority of an arbitrator nominated by him (s.2).

Column 1 Section number and subject	Column 2 ICAA/Model Law	Column 3 Draft Act	Column 4 Arbitration Act
15. Appointment of substitute arbitrator.	(1) Rules applicable to appointment of arbitrator being replaced apply to substitute.	(1) Unless otherwise agreed, rules applicable to appointment of arbitrator being replaced apply to substitute.	(1) and (2) In listed cases, failing other means, Court can appoint after notice (s. 5).
	(2) Power of QB to appoint is not referred to but is probably included.	(2) Failing other means, QB can appoint, after notice, with no appeal.	(2) In listed cases, failing other means, QB can appoint after notice (s. 5).
	(3) No provision.	(3) No power of substitution if reference to arbitration was conditional on named arbitrator.	(3) No power of substitution if submission shows that the vacancy should not be filled (s. 5).
	(4) Unless otherwise agreed, hearings must be repeated (ICAA s.6(1)).	(4) QB may give directions about future conduct of arbitration.	(4) No provision.
16. Objection to jurisdiction.	(1) Unless otherwise agreed, tribunal may rule on its own jurisdiction, arbitration agreement being treated as independent of main contract.	(1) Same as Model Law.	(1) No provision.
	(2) Timely objection must be made unless tribunal permits it later.	(2) Same as Model Law.	(2) No provision.
	(3) Failure to raise timely objection is probably a waiver under article 4. Article 16 does not say so.	(3) Same as Model Law, but failure to raise timely objection is stated to be waiver.	(3) No provision.
	(4) If tribunal rules as preliminary matter that it has jurisdiction, party may apply to QB within 30 days, with no appeal.	(4) Same as Model Law.	(4) No provision.

Column 1 Section number and subject	Column 2 ICAA/Model Law	Column 3 Draft Act	Column 4 Arbitration Act
17. Interim measures.	(1) Unless otherwise agreed, tribunal may take interim measure of protection and require security.	(1) Same as Model Law.	(1) No provision.
	(2) No provision.	(2) Tribunal may make interim award.	(2) No provision.
18. Equality of treatment of parties.	(1) Parties must be treated "with equality" and given full opportunity of presenting case.	(1) Parties must be treated with equality and given fair opportunity of presenting case and responding to other parties' cases.	(1) No provision.
	(2) No provision.	(2) Section applies notwithstanding agreement to contrary.	(2) No provision.
19. Rules of procedure and evidence.	(1) Subject to Model Law, parties may agree on procedure.	(1) Same as Model Law.	(1) No provision.
	(2) Failing agreement, tribunal determines.	(2) Same as Model Law.	(2) No provision.
	(3) Tribunal has power to determine admissibility, relevance, materiality and weight of evidence.	(3) Same as Model Law, except that provision added that tribunal is not bound by rules of evidence.	(3) No provision. (Alberta Evidence Act applies.)
20. Time and place of arbitration.	Unless otherwise agreed, decided by arbitrators.	Same as Model Law.	No provision.
21. Commencement of arbitration.	Unless otherwise agreed, proceedings commence when request for arbitration received by respondent.	Proceedings commenced by notice to party or third party to appoint arbitrator, notice demanding arbitration, or other means recognized by law.	No provision.
22. Matters referred to arbitration.	No provision.	Notice must say what disputes are referred to arbitration. If it does not, all matters are referred which the party giving notice is entitled to have referred.	No provision.

Column 1 Section number and subject	Column 2 ICAA/Model Law	Column 3 Draft Act	Column 4 Arbitration Act
23. Procedural orders and directions.	(1) Within time agreed or determined, claimant must state facts, issues and remedies claimed and respondent must state defence, with right to amend unless tribunal considers amendment inappropriate.	(1) Same as Model Law, except that, parties may otherwise agree, and tribunal has discretion whether or not to order that statements of claim and defence be delivered and to allow oral statements.	(1) No provision.
	(2) No provision.	(2) Parties must submit to examination, produce documents and do other things required by tribunal.	(2) Same as draft Act (Schedule, s.6).
	(3) No provision.	(3) QB has same powers to enforce tribunal's procedural orders as it has to enforce its own.	(3) No provision.
24. Hearings and written proceedings.	(1) Parties may agree on whether hearings must be held. Failing agreement, a party may demand a hearing. Otherwise the tribunal may decide whether or not to hold hearing.	(1) Same as Model Law.	(1) No provision.
	(2) Parties must be given sufficient notice.	(2) Same as Model Law.	(2) No provision.
	(3) Statements, documents, information and expert opinions must be circulated to the parties.	(3) Same as Model Law.	(3) No provision.
25. Default of a party.	(1) Mandatory termination of proceedings if claimant fails to state his claim under art. 23(1).	(1) Same as Model Law, except termination is discretionary.	(1) No provision.

Column 1 Section number and subject	Column 2 ICAA/Model Law	Column 3 Draft Act	Column 4 Arbitration Act
25. Default of a party. (CON'T)	(2) If respondent does not state defence, or if party fails to appear or produce documents, tribunal may carry on.	(2) Same as Model Law.	(2) No provision.
	(3) No provision.	(3) Unless otherwise agreed, if there is delay, the tribunal may dismiss claim.	(3) No proviaion.
26. Expert appointed by arbitral tribunal.	Unless otherwise agreed, tribunal may appoint expert to make report and, if required, appear at hearing. Parties must provide information, and produce documents and goods for inspection.	Same as Model Law.	No provision.
27. Obtaining evidence.	(1) Court may assist a tribunal or party in taking evidence.	(1) Same as Model Law.	(1) No provision.
	(2) No provision.	(2) Notice to attend at arbitration has same effect as notice to attend and produce documents at trial of an action.	(2) Same as draft Act (s.8).
	(3) No provision.	(3) Tribunal may require evidance under oath or affirmation.	(3) Same as draft Act (s.7).
28. Application of law.	(1) Tribunal must apply law chosen by parties, and, failing choice, arbitrators must apply law which they think appropriate (art. 26(2) as varied by ICAA s.7).	(1) Same as Model Law as varied by ICAA.	(1) No provision.
	(2) Tribunal may decide ex aequo et bono or as amiable compositeur only if parties agree.	(2) Tribunal may decide on any basis other than law only if parties agree.	(2) No provision.

Column 1 Section number and subject	Column 2 ICAA/Model Law	Column 3 Draft Act	Column 4 Arbitration Act
28. Application of law. (CON'T)	(3) No provision.	(3) Tribunal may apply equity and grant equitable remedies, including specific performance and injunctions.	(3) No provision.
29. Decision making by panel of arbitrators.	(1) Unless otherwise agreed, decision shall be made by majority.	(1) Same as Model Law.	(1) No provision.
	(2) No provision.	(2) If there is no majority decision, the chairman's decision prevails.	(2) No provision.
	(3) Parties or tribunal may authorize a presiding arbitrator to decide questions of procedure.	(3) Same as Model Law.	(3) No provision.
30. Mediation and settlement.	(1) With agreement, tribunal may attempt mediation without being disqualified (ICAA s.5).	(1) Same as ICAA.	(1) No provision.
	(2) Tribunal must terminate proceeding if parties settle, and if requested and has no objection, tribunal must record the settlement in agreed award.	(2) Same as Model Law.	(2) No provision.
31. Form, contents and time of award.	(1) Unless otherwise agreed, award must be signed by at least a majority, and state its date and the place of arbitration, and copy must be delivered to each party.	(1) Same as Model Law, except that award is not required to show place of arbitration.	(1) No provision.
	(2) Unless otherwise agreed, reasons must be given.	(2) Same as Model Law, but if award does not contain sufficient reasons, the tribunal may, and if ordered by the Court, shall deliver reasons.	(2) No provision.

Column 1 Section number and subject	Column 2 ICAA/Model Law	Column 3 Draft Act	Column 4 Arbitration Act
31. Form, contents and time of award. (CON'T)	(3) No provision.	(3) Court may extend agreed time limit for award notwithstanding agreement.	(3) No provision.
	(4) No provision.	(4) Unless otherwise agreed, tribunal may make more than one award disposing of one or more referred questions.	(4) No provision.
32. Termination of proceedings.	(1) Proceedings and tribunal's mandate are terminated by an award or by tribunal's order terminating arbitration becuse claim withdrawn (though tribunal may continue arbitration if respondent has legitimate interest in doing so) or because parties agree to terminate or arbitration has become unnecessary or impossible.	(1) Same as Model Law, recognizing additional cases of termination and providing for revival in cases in which tribunal may or must exercise powers later.	(1) No provision.
	(2) No provision.	(2) Unless otherwise agreed, death of a party does not terminate arbitration.	(2) No provision.
33. Correction and interpretation of award; additional award.	(1) Unless otherwise agreed, tribunal may correct clerical, computational and typographical errors in award, by agreement give an interpretation, and on application make an additional award on claim omitted from first award.	(1) Same as Model Law, except that specific time period not applicable to interpretation or additional award.	(1) No provision.
	(2) No provision.	(2) Tribunal on application within 30 days may change award to correct injustice caused by tribunal's oversight.	(2) No provision.

Column 1 Section number and subject	Column 2 ICAA/Model Law	Column 3 Draft Act	Column 4 Arbitration Act
34. Recourse against award.	(1) QB may set aside award on application within 3 months if party under incapacity or agreement not valid; party not given notice or was unable to present case; dispute not referred; composition of tribunal was not proper; dispute was not arbitrable; or award is in conflict with public policy.	(1) Same as Model Law, except that application must be made within 30 days and grounds must not have been waived; public policy is omitted as grounds; and grounds added: lack of equal treatment, non-conformity with Act, serious departure from a fundamental rule of procedure, and corrupt or fraudulent practice or lack of independence or impartiality.	(1) QB may set aside award if arbitrator has misconducted himself (s.11(2)).
	(2) QB may suspend proceedings to give tribunal a chance to take action to eliminate grounds for setting aside.	(2) QB may remove arbitrator or remit award and give directions for future conduct of the arbitration.	(2) QB may remit matters for reconsideration (s.10(1)).
	(3) No provision.	(3) On appeal on question of law, if satisfied of importance and likely substantial effect of appeal, QB may confirm, vary or set aside award, or remit with directions (subject to appeal with leave of Court of Appeal).	(3) QB may set aside award if arbitrator has misconducted himself (s.11(2)).
	(4) No provision.	(4) QB's power to make declarations and consequential injunctions in cases of fundamental flaws in proceedings preserved.	(4) No provision (unnecessary because no counterpart of draft Act section 5).
	(5) No provision.	(5) Section 4(2) makes section 34 apply despite contrary agreement.	(5) No provision.

Column 1 Section number and subject	Column 2 ICAA/Model Law	Column 3 Draft Act	Column 4 Arbitration Act
35. Enforcement of awards.	(1) QB must recognize and enforce an award unless one of the grounds for refusing an award under art. 36 applies, which are the same as the grounds for setting aside under art. 34 plus a further ground that the award has not become binding or has been set aside or suspended.	(1) An award by leave of the QB may be enforced in the same manner as a judgment or order of the QB. The QB may make such orders as are necessary to give effect to the award. Nothing in s.35 or s.5 precludes bringing an action on the award.	(1) An award by leave of the QB may be enforced in the same manner as a judgment or order of the QB.
	(2) No provision.	(2) Section 4(2) makes section 35 apply despite contrary agreement.	(2) No provision.
36. Crown.	Crown is bound (ICAA s.11).	Crown is bound.	No provision.
37. Compensation and expenses of arbitrators.	No provision.	Costs of arbitrators and others not to exceed fair valuable and, unless otherwise agreed, to be taxable by QB taxing officer with review by Court, and, once taxed, to be enforceable as joint and several judgment.	Provision for taxation of fees as per agreement or regulations, with treble penalty for excessive claims (s.19,20,23-25).
38. Costs and interest.	(1) No provision.	(1) Tribunal may award costs, taxable by taxing officer if tribunal does not quantify.	(1) Costs taxable by clerk of QB. (Some specific provisions) (s.22,23).
	(2) No provision.	(2) In absence of award, costs of arbitrstion, etc. borne equally and parties bear own costs.	(2) No provision.
	(3) No provision.	(3) Pre-award offer by a party to be taken into account, with provision for depriving an offeree respondent of his costs or giving an offeror claimant double costs.	(3) No provision.

Column 1 Section number and subject	Column 2 ICAA/Model Law	Column 3 Draft Act	Column 4 Arbitration Act
38. Costs and interest. (CON'T)	(4) No provision.	(4) Tribunal may award pre-judgment interest, and award bears interest as a judgment.	(4) No provision.
39. Gas price arbitrations.	No provision.	Special provisions (subject to contrary agreement) for residential qualification of arbitrator and matters to be taken into account.	Same as draft Act (s.17).