UNIFORM LAW CONFERENCE OF CANADA
WORKING GROUP ON ARBITRATION LEGISLATION

DISCUSSION PAPER

Towards a New Uniform *International Commercial Arbitration Act*

JANUARY 2013

PREFACE

At the request of the private sector, the Uniform Law Conference of Canada has appointed a Working Group to make recommendations concerning the preparation and implementation of new uniform Canadian arbitration legislation. The Working Group, comprised of a small Core Group and a larger Advisory Board, is proceeding with the project in two phases. Phase I (International) will provide recommendations concerning the preparation and implementation of a new Uniform International Commercial Arbitration Act. Phase II (non-International) will deal with a new Uniform Commercial Arbitration Act.

This Discussion Paper has been prepared by the Core Group to record recommendations and identify issues relating to Phase I. It is intended to provide a basis for further consultation with the Canadian arbitration community, to supplement the consultation that has already occurred through the Advisory Board.

The Core Group has been charged with the responsibility to present a new Uniform International Commercial Arbitration Act to the ULCC for approval in August 2013. Consultation with interested parties must be concluded by early May 2013. The Core Group will work with arbitral and academic institutions to coordinate what we hope will be an interesting and fruitful consultation process.

Gerald W. Ghikas Q.C.
Working Group Chair

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Gerald W. Ghikas Q.C., FCIArb., C. Arb. is an independent commercial arbitrator with an office at Vancouver Arbitration Chambers in Vancouver, British Columbia. He is a former Chair of the National Arbitration Committee of the International Chamber of Commerce (ICC) Canada, a former Canadian Delegate to the United Nations Commission on International Trade Law (UNCITRAL), a former Director of the ADR Institute of Canada, Inc. (ADRIC) and a co-founder of the Western Canada Commercial Arbitration Society (WCCAS).

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EXECUTIVE SUMMARY

[1] This Discussion Paper is intended to provide a framework for debate and informed comment concerning Phase I (international arbitration) of the Project. The Discussion Paper is organized as follows:

[a] Part 1 sets out the background to the Project.

[b] Part 2 summarizes the Working Group's policy recommendations as approved by the Uniform Law Conference of Canada (**ULCC**) and outlines the rationale for those policy recommendations.

[c] Part 3 identifies issues for discussion and includes:

(i) issues concerning which the Working Group makes recommendations; and

(ii) issues concerning which the Working Group has not yet formulated a recommendation.

[d] Appendix 1 offers an annotated preliminary draft of a proposed new Uniform International Commercial Arbitration Act (**Uniform International Act**), including:

(i) the proposed new Uniform International Act, reflecting changes that the Working Group recommends and other possible changes;

(ii) the New York Convention (**Convention**), which would continue to appear as Schedule A to the New Uniform International Act; and

(iii) the UNCITRAL Model Law (**Model Law**), which would continue to appear as Schedule B to the new Uniform International Act, and which includes the 2006 United Nations Commission on International Trade Law (**UNCITRAL**) amendments to the Model Law (**2006 Model Law Amendments**). Annotations explain why the Working Group recommends that the amendments to the 2006 Model Law Amendments be included, but also flag for discussion purposes certain issues arising from those amendments.

[e] Appendix 2 compares the language of the existing Uniform International Act side-by-side with that of the proposed new Uniform International Act.

[2] The Working Group intends to collaborate with arbitral organizations in Canada to encourage an orderly review and constructive discussion of the new proposed Uniform International Act. A secondary objective is to build a strong consensus in support of the new legislation to facilitate its ultimate implementation by the legislatures. The Working Group looks forward to receiving comments from the arbitration community

Summary of ULCC Approved Policy Recommendations

[3] The Working Group's policy recommendations that have already been approved by the ULCC are discussed under the following headings:

#1. Continue to base the Uniform International Act on the Convention and Model Law (¶¶[17] and [18]);

#2. Prepare a single statute that appends the Model Law and Convention (¶¶[19] to [22]);

#3. Depart from the Model Law's text only for good reason (¶¶[23] to [29]);

#4. Continue to have separate uniform statutes for international and non-international arbitration (¶¶[30] to [31]); and

#5. Promote uniformity within Canada to avoid undue complexity for foreign users (¶¶[32] to [34]).

Summary of Issues for Discussion

[4] Issues concerning which the Working Group makes recommendations or concerning which the Working Group has not yet formulated a recommendation are as follows:

#1. Should all of the 2006 Model Law Amendments (including Articles 17B and 17C allowing *ex parte* preliminary orders) be implemented through the new Uniform International Act? (¶¶[35] to [41])

There was a tentative consensus among the members of the Working Group, endorsed by the ULCC, that all of the 2006 Model Law Amendments should be implemented through the new Uniform International Act. The primary issue is whether the articles allowing ex parte *preliminary orders should be included.*

#2. Which Option should Canada choose in relation to amended Article 7 of the Model Law? (¶¶[42] to [55])

This Article concerns the content of the requirement that an arbitration agreement must be in writing. The 2006 Model Law Amendments set out two options. Consultation to date has favoured Option I, but there is also support for Option 2. The Working Group recommends Option I, supplemented by a cross-reference to Canada's electronic commerce legislation.

#3. Should the new Uniform International Act harmonize Canadian limitation periods for recognition and enforcement proceedings? (¶¶[56] to [59])

The Working Group recommends a provision to establish a uniform limitation period for applications seeking recognition and enforcement. A related issue is what length of limitation period is appropriate.

#4. Should the new Uniform International Act address the question of limitation periods for the commencement of international arbitration proceedings? (¶¶[60] to [61])

The Working Group recommends against establishing a uniform limitation period for commencement of arbitration proceedings. It does, however, provide for discussion purposes a uniform provision to ensure that the same statutory limitation periods should apply to both court and arbitration proceedings, while recognizing that limitation periods will vary from one province or territory to another.

#5. Should international awards made in Canada be recognized and enforced under the Convention as foreign awards? (¶¶[62] to [67])

The Working Group recommends including a provision in the new Uniform International Act to clarify that for the purposes of the Convention international arbitration awards made in other parts of Canada are "not considered domestic" and thus are enforceable under the Convention.

#6. Do or should the Convention and Model Law apply to the recognition and enforcement of (a) foreign domestic (non-international) awards; and (b) Canadian domestic (non-international) awards? (¶¶[68] to [76])

The Working Group considers that this is an area deserving of clarification and uniformity of approach and recommends adding a provision to the new Uniform International Act to make it clear that domestic awards made in other parts of Canada are not enforceable under the Convention. The Working Group interprets the Convention to require that its recognition and enforcement provisions apply to foreign domestic awards.

#7. Should there be provision for interjurisdictional enforcement of Canadian judgments recognizing and enforcing international arbitration awards? (¶¶[77] to [82])

The Working Group recommends that the new Uniform International Act should provide for interjurisdictional enforcement of judgments made within Canada that recognize and enforce international arbitration awards.

#8. What should the new Uniform International Act say about the nationality of arbitrators and the ability of parties to impose nationality restrictions? (¶¶[83] to [91])

The issues for discussion are: (a) whether a court appointing an arbitrator should be precluded from appointing an arbitrator of the same nationality as one of the parties (absent agreement), or whether nationality should only be one factor for consideration; and (b) whether as a matter of policy Canadian legislation should expressly permit parties to impose limitations based on nationality (and perhaps other factors such as gender, religious affiliation, etc.).

#9. Should parties be able to contract out of or in to the Uniform International Act? (¶¶[92] to [98])

Generally, to what extent should parties be permitted to contract out of or in to the International Act. The primary issue is whether, and if so when and how, parties to an "international" arbitration should be permitted to contract out of the Uniform International Act and to contract in to a domestic arbitration statute.

#10. Should the new Uniform International Act deal with confidentiality of arbitration proceedings not involving state parties? (¶¶[99] to [103])

The issues for discussion are: (a) whether the new Uniform International Act should include a confidentiality provision; (b) if so, what should the scope of the provision be; and (c) should it be an opt-in or opt-out provision?

#11. What is the appropriate transitional provision for the new Uniform International Act? (¶¶[104] to [106])

Should the new Uniform International Act, once enacted, apply to arbitration agreements whenever made or should it apply only to arbitration agreements made after it comes into effect?

#12. Should "commercial arbitration" and "commercial relationship" be defined terms in the new Uniform International Act? (¶¶[107] to [111])

The Working Group recommends the addition of definitions for these terms as used in the Convention and the Model Law.

#13. Should references to the "International Law" be replaced with references to the "Model Law" in the new Uniform International Act? (¶¶[112] and [113])

The Working Group recommends the use of "Model Law" in place of "International Law."

#14. Should subsection 1(2) of the Uniform International Act be revised for clarity? (¶¶[114] to [116])

The Working Group recommends that the meanings to be attributed to terms used in the Convention and the Model Law be clarified.

#15. Should awards not yet recognized and unenforced be capable of being raised as a basis for a defence, set-off, or counterclaim? (¶¶[117] to [124])

The issues for discussion are: (a) whether a provision should be added that recognition and enforcement can be sought in existing legal proceedings in aid of a defence, set-off, or counterclaim; and (b) whether the ability to pursue such a defence, set-off, or counterclaim should end upon the expiry of the limitation period for recognition and enforcement.

#16. Should the existing provision concerning conciliation and mediation be preserved? (¶¶[125] to [127])

The Working Group has not yet reached consensus on the desirability of the existing provision and invites comment on the implications if it were to be deleted.

#17. Should Section 7 of the existing Uniform International Act that requires hearings to be re-started upon arbitrator replacement be modified? (¶¶[128] to [135])

The Working Group invites comment as to whether any revision to this provision is appropriate.

#18. Should the new Uniform International Act contain a provision concerning the proper law to be applied to the interpretation of an arbitration agreement? (¶¶[136] to [140])

The Working Group invites comment as to whether such a provision would be helpful.

#19. Should the consolidation provision in the existing Uniform International Act be revised (¶¶[141] to [147])

[a] to make it clear that the agreement of all parties is required (if that is the intent)?

[b] to set out the matters that a court can address when ordering consolidation?

[c] to authorize a court to order consolidation without party consent if:

(i) all of the claims in the arbitrations are made under the same arbitration agreement? or

(ii) the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the court finds the arbitration agreements to be compatible?

#20. Should the approach taken in Ontario's *International Commercial Arbitration Act* to specifying the meaning of "State" in various contexts when used in the Model Law be included in the new Uniform International Act? (¶¶[148] and [149])

The Working Group recommends that the Ontario approach be followed.

#21. Should the new Uniform International Act include a provision informing the application of the requirement for "the observance of good faith" under Article 2A(1) of the Model Law? (¶¶[150] to [157])

The Working Group seeks comment concerning a possible provision to make it clear that the "good faith" element relates to the manner in which the arbitration is conducted and does not add to the substantive obligations of the parties in relation to the underlying commercial relationship.

#22. Should a provision be added to the new Uniform International Act to promote its uniform interpretation and application across Canada? (¶[158])

The Working Group recommends adding such a provision.

#23. Should a provision be added to the new Uniform International Act addressing the approach to be taken by courts when considering tribunal determinations as to jurisdiction? (¶¶[159] to [164])

The Working Group intends to consider this issue further, but in the meantime invites comment.

PART 1
BACKGROUND

1986 Uniform International Act and the Need for Renewal

[5] In 1986 the ULCC developed the Uniform International Act to serve as a template for the implementation of the Model Law and the Convention by the provincial, territorial, and federal governments of Canada. With a few variations in form and substance, described below, the Uniform International Act was quickly enacted throughout Canada.

[6] British Columbia anticipated the outcome of the ULCC's work by enacting its own form of statute based on the Model Law and separate legislation to implement the Convention. British Columbia's *International Commercial Arbitration Act*[1] contains refinements to the text of the Model Law and includes some differences from the ultimate text of the Uniform International Act. Québec implemented the Model Law and Convention through amendments to the *Civil Code of Québec* (CCQ) and *Code of Civil Procedure* (CCP). The legislation in British Columbia and Québec is substantially different in form from the Uniform International Act, and there are some differences in substance. In other provinces refinements were made to the language of the Uniform International Act at the time of enactment or thereafter. Ontario later repealed the legislation it had adopted to implement the Convention, on the premise that it was redundant in the light of the adoption of the Model Law. Some jurisdictions (British Columbia, Canada, Saskatchewan, and the Yukon) enacted separate legislation to implement the Convention. The result of these different approaches to the implementation of the Uniform International Act is that, although the core legislation is similar, there are differences among Canadian jurisdictions.

[7] There have been significant changes in international arbitration law and practice since the Canadian legislative framework was established. Canadian courts have interpreted and applied the text and its variations. Other countries have adopted new arbitration legislation. Foreign courts have applied and interpreted statutes based wholly or partly on the Model Law. The Model Law itself was amended by the 2006 Model Law Amendments.

[8] The 2006 Model Law Amendments included (in addition to minor consequential amendments):

- **Article 2A**: General principles regarding interpretation
- **Article 7**: Form of the arbitration agreement (2 options)
- **Article 17**: Interim measures, preliminary orders and related amendments regarding their enforcement

  (**Articles 17 and 17A**) – Permit an arbitral tribunal to award interim measures, define interim measures, and stipulate the conditions for the granting of such measures;

  (**Articles 17B and 17C**) – Permit an arbitral tribunal to make preliminary *ex parte* orders, although such orders are not enforceable by a court;

[1] R.S.B.C 1996, c. 233.

(**Articles 17D to 17G**) – Provide additional details concerning interim measures and preliminary orders;

(**Articles 17H and 17I**) – Provide for recognition by courts of the interim measures made by an arbitral tribunal; and

(**Article 17J**) – Confirms that courts have equivalent powers to order interim measures.

[9] The 2006 Model Law Amendments have been implemented by legislation in at least 14 other countries, including Australia, New Zealand, and Singapore. Since 1986, other countries (*e.g.*, the United Kingdom) have modernized their arbitration legislation to reflect the evolution of arbitral practice and user expectations and to support their position as forward-thinking, arbitration-friendly jurisdictions.

[10] In 2010 an *ad hoc* group of representatives of various Canadian arbitral institutions (the **Task Force**) concluded that it was important for Canada and its provinces and territories to review and update their laws relating to international commercial arbitration. This was viewed as an important part of the infrastructure required to promote the use and development of arbitration in Canada and the choice of Canada as a seat of arbitration.

[11] In early 2011 the Task Force asked the ULCC to establish a two-phased Project aimed at revising arbitration legislation in Canada. Phase I (international arbitration) would entail modernizing the Uniform International Act and promoting its implementation throughout Canada. Phase II (non-international arbitration) would involve a similar review of Canadian legislation concerning non-international arbitration and revisions to the ULCC's Uniform Arbitration Act.

[12] In August 2011 the ULCC approved Phase I of the Project. The ULCC established a Working Group to bring forward recommendations for a new Uniform International Act. Phase II of the Project was approved at the ULCC's meeting in August 2012.

[13] The purpose of this Discussion Paper is to provide a basis for further discussion among members of the Canadian arbitration community concerning Phase I (international arbitration) of the Project so that a new Uniform International Commercial Arbitration Act can be presented to the ULCC for approval in August 2013.

ULCC Working Group

[14] The ULCC mandated the formation of a Working Group to formulate policy recommendations and new uniform legislation for consideration by the ULCC. In late 2011 a small, representative Core Group was appointed by the ULCC and assumed primary responsibility to steer the Working Group's activities. A larger Advisory Board of experienced practitioners, academics, and institutional leaders from across Canada was then established to serve as a sounding board and resource for the Core Group. The members of the Core Group and the Advisory Board are listed in the preface to this Discussion Paper.

Policy Recommendations

[15] The preliminary work undertaken by the Core Group and the results of consultation with the Advisory Board were described in the Working Group's Report to the ULCC Civil Law Section in August 2012. The Report set out policy recommendations to guide the drafting of a new Uniform International Act.

[16] At a meeting in Whitehorse in August 2012 the ULCC approved (subject to some directions) the recommendations set out in the Report and authorized the Working Group to proceed with further consultation and the drafting of a new Uniform International Act for presentation to the ULCC at its meeting in August 2013. The ULCC also authorized the Working Group to begin work on Phase II (non-international arbitration) of the Project.

PART 2

APPROVED POLICY RECOMMENDATIONS AND CONSEQUENTIAL DECISIONS OF WORKING GROUP

Policy Recommendation #1 – Continue to Base the Uniform International Act on the Convention and Model Law

[17] The Working Group recommended and the ULCC agreed that the new Uniform International Act should continue to give effect to Canada's commitment to the Convention and should continue to be based on the Model Law. This recommendation was strongly supported by the Advisory Board and strongly endorsed by the ULCC.

[18] Canada and its provinces and territories have benefited from their association with the UNCITRAL "brand," and from the hard work of UNCITRAL to reflect an international consensus concerning the essential elements of an international arbitration law. It is important that, despite an internal division of legislative competence, Canada continue to be perceived by its external audience as a "New York Convention and Model Law State." No-one involved in the process has identified any mischief arising from the present approach. A move away from the current approach and toward idiosyncratic international commercial arbitration legislation at this stage might cause uncertainty in the international community.

Policy Recommendation #2 – Prepare a Single Statute that Appends the Model Law and Convention

[19] The existing Uniform International Act includes the Convention as Schedule A and the Model Law as Schedule B. The Schedules are attached to a short operative instrument that (i) states that the Model Law and the Convention are in effect in the enacting jurisdiction; (ii) fills in several "blanks" in the two scheduled instruments (*e.g.*, specifying the competent court); (iii) addresses several elections that may be made under the Convention; and (iv) adds a limited number of provisions dealing with matters not specifically addressed in the Schedules.

[20] Currently, Alberta, Manitoba, Newfoundland and Labrador, New Brunswick, the Northwest Territories, Nova Scotia, Nunavut, Ontario, and Prince Edward Island have a single statute based on or incorporating by reference both the Model Law and the New York Convention. Canada, British Columbia, Saskatchewan, and the Yukon have separate statutes to address international commercial arbitration and foreign arbitral awards. In Québec, elements of the Model Law and the Convention have been embedded in the CCP and CCQ.

[21] Although some members of the Advisory Board expressed a preference to have separate statutes implementing the Model Law and the Convention, the Working Group recommended and the ULCC agreed that the new Uniform International Act should be structured in the same manner as the existing Uniform International Act.

[22] The Working Group considers that implementing both instruments in the form of schedules to a single, relatively short statute has several advantages. The international arbitration community is familiar with the text of the two instruments. Jurisprudence and academic commentary cite their provisions. No

changes can or should be made to the text of the multi-lateral Convention. Additions to or departures from the Model Law can be highlighted in the operative part of the Act.

Policy Recommendation #3 – Depart from the Model Law's Text Only for Good Reason

[23] Despite general agreement among the members of the Working Group that the new Uniform International Act should continue to implement the Model Law, there were different views about the extent, if any, to which the new Uniform International Act should depart from the text of the UNCITRAL Model Law. After consultation, the Working Group recommended and the ULCC agreed that departures from the text of the Model law should be few if any, and only as necessary.

[24] This issue was raised in a questionnaire addressed to the members of the Advisory Board. One response was that while the new Uniform International Act should continue to be based on the Model Law, changes should be made to address perceived weaknesses in the Model Law that have not been remedied by the 2006 Model Law Amendments. It was suggested that such changes would assert Canada's position as a sophisticated international arbitration jurisdiction with a legislative framework that is fully responsive to the needs of its users.

[25] The dominant view expressed by members of the Advisory Board and Core Group, though, was that there is inherent value in adhering as closely as possible to the UNCITRAL text and that unnecessary "tinkering" should be avoided. That approach was endorsed by the ULCC.

[26] If departures from or clarifications to the Model Law text are found to be necessary, the Working Group recommends that the full original text of the Model Law be scheduled and that any variations to the Model Law text be clearly set out in the operational part of the new Uniform International Act. Some members of the Working Group recommended that variations also be flagged through an appropriate annotation in the Schedule.

[27] Independent of the ULCC Project, Québec has undertaken a review of the arbitration provisions of the CCQ and CCP. The Government of Québec has been reviewing a Mémoire présenté à la Commission des Institutions de l'Assemblée Nationale du Québec sur l'Avant-Projet de Loi submitted by an interested group of arbitration practitioners from Québec. The Mémoire identifies concerns in respect of the drafting of l'Avant-Projet de Loi. Once the Province of Québec has completed its review of the Mémoire, its authors will be contacted for discussion.

[28] The Working Group recognizes that the Québec reform initiative will not be put on hold pending the outcome of the Project. Nevertheless, members of the Core Group have maintained contact with those leading the Québec reform initiative to keep them apprised of the Project's progress, and to ensure a two-way flow of information.

[29] The adoption of any new arbitration legislation in Québec raises some unique considerations. Québec has split its implementation of the Model Law (and to some extent Canada's commitments under the Convention) between the CCP and the CCQ. Although some of the Model Law provisions find expression in the CCQ (for example, what constitutes an arbitration agreement), the vast majority of the Model Law's provisions are implemented in Québec via the CCP. For the purpose of integrating a new Uniform International Act in Québec, uniformity in substance is more important than any necessary differences in form. The objective for implementation in Québec should be to remain faithful to and consistent with the overall legislative objective, while recognizing that different language and forms may have to be employed in the pursuit of that objective.

Policy Recommendation #4 – Continue to Have Separate Uniform Statutes for International and Non-International Arbitration

[30] When Phase II (non-international arbitration) of the Project was authorized by the ULCC, the Working Group considered whether there would be benefit to combining in a single uniform act legislation dealing with both international and non-international arbitration. That approach has been followed in some other countries (*e.g.*, England). The legislation in Québec applies in the same manner to both international and non-international arbitrations. There was some sentiment that to control the time and cost of non-international arbitration, a closer alignment with international arbitration practices would be appropriate.

[31] The Working Group concluded, though, and the ULCC agreed, that there should continue to be separate uniform legislation for international and non-international arbitrations. The present differences of approach (as between international and non-international cases) in relation to matters such as appeals and court intervention is unlikely to change. International users may be confused by a statute that includes domestic practices that are different from those generally viewed as appropriate to international arbitration. As a practical matter, the Working Group also perceives that the renewal of non-international legislation is likely to be time-consuming. The enactment of new international arbitration legislation should not be delayed.

Policy Recommendation #5 – Promote Uniformity within Canada to Avoid Undue Complexity for Foreign Users

[32] The international audience is not generally alive to the division of legislative competence within Canada in relation to international arbitration. Consistent with the manner in which Canadians promote themselves to the international business and legal communities, foreigners tend to think of "Canada" as a Model Law jurisdiction and a Convention State. The task of promoting Canada as an arbitration-friendly jurisdiction becomes more complex if there are significant differences in legislation among Canadian jurisdictions. These facts were important considerations when the existing Uniform International Act was developed and implemented.

[33] The Working Group recommended and the ULCC agreed that the new Uniform International Act should reflect a national consensus as to the appropriate legislative framework, incorporating best practices from across the country, and that its uniform implementation should be encouraged.

[34] The Working Group recognizes that it may not be possible to eliminate differences in approach within Canada completely. Some issues associated with international commercial arbitration are not specifically covered by the existing Uniform International Act and may not be appropriate to address in a new Uniform International Act. Examples include the matter of arbitrability (what disputes are not arbitrable as a matter of public policy) and limitation periods for the commencement of arbitrations (to the extent that they are regulated by local limitation laws).

PART 3
ISSUES TO BE CONSIDERED

Issue #1 – Should All of the 2006 Model Law Amendments (Including Articles 17B and 17C Allowing *ex parte* Preliminary Orders) be Implemented Through the New Uniform International Act?

[35] There was a tentative consensus (subject to broader consultation and any refinements found to be necessary – see above) among the members of the Core Group and the Advisory Board, endorsed by the ULCC, that all of the 2006 Model Law Amendments should be implemented through the new Uniform International Act.

[36] The only parts of the 2006 Model Law Amendments that attracted serious criticism were Articles 17B and 17C, empowering the Tribunal to grant interim measures of protection through *ex parte* preliminary orders. There was a minority view that *ex parte* relief should be available only from a court, as *ex parte* decision-making is inconsistent with fundamental principles of international commercial arbitration. For the reasons expressed by that minority, Australia and Mauritius did not include the two articles in question in their new arbitration laws. On the other hand, New Zealand and other states have enacted these articles as part of their international arbitration laws.

[37] Most members of the Core Group considered that Article 17B does not deny the right to be heard but rather deals with the situation where waiting for a full hearing may permit dissipation of assets and thus defeat any interim measure sought. Under Article 17B, the other party would ultimately be given an opportunity to be heard but would not be informed of the initial request. New Article 17E(2) requires (unless otherwise ordered) that the party applying for a preliminary order must provide security in connection with it.

[38] The question is whether this type of relief is best left to the courts. The risk of dissipation of assets is greatest between the time that the notice of arbitration is issued and the tribunal is fully constituted. It is during this time that parties are most likely to seek protection from the courts. Institutions such as the International Chamber of Commerce (ICC) and the International Centre for Dispute Resolution (ICDR) have established processes for the speedy appointment of emergency arbitrators to deal with interim measures applications pending the constitution of the tribunal.

[39] The regime for *ex parte* orders received a mixed reception from members of the Advisory Board. Opponents argued that these provisions are contrary to the consensual nature of arbitration. An *ex parte* order by an arbitrator could negatively impact a party's perception of the tribunal's independence and impartiality. For these reasons, members of the Advisory Board who oppose the adoption of Articles 17B and 17C contend that recourse to the courts is a sufficient way to deal with situations in which one party is facing a threat of serious irreparable harm.

[40] Many of the supporters of Articles 17B and 17C recognized that statutorily authorized *ex parte* orders or awards may be somewhat at odds with the consensual nature of arbitration, but they cautioned that simply granting the power to make *ex parte* orders does not mean that it will routinely be exercised. The absence of this power can expose parties to serious irreparable harm. Furthermore, the preliminary order *prima facie* expires after twenty days and the party against whom it is directed may present its case

in opposition to the preliminary order at the earliest practicable time. These provisions are seen as having moral weight to preserve the integrity of the arbitral process. It is expected that arbitrators will be and should be reluctant to award such measures. The power to order *ex parte* interim measures is expected to have a significant salutary effect without being actively exercised, somewhat similar to the availability of *Mareva* injunctions in litigation proceedings.

[41] The Working Group invites further comment regarding the desirability of these provisions.

Issue #2 – Which Option Should Canada Choose in Relation to Amended Article 7 of the Model Law?

[42] The 2006 Model Law Amendments set out two options for Article 7, dealing with the requirement for a written arbitration agreement:

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

OPTION II

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

"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.

[43] Subject to further comment and analysis concerning one issue, the Working Group recommends that the Uniform International Act adopt Option I for Article 7 of the Model Law, but that Article 7 should be supplemented by also referencing Canadian laws concerning electronic functional equivalents of "writing."

[44] Based on the requirements of Article II of the Convention, the 1985 Model Law imposed a strict writing requirement, demanding signatures or an exchange of documents in order to establish that parties had consented to arbitration. These technical requirements could affect the validity of an arbitration agreement, despite the parties' express intentions to arbitrate as otherwise evidenced.

[45] UNCITRAL wished to ensure that electronic communications could effectively give rise to a binding arbitration agreement. The desire was to create a provision flexible enough to grow with different technologies and evolve over time. Article 2(2) of the Convention may lack this flexibility.

[46] Building on the language of Article 7 as it existed under the 1985 Model Law, Option I still requires that arbitration agreements be in writing, although the technical requirements have been relaxed to capture any arbitration agreement, so long as the *content* of the agreement is recorded in written form, regardless of whether the arbitration agreement or contract *itself* was concluded orally, by conduct, or by other means. This proposal reflects earlier work done by UNCITRAL in relation to the laws of electronic commerce. It was envisaged that this option would be attractive to states that had not yet developed legislation concerning the effectiveness of electronic communications in international commercial transactions. Option I also sets out a number of ways in which an arbitration agreement may be deemed to have been created.

[47] Option II, on the other hand, removes the writing requirement from the Model Law and leaves applicable contract laws to govern the validity of the form of the arbitration agreement. It was expected that this option might be used by states that already had legislation concerning the effectiveness of electronic communications. As set out below, though, it should not be assumed that the contract laws of the seat necessarily apply to determine the validity of an arbitration agreement. Option II leaves that question open.

[48] UNCITRAL's Model Law on E-Commerce of 1996 formed the basis of the ULCC's Uniform Electronic Commerce Act, which was adopted in 1999 and enacted in most Canadian jurisdictions soon thereafter. UNCITRAL continued its work on electronic commerce issues, culminating in the Electronic Communications Convention in 2005. That work then formed the basis of the ULCC's Uniform Electronic Commerce Act, which has in turn been enacted throughout Canada.

[49] Most members of the Advisory Board who responded to the Questionnaire favoured Option I, finding a relaxed writing requirement to be desirable. A few respondents favoured Option II because of the view that the flexibility it permits might allow a more liberal approach to the question of whether an

arbitration agreement exists, thereby enhancing Canada's reputation as a "pro-arbitration" state. Of the states that have adopted the 2006 Model Law Amendments, none has fully embraced Option II.

[50] The Working Group supports the intention behind Option I of Article 7 of the 2006 Model Law Amendments. While sophisticated commercial parties typically reduce their arbitration agreements to writing, formal writing requirements can become an issue with less sophisticated parties, whose arbitration agreements may arise by course of conduct. The Working Group considers it desirable for those parties' expectations to be recognized and enforced. The tentative consensus of the Working Group (subject to broader consultation) favours the adoption of Option I. The Working Group considers that it may be helpful, though, to ensure that Canadian courts take into account the more full articulation of how agreements can be reached that is now set out in Canadian electronic commerce statutes, particularly as those statutes reflect the refined thinking of UNCITRAL itself.

[51] Consideration also will need to be given to the tensions between the Convention and the Model Law on the writing requirement. The flexibility of the 2006 Model Law Amendments to Article 7 stands in contrast to the approach taken in Article II(2) of the Convention. The Working Group considers that there is value to harmonizing the two instruments, without diminishing the scope of Canada's commitments to recognize and enforce arbitration agreements under the Convention.

[52] Subject to comment concerning the issues described below, the Working Group recommends that these objectives be achieved by including the full text of Option I of Article 7 in the Model Law, while also including in the new Uniform International Act the following provisions:

> For the purposes of article II(2) of the Convention, "agreement in writing" includes an arbitration agreement satisfying the requirements of article 7 of the Model Law and an agreement that satisfies the requirements of [*the electronic commerce statute of the enacting jurisdiction, or other statute concerning electronic functional equivalents of writing*].
>
> For the purposes of article 7 of the Model Law, an arbitration agreement will also be considered to be in writing if it satisfies the requirements of [*the electronic commerce statute of the enacting jurisdiction, or other statute concerning electronic functional equivalents of writing*].

[53] When considering this issue commentators are asked to take into account the question of the proper law applicable to the determination of whether an arbitration agreement exists, and whether different laws might be applicable to that issue in different contexts. The focus of the Convention is to define the prerequisites that trigger the mandatory stay of proceedings in a national court. It is not intended to lay down substantive legal requirements or alter legal rights as between the parties. Thus, although an arbitration agreement may not be capable of enforcement through a stay under the Convention because it fails to meet the writing requirement, it may nonetheless be valid as between the parties under another law that is found to be applicable to its interpretation.

[54] The writing requirement under the Model Law may, however, serve a different purpose than that under the Convention. When adopted as law in Canada, it sets out the legal requirements for an enforceable international arbitration agreement under Canadian law. If a stay is sought under the Model Law rather than the Convention, though, it may be that a court should be testing whether an arbitration agreement exists, or is "void, inoperative or incapable of being performed" applying the law applicable to the arbitration agreement. That law may be Canadian law or it may be some other law. In addition:

- On a stay application under the Model Law, should the Canadian court always apply tests laid down under Canadian statute laws?

- Can comfort be taken from the fact that the Canadian laws (the Model Law and the electronic commerce statutes) were born out of an international consensus developed by UNCITRAL?
- If a Canadian court applied Canadian law on a stay application, would that bind the arbitral tribunal to apply the same law when the tribunal arrives at its own decision as to whether a valid arbitration agreement exists?
- Does this conundrum make Option II more attractive, as it leaves entirely open the question of what law should be applied by a court or a tribunal to determine the existence on arbitration agreement?

[55] The Working Group invites comment and discussion concerning these complex issues.

Issue #3 – Should the New Uniform International Act Harmonize Limitation Periods for Recognition and Enforcement?

[56] Foreign parties may not be aware of differences in provincial and territorial laws concerning limitation periods. The Working Group recommended, and the ULCC agreed, that measures to harmonize limitation periods applicable to the recognition and enforcement of foreign arbitral awards across Canada be considered. This might be done through a provision in the new Uniform International Act or though uniform amendments to existing limitations legislation across Canada.

[57] One possible version of a provision in the new Uniform International Act (tracking the language of Article 34, which imposes a three-month limitation period on applications to set aside awards) is as follows:

> **(1)** An application
>
> (a) to obtain recognition and enforcement of an award under Articles III, IV, and V of the Convention; or
>
> (b) to obtain recognition and enforcement of an award under Articles 35 and 36 of the Model Law
>
> may not be made after three years from the earlier of:
>
> (i) if no proceedings have been commenced at the place of arbitration to set aside the award, the expiry of the time limited for the commencement of such proceedings; and
>
> (ii) if proceedings have been commenced to set aside the award at the place of arbitration within the time limited for doing so, the date on which such proceedings have been concluded.

[58] Enacting jurisdictions likely would still have to make consequential amendments to their limitations statutes to avoid potentially conflicting provisions. Furthermore, any harmonization must also take into account the requirement of the Convention that the "conditions" of recognizing and enforcing international awards cannot be more onerous than those applicable to domestic awards. Thus, to the extent that limitation periods for the recognition and enforcement of non-international awards differ from province to province, harmonization of those limitation periods also is required.

[59] The Working Group invites comment concerning whether it is both desirable and feasible to harmonize limitation periods for the enforcement and recognition of international arbitration awards across the various jurisdictions within Canada and, if so, what the limitation period should be.

Issue #4 – Should the New Uniform International Act Address the Question of Limitation Periods for the Commencement of International Arbitration Proceedings?

[60] The Working Group does not recommend that any effort be made in the new Uniform International Act to harmonize the limitation periods applicable under Canadian laws for the commencement of arbitration proceedings. The applicable limitation periods may be determined by the substantive law that is agreed or found to be applicable to the causes of action advanced in the arbitration, rather than by the law of the seat of arbitration. The parties should remain free to choose an applicable limitations law that they deem to be most advantageous.

[61] It may, however, be helpful to clarify that the limitation periods for commencing arbitration proceedings under Canadian laws (if they apply) is the same for international commercial arbitrations as it is for court actions. The Working Group would be interested to receive comment as to whether the following provisions would be helpful:

> If the limitation period governing the commencement of arbitration proceedings is to be determined by the law of [*enacting jurisdiction*] then, unless the parties have otherwise agreed, the limitation period is the same as would be applicable to court proceedings and the commencement of the arbitration will have the same effect as the commencement of court proceedings.

Issue #5 – Should International Awards Made In Canada be Recognized and Enforced Under the Convention and Model Law as Foreign Awards?

[62] The Working Group recommends that steps be taken to ensure that international arbitration awards made in Canada will be recognized and enforced in Canada under both the Convention and the Model Law, and that they are not mistakenly regarded as domestic awards.

[63] The first sentence of Article I(1) of the Convention indicates that it applies to awards made in another "State." As the word is used in Article I, "State" should be interpreted to mean "Canada," the State Party to the Convention itself, rather than the enacting province or territory. International arbitration awards made in other parts of Canada would not be enforceable under the first sentence of Article I(1). The second sentence of Article I(1) states that the Convention applies to awards "not considered as domestic awards in the State where their recognition and enforcement is sought." International arbitration awards made in other parts of Canada likely would be caught by the second sentence of Article I(1) on the basis that the enforcing jurisdiction would not consider them to be domestic.

[64] Section 5 of the 1985 Uniform International Act provided enacting jurisdictions with the option to permit or prohibit enforcement of international arbitration awards made in other parts of Canada under the Model Law:

> ***Reciprocity***
>
> 5. With respect to the recognition and enforcement of awards arising from an international commercial arbitration, the International Law applies only to awards made in

(a) a Contracting State within the meaning of the Convention;

(b) those territorial units outside Canada that are prescribed by regulation; and

(c) those provinces and territories of Canada that are prescribed by regulation.

[NOTE: *Jurisdictions not wishing to base Part II on a reciprocal basis should delete section 5.]*

[65] This approach could have resulted in a *lacuna* in which an award made in Province "A" that is considered to be international under its laws could not be enforced under the Model Law as an international award in Province "B" where the assets might reside, but also could not be enforced under legislation applicable only to domestic awards made in the Province where enforcement is sought. None of the implementing provincial or territorial legislation actually included section 5 of the Uniform International Act.

[66] Despite this, to create a clearer foundation for the application of the Convention to international arbitration awards made in Canada, the Working Group recommends that the new Uniform International Act provide that for the purposes of the Convention, international arbitration awards made in Canada are not considered to be domestic awards:

> For the purposes of article I(1) of the Convention, arbitral awards made in Canada in arbitrations that are considered to be international in the jurisdiction in which they are made shall not be considered as domestic awards.

[67] The Working Group invites comment on this proposal.

Issue #6 – Do/Should the Convention and the Model Law Apply to the Recognition and Enforcement of (a) Canadian Domestic and (b) Foreign Domestic (non-international) Awards?

[68] The Working Group has considered whether the recognition and enforcement provisions of the Convention and the Model Law do or should apply to awards made outside the province or territory in which recognition and enforcement is sought, but which are considered to be domestic awards. It is necessary to consider both "domestic" awards made in other parts of Canada and "domestic" awards made in other countries.

(a) Canadian Domestic Awards

[69] The Working Group considers that enforcement of and recourse against domestic awards made in Canada should be addressed in the domestic arbitration legislation of the provinces and territories. Provincial or territorial legislation of the seat of arbitration determines grounds of appeal from domestic awards. There are now and may continue to be differences in the scope of recourse from domestic awards compared to international awards. For example, typically (although not in Québec) grounds for appeal from non-international awards include "error of law." Under the Convention and the Model Law error of law does not provide a defence to enforcement of international awards. There is no logical basis for the grounds for setting aside a domestic award at the seat to be different from the grounds for resisting enforcement in another province or territory. The Working Group considers that the appropriate enforcement mechanism for domestic awards is to have the award converted into a court judgment at the seat, and then to enforce the judgment elsewhere in Canada relying on reciprocal enforcement legislation.

[70] The first sentence of Article I(1) of the Convention states that it applies to all awards made outside the "State" where recognition and enforcement is sought. As set out above, the preferred interpretation of "State" in the Convention is that it refers to "Canada", rather than its constituent provinces and territories. On its face, the first sentence of Article I(1) does not apply to awards made in Canada. Similarly, awards made in domestic arbitrations in Canada should not fall within the ambit of the second sentence.

[71] The Working Group invites comment on whether it would be helpful for the new Uniform International Act to provide as follows:

> For the purposes of article I(1) of the Convention, arbitral awards made in Canada in arbitrations that are not considered to be international in the jurisdiction in which they are made shall be considered as domestic awards.

[72] The Model Law is stated to apply to "international commercial arbitration." Articles 35 and 36, dealing with recognition and enforcement, are stated to apply "irrespective of the country in which [the "arbitral award"] was made." This language indicates that those articles would apply to an "arbitral award" made anywhere in Canada. Although "arbitral award" is not defined, as the entire Model Law is stated to apply only to "international commercial arbitration", "arbitral award" should be interpreted as referring only to international arbitral awards, and as excluding non-international awards made elsewhere in Canada.

[73] The Working Group asks commentators to consider whether it would be helpful to include a provision in the new Uniform International Act to make it clear that "arbitral award" when used in articles 35 and 36 of the Model Law does not include arbitration awards made in other parts of Canada that are not regarded as international under the laws of the place where the award was made.

(b) Foreign Domestic Awards

[74] On its face, the first sentence of Article I(1) applies to foreign domestic awards as well as to foreign international awards.

[75] As described above, the Model Law is stated to apply only to "international commercial arbitration" and for that reason "arbitral award" should be interpreted as referring only to international arbitral awards, and as excluding non-international awards made in other countries. However, perhaps based on a perception that it was necessary to do so to meet Canada's Convention obligations, in the light of Ontario's repeal of legislation expressly implementing the Convention, section 10 of Ontario's *International Commercial Arbitration Act*[2] expressly extends the reach of articles 35 and 36 of the Model Law to apply to domestic commercial arbitration awards made outside Canada.

[76] The Working Group invites comment as to whether it would be helpful to include the following provision in the new Uniform International Act:

> The Convention applies to arbitral awards made in commercial arbitrations outside Canada even if the award is not considered international.

[2] R.S.O. 1990, c. I.9.

Issue #7 – Should There be Provision for Interjurisdictional Enforcement of Canadian Judgments Recognizing and Enforcing International Arbitration Awards?

[77] In *Yugraneft Corp. v. Rexx Management Corp.*,[3] the Supreme Court of Canada held that a two-year limitation period applied to the recognition and enforcement in Alberta of a Russian arbitral award. Had the award been enforced in British Columbia, the applicable limitation period would have been six years. Some commentators have suggested that it might have been possible to enforce the award in British Columbia, convert it into a judgment of the Supreme Court of British Columbia, and then rely on the legislation that permits reciprocal enforcement of court judgments to enforce the award in Alberta. Other commentators have suggested that in such circumstances the Alberta courts would for policy reasons have looked beyond the British Columbia judgment and approached the matter on the basis that in substance it was an arbitration award that was sought to be enforced.[4]

[78] The Working Group has considered whether it is appropriate to require multiple proceedings within Canada to seek recognition and enforcement of an international arbitration award, or whether some form of abbreviated process to expedite enforcement of awards already recognized by a Canadian superior court would be valuable. The approach to be taken to this issue may be linked to the approach taken to harmonizing limitation periods for recognition and enforcement proceedings across Canada.

[79] There are diverse views among members of the Core Group on this subject. When considering the Working Group's report, the ULCC expressed some concern about purporting to usurp the ability of each superior court to conduct its own considered analysis before enforcing the underlying award. In this regard it is noted that the application of the public policy defence to recognition and enforcement might vary from one jurisdiction to another.

[80] One response of the Advisory Board suggested that it is useful to allow reconsideration in other provinces of one province's refusal to recognize an award on a "misguided basis." If so, then it would also seem logical to allow reconsideration from province to province of decisions to recognize and enforce, and of "misguided" decisions to set aside or to refuse to set aside.

[81] Despite the identified concerns, the Advisory Board strongly recommended that the new Uniform International Act should provide for enforcement of judgments made within Canada that recognize and enforce international arbitration awards. The following provision should be considered to achieve that result:

> A judgment of a court of competent jurisdiction in Canada recognizing and enforcing an award under articles III, IV, and V of the Convention or articles 35 and 36 of the Model Law shall be enforced in [*enforcing jurisdiction*] in the same manner as other judgments of that court.

[82] The Working Group invites comment on this issue and on the related question of whether a decision by one Canadian court to refuse recognition and enforcement also should be binding in other Canadian jurisdictions.

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[3] [2010] 1 S.C.R. 649, 401 N.R. 341, 318 D.L.R. (4th) 257, [2010] 6 W.W.R. 387, 68 B.L.R. (4th) 1, 84 C.P.C. (6th) 201, 22 Alta. L.R. (5th) 166, 482 A.R. 1, 2010 SCC 19 (Alta.).

[4] See, by analogy, *Activ Financial Systems, Inc. v. Orbixa Management Services Inc.* (2011), 109 O.R. (3d) 385, 345 D.L.R. (4th) 353, 2011 ONSC 7286.

Issue #8 – What Should the New Uniform International Act Say About the Nationality of Arbitrators and the Ability of Parties to Impose Nationality Restrictions?

[83] Article 11(1) of the Model Law, as amended, states:

> No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

[84] The Working Group understands that the intended purpose of this section was to ensure that national courts would not be bound by any national law requiring that arbitrators be of a particular nationality. The plain meaning of this provision, however, is that a Canadian court asked to appoint an arbitrator is not restricted from appointing an arbitrator of the same nationality as that of one of the parties. It also means that an agreement of the parties to limit the nationality of arbitrators is effective.

[85] In section 5 of its *International Commercial Arbitration Act*,[5] Ontario replaced Article 11(1) of the Model Law by mandating that a person of *any* nationality may be an arbitrator and eliminating the parties' ability to contract out of this requirement:

> 5. Article 11 (1) of the Model Law shall be deemed to read as follows:
>
> (1) A person of any nationality may be an arbitrator.

[86] This provision was introduced in an attempt to reduce the statute's exposure to attack on grounds of discrimination. At the time, Ontario gave significant thought to whether a provision about the nationality of an arbitrator would offend the *Canadian Charter of Rights and Freedoms*,[6] and in particular, the equality provisions in section 15 that had just come into force. *Obiter dicta* in *Noble China Inc. v. Lei*[7] states that this requirement is mandatory and cannot be waived. Arbitration practitioners will be familiar with the decision of the Supreme Court of the United Kingdom in *Jivraj v. Hashwani*,[8] reversing a decision of the Court of Appeal for England and Wales that a law directed at preventing employment discrimination was applicable to defeat an agreement that any arbitrator must be from the Ismaili community. The Supreme Court found that an arbitrator is not an employee and that, in any event, the agreed specification was a legitimate occupational requirement.

[87] Section 11 of British Columbia's *International Commercial Arbitration Act*[9] provides that a party of *any* nationality may be an arbitrator, but adds a further requirement for party consent if the Chief Justice is to appoint a sole or third arbitrator of the *same* nationality as any of the parties.

> 11(1). A person of any nationality may be an arbitrator.
>
> 11(9). Unless the parties have previously agreed to the appointment of a sole or third arbitrator who is of the same nationality as any of the parties, the Chief Justice must not appoint a sole or third arbitrator who is of the same nationality as that of any of the parties.

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[5] Supra, note 2.
[6] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[7] (1998) 42 O.R. (3d) 69, 42 B.L.R. (2d) 262, 28 C.P.C. (4th) 30 (S.C.).
[8] [2011] UKSC 40.
[9] Supra, note 1.

[88] Subsection 11(9) arose in response to the judgment of McEachern C.J.S.C. in *Quintette Coal Ltd. v. Nippon Steel Corp.*,[10] in which shortly after British Columbia's adoption of the Model Law, the Supreme Court of British Columbia was called upon to appoint a third arbitrator to chair a coal price arbitration between a Japanese company and a Canadian company. At the time, the British Columbia statute did not preclude the Court from appointing a third arbitrator of the same nationality as one of the parties. The Court appointed a Canadian, the retiring Chief Justice of British Columbia, Nathan T. Nemetz, to be the third arbitrator and Chair. This appointment sparked international criticism. British Columbia's *International Commercial Arbitration Act*[11] was then amended to prohibit (without party consent) an appointment of a sole or third arbitrator of the same nationality as that of any of the parties.

[89] The Working Group noted that Article 13(1) of the ICC Rules of Arbitration adopts an approach that treats nationality as one potential criterion of ineligibility rather than an automatically disqualifying factor:

> 13(1). In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13(2).

[90] Although the Working Group has not yet reached a consensus, one option may be to follow the British Columbia approach, but replace subsection 11(9) of British Columbia's *International Commercial Arbitration Act*[12] with a provision akin to ICC Article 13(1). For example:

> If the court is to appoint a sole or presiding arbitrator pursuant to the Model Law, then unless the parties have previously agreed to the appointment of a sole or third arbitrator who is of the same nationality as that of any of the parties, in appointing an arbitrator the court shall consider whether the prospective arbitrator's nationality, residence, and other relationships with the countries of which the parties or the other arbitrators are nationals might give rise to justifiable concerns about the arbitrator's independence or impartiality.

[91] The Working Group invites comment on this issue.

Issue #9 – Should Parties Be Able to Contract Out of or In To the Uniform International Act?

[92] One issue arising often in Canada is whether parties to an arbitration that is "international" under the Uniform International Act can contract out of that enactment or effectively agree that legislation governing non-international arbitration will apply in its place. This has an impact on rights of appeal and could impact the enforceability of the award under the Convention. Another issue that has arisen in several courts of first instance is whether parties can effectively waive the grounds for setting aside and the defences to enforcement stipulated in the Convention and the Model Law: see *Food Services of*

[10] (24 March 1988), Vancouver A880290 (B.C.S.C.).
[11] *Supra*, note 1.
[12] Ibid.

America Inc. v. Pan Pacific Specialties Ltd.[13] and *Noble China Inc. v. Lei*.[14] A third question is whether parties to what might be considered to be in substance domestic disputes should be permitted to opt-in to the international legislation.

[93] The present Uniform International Act and the Model Law do not expressly permit parties to "contract out" of their application. The principle of party autonomy would favour allowing the parties to contract out of international legislation and in to non-international legislation. There is, however, a legitimate concern that apparent efforts to contract out are often unintentional and are due to poor drafting of arbitration agreements. As well, significant problems could arise if parties can contract out of the only otherwise applicable arbitration law without replacing it with some other arbitration law.

[94] One option might be to allow the parties to opt-out of the Uniform International Act and Model Law and to opt-in to the statute applicable to non-international arbitrations at the seat. A variation would be to allow the parties to do so, provided they do so by written agreement *after* the arbitration has been commenced:

> An agreement in writing between the parties to an arbitration to which this Act applies that the [*non-international arbitration act of enacting jurisdiction*] rather than this Act applies to all proceedings in relation to the arbitration, is valid and enforceable *[if made after the commencement of the arbitration.]*

[95] Such a provision would, however, preclude the parties from expressly and clearly agreeing in advance to a substitution of statutes. Another consequence would be that arbitration agreements would be unenforceable that state that the arbitration laws of another country, rather than those of the seat, will apply.

[96] With a view to promoting the laudable objective of finality in international arbitration, it is common for institutional arbitral rules to include a blanket waiver of all recourse from an award "to the maximum extent permissible by applicable law." The Working Group invites comment as to whether it would be appropriate to include in the new Uniform International Act a provision making it clear that a general waiver of rights of recourse from an award shall not be construed as a waiver of the defences to enforcement under Article 36 of the Model Law or Article V of the Convention.

[97] Subsection 2(3) of Ontario's *International Commercial Arbitration Act*[15] bars parties from opting-in to that Act if it would not otherwise apply. Commentators may wish to consider whether a similar provision should be included in the new Uniform International Act.

[98] The Working Group invites comment on these issues.

[13] (1997), 32 B.C.L.R. (3d) 225.
[14] *Supra*, note 7.
[15] *Supra*, note 2.

Issue #10 – Should the New Uniform Act Deal with Confidentiality of Arbitration Proceedings not Involving State Parties?

[99] Arbitration parties often assume, wrongly, that all aspects of the arbitration are necessarily to be treated as confidential. The better view is that although arbitration hearings are private, and although confidentiality obligations can be agreed, or in proper cases imposed by a tribunal, there is no implicit comprehensive confidentiality obligation. The present Uniform International Act and the Model Law do not contain a provision dealing with confidentiality. Usually this issue is left to be addressed by the agreed arbitration rules, if any, or by the parties' specific agreement.

[100] There are many aspects of the arbitral process that one might wish to treat as confidential, including: the existence of a dispute; the existence of an arbitration; the names of the participants; the nature of the dispute; the "pleadings"; submissions and similar filings; information that is produced during the course of the proceeding; the evidence and transcripts thereof; procedural orders and awards; the results; and materials that are filed with courts to seek interim measures or to enforce awards or interim measures orders. There are different potential audiences from which confidential information might wish to be protected, including: the public and media; competitors; and, in the case of proprietary information, perhaps other parties, counsel, or experts involved in the proceeding. In some cases, too narrow a restriction on disclosure will be impractical or even unlawful: regulators, shareholders and investors, auditors, and other external advisors may have to be informed of some confidential matters. There may also be issues as how and by whom confidentiality obligations can be enforced: does a breach of a confidentiality obligation give rise to a cause of action and, if so, is it enforceable by the tribunal in the existing proceeding or must it be separately enforced?

[101] Canada and some other state parties to investment treaties as a matter of policy endorse transparency *in investment treaty arbitration*, and it would not be acceptable to add a provision in the new Uniform International Act that is inconsistent with that policy. Some members of the Working Group are concerned that a provision automatically cloaking commercial arbitration proceedings with confidentiality might not be generally supported.

[102] Australia's *International Arbitration Act, 1974*[16] as amended includes extensive confidentiality provisions that apply only if the parties have expressly opted-in to their application:

> **23C Disclosure of confidential information**
>
> (1) The parties to arbitral proceedings commenced in reliance on an arbitration agreement must not disclose confidential information in relation to the arbitral proceedings unless:
>
> (a) the disclosure is allowed under section 23D; or
>
> (b) the disclosure is allowed under an order made under section 23E and no order is in force under section 23F prohibiting that disclosure; or
>
> (c) the disclosure is allowed under an order made under section 23G.

[16] (Cth) (No. 136 of 1974).

(2) An arbitral tribunal must not disclose confidential information in relation to arbitral proceedings commenced in reliance on an arbitration agreement unless:

(a) the disclosure is allowed under section 23D; or

(b) the disclosure is allowed under an order made under section 23E and no order is in force under section 23F prohibiting that disclosure; or

(c) the disclosure is allowed under an order made under section 23G.

23D Circumstances in which confidential information may be disclosed

(1) This section sets out the circumstances in which confidential information in relation to arbitral proceedings may be disclosed by:

(a) a party to the arbitral proceedings; or

(b) an arbitral tribunal.

(2) The information may be disclosed with the consent of all of the parties to the arbitral proceedings.

(3) The information may be disclosed to a professional or other adviser of any of the parties to the arbitral proceedings.

(4) The information may be disclosed if it is necessary to ensure that a party to the arbitral proceedings has a full opportunity to present the party's case and the disclosure is no more than reasonable for that purpose.

(5) The information may be disclosed if it is necessary for the establishment or protection of the legal rights of a party to the arbitral proceedings in relation to a third party and the disclosure is no more than reasonable for that purpose.

(6) The information may be disclosed if it is necessary for the purpose of enforcing an arbitral award and the disclosure is no more than reasonable for that purpose.

(7) The information may be disclosed if it is necessary for the purposes of this Act, or the Model Law as in force under subsection 16(1) of this Act, and the disclosure is no more than reasonable for that purpose.

(8) The information may be disclosed if the disclosure is in accordance with an order made or a subpoena issued by a court.

(9) The information may be disclosed if the disclosure is authorised or required by another relevant law, or required by a competent regulatory body, and the person making the disclosure gives written details of the disclosure including an explanation of reasons for the disclosure to:

(a) if the person is a party to the arbitral proceedings – the other parties to the proceedings and the arbitral tribunal; and

(b) if the arbitral tribunal is making the disclosure – all the parties to the proceedings.

(10) In subsection (9):

"another relevant law" means:

(a) a law of the Commonwealth, other than this Act; and

(b) a law of a State or Territory; and

(c) a law of a foreign country, or of a part of a foreign country:

(i) in which a party to the arbitration agreement has its principal place of business; or

(ii) in which a substantial part of the obligations of the commercial relationship are to be performed; or

(iii) to which the subject matter of the dispute is most commonly connected.

23E Arbitral tribunal may allow disclosure in certain circumstances

(1) An arbitral tribunal may make an order allowing a party to arbitral proceedings to disclose confidential information in relation to the proceedings in circumstances other than those mentioned in section 23D.

(2) An order under subsection (1) may only be made at the request of one of the parties to the arbitral proceedings and after giving each of the parties to the arbitral proceedings the opportunity to be heard.

23F Court may prohibit disclosure in certain circumstances

(1) A court may make an order prohibiting a party to arbitral proceedings from disclosing confidential information in relation to the arbitral proceedings if:

(a) the court is satisfied in the circumstances of the particular case that the public interest in preserving the confidentiality of arbitral proceedings is not outweighed by other considerations that render it desirable in the public interest for the information to be disclosed; or

(b) the disclosure is more than is reasonable for that purpose.

(2) An order under subsection (1) may only be made on the application of a party to the arbitral proceedings and after giving each of the parties to the arbitral proceedings the opportunity to be heard.

(3) A party to arbitral proceedings may only apply for an order under subsection (1) if the arbitral tribunal has made an order under subsection 23E(1) allowing the disclosure of the information.

(4) The court may order that the confidential information not be disclosed pending the outcome of the application under subsection (2).

(5) An order under this section is final.

23G Court may allow disclosure in certain circumstances

(1) A court may make an order allowing a party to arbitral proceedings to disclose confidential information in relation to the arbitral proceedings in circumstances other than those mentioned in section 23D if:

(a) the court is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the information to be disclosed; and

(b) the disclosure is not more than is reasonable for that purpose.

(2) An order under subsection (1) may only be made on the application of a person who is or was a party to the arbitral proceedings and after giving each person who is or was a party to the arbitral proceedings the opportunity to be heard.

(3) A party to arbitral proceedings may only apply for an order under subsection (1) if:

(a) the mandate of the arbitral tribunal has been terminated under Article 32 of the Model Law; or

(b) a request by the party to the arbitral tribunal to make an order under subsection 23E(1) allowing the disclosure has been refused.

(4) An order under this section is final.

[103] The Working Group invites comments as to whether:

(a) the new Uniform International Act should include a confidentiality provision applicable to arbitrations that do not involve state parties;

(b) if so, what should the scope of the provision be; and

(c) should it be an opt-in or opt-out provision?

Issue #11 – What is the Appropriate Transitional Provision for the New Uniform International Act?

[104] The new Uniform Arbitration Act would not come into force until a date to be determined by each enacting jurisdiction. The Working Group intends that the new Uniform Act be enacted to replace existing legislation, which would be repealed. It is necessary to decide whether all or any of the changes should apply retroactively, or whether they should apply only prospectively. It may be appropriate for parts of the new legislation to come into force on different dates.

[105] Sections 28 to 35 of the Australian *International Arbitration Amendment Act 2010*,[17] which brought into force the 2006 Model Law Amendments and many other changes, gave effect to the amendments on various different dates:

- in relation to arbitration agreements entered into on or after the effective date of the amendment; or
- in relation to proceedings to enforce a foreign award brought on or after the effective date of the amendment; or
- in relation to a person acting as arbitrator on or after the effective date of the amendment;
- in relation to:
  - (a) the exercise of a power; or
  - (b) the performance of a function; or
  - (c) the interpretation of this Act; or

[17] (Cth) (No. 97 of 2010).

(d) the interpretation of the Model Law; or

(e) the interpretation of an agreement or award;

on or after the effective date of the amendment.

[106] The Working Group will consider this issue further, but invites comment.

Issue #12 – Should "Commercial Arbitration" and "Commercial Relationship" be Defined Terms In the New Uniform International Act?

[107] Article I(3) of the Convention allows Contracting States to limit its application to legal relationships that are considered commercial under the Contracting State's national laws, but "commercial" is not defined. Canada and all Canadian provinces and territories other than Québec have implemented this commercial reservation in their existing laws. The Model Law also states that it applies only to "international commercial arbitration". Although it defines "international", it does not define "commercial arbitration" and instead includes an explanatory note.

[108] The Working Group notes that most State Parties to the Convention have not made the commercial reservation, and wonders whether there is a principled basis for Canadian jurisdictions to continue to do so. If the commercial reservation under the Convention is not to be continued, consideration also will have to be given to whether the word "commercial" as used in Article 1(1) of the Model Law should be deleted.

[109] The Working Group is mindful that its mandate is restricted to preparing a form of model uniform act, and that each enacting jurisdiction will make its own decision as to whether to or not it is appropriate to make, or to continue to make, the commercial reservation. The Working Group concludes that the text of the new Uniform International Act must take into account the possibility that the reservation will be made. To that end, a majority of the Working Group considered that adding definitions of "commercial arbitration" and "commercial relationship" would add certainty. The minority view was that adding definitions could be inappropriately restrictive, although that concern might be addressed in part by providing non-exclusive definitions.

[110] The Working Group recommends that the new Uniform International Act incorporate the following defined terms (which track the language of the explanatory note in the Model Law) in the same manner as section 1 of British Columbia's *International Commercial Arbitration Act*:[18]

(a) "Commercial arbitration" means an arbitration arising out of a commercial relationship.

(b) "Commercial relationship" means any legal relationship of a commercial nature, whether contractual or not, and includes, but is not limited to, a relationship arising out of the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation, or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms

[18] *Supra*, note 1.

of industrial or business cooperation; carriage of goods or passengers by air, sea, rail, or road.

[111] The Working Group invites comment on whether:

(a) enacting Canadian jurisdictions should make the commercial reservation under the Convention and, if not, whether the term "commercial" in Article I(1) of the model law should be deleted; and

(b) the proposed definitions of "commercial arbitration" and "commercial relationship" are appropriate.

Issue #13 – Should References to the "International Law" be Replaced with References to the "Model Law" in the New Uniform International Act?

[112] The Working Group recommends that the defined term "International Law" be changed to "Model Law" to reflect the terminology customarily used in international arbitration practice. Consequential changes to the use of the defined term are recommended to be made throughout the text of the new Uniform International Act.

[113] The Working Group invites comment concerning this recommendation.

Issue #14 – Should Subsection 1(2) of the Uniform International Act be Revised for Clarity?

[114] Subsection 1(2) of the existing Uniform International Act provides as follows:

(2) Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the Convention and the International Law, as the case may be.

[115] Some terms are used in slightly different senses in the Convention and the Model Law. For clarity, the Working Group recommends that section 1(2) be amended as follows in the new Uniform International Act:

(2) Except as otherwise provided in this Act:

(a) words and expressions used in Part 2 of this Act have the same meaning as the corresponding words and expressions in the Convention; and

(b) words and expressions used in Part 3 of this Act have the same meaning as the corresponding words and expressions used in the Model Law.

[116] The Working Group invites comment concerning this recommendation.

Issue #15 – Should Awards Not Yet Recognized and Enforced Be Capable of Being Raised as a Basis for a Defence, Set-off, or Counterclaim?

[117] The Working Group has identified two related issues. The first is whether awards that have not yet been recognized and enforced should be able to be raised as the basis for a defence, set-off, or counterclaim in existing proceedings without the need to commence separate proceedings for recognition and enforcement. If so, the second issue is whether the expiry of the limitation period for seeking recognition and enforcement should preclude the ability to rely on the award.

[118] The Convention deals with both recognition and enforcement. The distinction between recognition and enforcement may become important in instances where an arbitral award is sought to be used as a defence to a claim, or where status is in issue (such as in respect of marriage or divorce case), or in cases of set-off or counterclaim. This issue has already surfaced in Canadian jurisprudence: in *Yugraneft*[19] the distinction between recognition and enforcement arose from a question regarding the court's jurisdiction to make a declaratory judgment in respect of an arbitral award.

Should a Separate Application be Required?

[119] Both the Convention and the Model Law contemplate an application in line with Article 35(1) of the Model Law, which provides that "[a]n 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." It may be appropriate for an award to be recognized without the need for a separate application under the Model Law.

[120] Subsection 11(2) of Ontario's *International Commercial Arbitration Act*[20] provides as follows:

> 11(2). An arbitral award recognized by the court binds the persons as between whom it was made and may be relied on by any of those persons in any legal proceeding.

[121] Subsection 101(1) of the English *Arbitration Act, 1996*[21] states:

> 101(1). A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.

[122] The Working Group considers that it might be helpful to clarify that an international commercial arbitration award may be raised by way of defence, set-off, or counterclaim in existing proceedings, without the need to commence separate proceedings seeking recognition and enforcement.

> 3(2). Recognition or enforcement of an arbitral award in accordance with the Convention may be sought by way of application in an existing legal proceeding in [*enacting jurisdiction*] where a party to that legal proceeding relies upon the award by way of defence, set-off, or otherwise.

[19] *Supra*, note 3.
[20] *Supra*, note 2.
[21] (U.K.), c. 23.

Impact of Expired Limitation Period

[123] There is extensive jurisprudence and some legislation in Canada addressing the question of whether causes of action that are otherwise statute-barred may be relied on in court proceedings by way of defence, set-off, counterclaim, or third-party proceedings. If arbitral awards can be relied on in similar circumstances, the same question arises as to the impact of expired limitation periods.

[124] The Working Group invites comment on:

(a) whether it is desirable to have a provision dealing with these subject matters; and, if so,

(b) whether a different limitation period should apply to a request for recognition and enforcement made in answer to a claim than applies to applications for recognition and enforcement or whether the expiry of the limitation period for recognition and enforcement should preclude raising an award by way of defence, set-off, or counterclaim.

Issue #16 – Should the Existing provision Concerning Conciliation and Mediation Be Preserved?

[125] Section 6 of the existing Uniform International Act provides as follows:

> 6. 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.

[126] The Working Group has not reached a consensus on whether this provision is necessary or desirable and invites comment on that issue. Some members of the Working Group questioned the utility of this provision. Others were concerned that it appears to endorse arbitrators acting in multiple roles, which some members found troubling even though the provision applies only where the parties have agreed. What impact might this provision have on the enforceability of an award that is challenged on the basis that the arbitral tribunal improperly treated as evidence or was influenced by 'without prejudice' communications heard during a mediation? The section protects the arbitrators from disqualification but does it also protect the award? As a matter of policy, should the legislation endorse arbitrators acting in a dual capacity, even with party consent?

[127] The Working Group invites comment on the issue of whether a mediation-conciliation provision akin to section 6 of the current Uniform International Act should be included in the new Uniform International Act.

Issue #17 – Should Section 7 of the Existing Uniform International Act That Requires Hearings to be Re-started upon Arbitrator Replacement be Modified?

[128] Subsections 7(1) and 7(2) of the existing Uniform International Act provide as follows:

> 7.(1) Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the Model Law, any hearing held prior to the replacement or removal shall be repeated.
>
> (2) With respect to article 15 of the Model Law, the parties may remove an arbitrator at any time prior to the final award, regardless of how the arbitrator was appointed.

[129] The Working Group considered whether subsection 7(1) should be removed or modified.

[130] The issue is whether an arbitrator's removal should always require that any hearing previously held in the matter be started afresh. The Working Group initially questioned the need for this provision, recognizing that the consequences of an arbitrator's removal are most often, and perhaps most appropriately, addressed in the arbitral rules.

[131] While it seems obvious that hearings should start afresh on the removal of an arbitrator unless the parties otherwise agree, the Working Group noted that the current climate of increasing tactical challenges to arbitrators may create a greater need for flexibility.

[132] British Columbia's *International Commercial Arbitration Act*[22] differs from the current Uniform International Act by distinguishing (in subsection 15(3)) the implications of removing a sole or presiding arbitrator from the implications of removing an arbitrator other than a sole or presiding arbitrator:

> 15(3). Unless otherwise agreed by the parties,
>
> (a) if the sole or presiding arbitrator is replaced, any hearings previously held must be repeated, and
>
> (b) if an arbitrator, other than the sole or presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.

[133] Article 15 of the recently revised UNCITRAL Arbitration Rules states:

> **Article 15 Repetition of hearings in the event of the replacement of an arbitrator**
>
> If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

[22] *Supra*, note 1.

[134] Most members of the Working Group favoured repeating the hearing upon an arbitrator's removal unless the parties agreed, and did not favour giving discretion to the arbitral tribunal. If the implications of a non-presiding arbitrator's removal were left to the discretion of the arbitral tribunal as permitted under British Columbia's statute, then the presiding arbitrator and the remaining party-appointed arbitrator could *de facto* deprive the party whose appointee had been removed of the opportunity to have a fully informed party-appointed arbitrator of its choosing.

[135] The Working Group invites comments, including comment regarding what inference might be drawn if subsection 7(1) of the current Uniform International Act were to be removed or altered.

Issue #18 – Should the New Uniform International Act Contain a Provision Concerning the Law Applicable to the Interpretation of an Arbitration Agreement?

[136] Section 8 of the existing Uniform International Act provides as follows:

> *Rules applicable to substance of dispute*
>
> 8. Notwithstanding article 28(2) of the Model Law, if the parties fail to make a designation pursuant to article 28(1) of the Model Law, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances respecting the dispute.

[137] The Working Group understands that section 8 is intended to clarify that Canadian conflict of laws principles need not necessarily be applied to identify the applicable law, if the parties have failed to designate an applicable law. The tribunal is authorized to apply such rules of law as it considers appropriate.

[138] The arbitration agreement is regarded as separate from the commercial agreement in which it is contained, and may fall to be interpreted according to a law other than the law applicable to the interpretation of the commercial agreement. The Working Group's discussions raised the question of whether a provision similar to section 8 should be included to give the tribunal the same discretion with respect to the law applicable to the interpretation of the arbitration agreement.

[139] Article 3121 of the CCQ deals with this issue differently. It provides as follows:

> 3121. Failing any designation by the parties, an arbitration agreement is governed by the law applicable to the principal contract or, where that law invalidates the agreement, by the law of the country where arbitration takes place.

[140] The Working Group recommends that some provision addressing this issue be included in the new Uniform International Act, but invites comment on that issue, as well as on the question of whether any such provision should follow the approach taken in the existing Uniform International Act or that in the CCQ.

Issue #19 – Should the Consolidation Provision in the Existing Uniform International Act be Revised?

[141] Subsections 9(1), 9(2), and 9(3) of the existing Uniform International Act provide as follows:

> 9. (1) The (*name of the court*) Court, upon application of the parties to two 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;
>
> (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 paragraph (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 two or more arbitration proceedings from agreeing to consolidate those arbitration proceedings and taking such steps as are necessary to effect that consolidation.

[142] The phrase "upon application of the parties" used in subsection 9(1) likely was intended to mean that consolidation may occur only if all parties to the proceedings sought to be consolidated agree. If that is the intent, then the Working Group recommends that the language be clarified.

[143] Subsection 27(2) of British Columbia's *International Commercial Arbitration Act*[23] uses more robust language:

> 27 (2). If the parties to 2 or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, the Supreme Court may, on application by one party with the consent of all the other parties to those arbitration agreements, do one or more of the following:
>
> (a) order the arbitrations to be consolidated on terms the court considers just and necessary;
>
> (b) if all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with section 11 (8);
>
> (c) if all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.

[23] *Supra*, note 1.

[144] The Working Group recommends that the new Uniform International Act be revised to provide as follows:

> (1) If the parties to 2 or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, then, unless the parties have agreed to a different procedure, the court may, on application by one party with the consent of all the other parties to those arbitration agreements order the arbitrations to be consolidated on terms the court considers just and necessary.
>
> (2) If the court orders arbitration proceedings to be consolidated pursuant to subsection (1) and all the parties to the consolidated arbitration proceedings agree as to the choice of the arbitral tribunal for those arbitration proceedings, then that arbitral tribunal shall be appointed by the court.
>
> (3) Unless the parties have agreed to another method of appointment for consolidated proceedings, if the court orders arbitration proceedings to be consolidated pursuant to subsection (1) and all the parties cannot agree to the choice of the arbitral tribunal for those arbitration proceedings, then the court may appoint the arbitral tribunal for those arbitration proceedings.
>
> (4) Nothing in this section shall prevent the parties to two or more arbitration proceedings from agreeing to consolidate those arbitration proceedings and taking such steps as are necessary to effect that consolidation.

[145] Article 10 of the 2012 ICC Rules of Arbitration allows the ICC Court to order consolidation in some circumstances without party consent (but, of course, the Court has no power to do so unless all parties have agreed that the ICC's rules apply!). This was done to address concerns expressed by some users about the inefficiency of requiring separate arbitrations simply because there are multiple contracts when the disputes arise out of essentially the same circumstances:

> 10. The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:
>
> a) the parties have agreed to consolidation; or
>
> b) all of the claims in the arbitrations are made under the same arbitration agreement; or
>
> c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.
>
> In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.
>
> When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.

[146] The Working Group has arrived at no conclusion as to whether it is desirable to facilitate consolidation without consent under the circumstances set out in sub-paragraphs (b) and (c) of Article 10 of the ICC Rules of Arbitration. Some members expressed the view that these issues are best addressed through arbitration rules, or perhaps domestic arbitration legislation, rather than in a new Uniform International Act. Others thought that a regime that allowed courts to order consolidation in certain circumstances without party consent would be attractive and helpful to users. For example, consolidation might be permitted where:

(a) all of the claims in the arbitrations are made under the same arbitration agreement; or

(b) the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

Arbitration agreements that require administration of the arbitration by different institutions, or that specify a different legal place or seat of arbitration shall not be considered to be compatible.

[147] The Working Group invites comment on:

(a) whether its recommended changes to the consolidation provisions are appropriate; and

(b) whether additional provisions allowing consolidation without consent of all parties should be included in the new Uniform International Act.

Issue #20 – Should the Approach Taken in Ontario's *International Commercial Arbitration Act* to Specifying the Meaning of "State" in Various Contexts When Used in the Model Law Be Included in the New Uniform International Act?

[148] The word "State" is used throughout the Model Law. In the context of Canada's non-unitary structure, the term should have different meanings when used in different contexts. Section 6 of Ontario's *International Commercial Arbitration Act*[24] deals with this issue as follows:

> 6. (1) In article 1 (1) of the Model Law, an "agreement in force between this State and any other State or States" means an agreement between Canada and any other country or countries that is in force in [enacting jurisdiction].
>
> (2) In articles 34(2)(b)(i) and 36(1)(b)(i) of the Model Law, "law of this State" means the laws of [enacting jurisdiction] and any laws of Canada that are in force in [enacting jurisdiction].
>
> (3) In article 35 (2) of the Model Law, "this State" means Canada.
>
> (4) In articles 1 (2) and (5), 27, 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, "this State" means [enacting jurisdiction].

[24] *Supra*, note 2.

(5) In article 1(3) of the Model Law, "different States" means different countries, and "the State" means the country.

[149] The Working Group recommends that similar provisions be included in the new Uniform International Act.

Issue #21 – Should the New Uniform International Act Include a Provision Informing the Application of the Requirement for "the observance of good faith" Under Article 2A (1) of the Model Law?

[150] Article 2A(1) of the Model law, as amended, provides as follows:

2A(1). In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

[151] The Working Group questioned the intent of the phrase "observance of good faith". Does it mean that the Act is to be interpreted as requiring good faith in conducting the arbitration process (a procedural obligation) or is it to be interpreted as requiring the parties to perform in good faith the substantive obligations that are the subject matter of the dispute (a substantive obligation)? Does a requirement to the observe good faith (a fact-dependent inquiry) promote uniformity of interpretation and application? What would be the implications, in terms of international perception, if Canada did not include a good faith concept?

[152] The Advisory Board's responses to the questionnaire revealed differing views regarding the content of the good faith obligation under Article 2A(1). Members of the Advisory Board diverged regarding whether the good faith reference imposed a duty on courts and arbitrators or a duty on the arbitrating parties.

[153] Almost all respondents were concerned about the wording of Article 2A(1). Most, however, were hesitant to endorse a departure from the language of the 2006 Model Law Amendments. A deviation of this nature could have negative repercussions on the perception of Canada as a Model Law jurisdiction.

[154] The UNCITRAL commentary on the Model Law contains little guidance on Article 2A(1). Similar "good faith" provisions are found in a variety of UNCITRAL texts, including Article 2(1) of the UNCITRAL Model Law on International Commercial Conciliation, Article 7(1) of United Nations Convention on Contracts for the International Sales of Goods, Article 3(1) of the UNCITRAL Model Law on Electronic Commerce, Article 8 of the UNCITRAL Model Law on Cross-Border Insolvency, and Article 4(1) of the UNCITRAL Model Law on Electronic Signatures.

[155] While the Working Group has residual concerns about the language of Article 2A(1), it recommends adopting Article 2A(1) as written. It also suggests, though, that consideration be given to augmenting it with a usage provision, explanatory note, or code of conduct to provide more content to the language. Members of the Advisory Board were divided on the desirability of amplifying on the content of Article 2A(1) in this way. While some members thought it best to avoid additional rules and ambiguity, others thought a soft law instrument or explanatory note adopted concurrently with the new model statute would provide useful background and could assist the courts in settling any disputes arising from the provision's wording.

[156] Although there is no consensus, one option might be to include in the body of the new Uniform International Act a provision to the effect that:

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

[157] The Working Group invites comment concerning this issue.

Issue #22 – Should a Provision be Added to the New Uniform International Act to Promote its Uniform Interpretation and Application Across Canada?

[158] The Working Group recommends that the following provision be added to the new Uniform International Act:

> 3. In the interpretation and application of this Act, regard is to be had to the need to promote uniformity within Canada in the application of similar laws relating to international commercial arbitration.

Issue #23 – Should a Provision be Added to the New Uniform International Act Addressing the Approach to be Taken by Courts When Considering Tribunal Determinations as to Jurisdiction?

[159] Article 16(3) of the Model Law provides as follows:

> 16 (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.

[160] Article 16(3) allows an arbitral tribunal to rule on its jurisdiction either: (1) as a preliminary question; or (2) in its final award on the merits. This choice is significant because it determines when a party may seek to have a court review or "decide the matter." If the arbitral tribunal makes a preliminary decision that it has jurisdiction a party may immediately go to the national court to decide the matter.

[161] If the arbitral tribunal waits until its final award to decide jurisdiction, Articles 34 to 36 of the Model Law give the Court discretion to set aside or decline to recognize and enforce an award where:

> the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;

[162] In 2011 the Court of Appeal for Ontario held that the standard of review on appeals from final awards as to jurisdiction under Ontario's *International Commercial Arbitration Act*[25] is "correctness."[26]

[163] Two related issues arise:

(a) would there be benefit to specifying the standard of review to be applied when a court considers preliminary and non-preliminary awards (either on set-aside applications or in answer to applications to recognize and enforce) of arbitral tribunals finding that they have jurisdiction? and

(b) should the same standard of review apply to a determination by an arbitral tribunal that it does not have jurisdiction?

[164] The Working Group invites comment concerning these issues.

[25] Supra, note 2.
[26] See *United Mexican States v. Cargill, Inc.* (2011), 107 O.R. (3d) 528, 341 D.L.R. (4th) 249, 284 O.A.C. 123, 2011 ONCA 622, leave to appeal ref'd (2011), [2012] 1 S.C.R. xiii.

APPENDIX 1

ANNOTATED PRELIMINARY DRAFT OF PROPOSED NEW UNIFORM *INTERNATIONAL COMMERCIAL ARBITRATION ACT*

UNIFORM *INTERNATIONAL COMMERCIAL ARBITRATION ACT*

PART 1
INTERPRETATION

Definitions

1. **(1)** In this Act:

(a) "Commercial arbitration" means an arbitration arising out of a commercial relationship.[1]

(b) "Commercial relationship" means any legal relationship of a commercial nature, whether contractual or not, and includes, but is not limited to, a relationship arising out of the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation, or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail, or road.[2]

(c) "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 A;

(d) "Model Law" means the Model Law On International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on June 21, 1985 as amended by the United Nations Commission on International Trade Law on 7 July 2006 as set out in Schedule B.[3]

(2) Except as otherwise provided in this Act:

(a) words and expressions used in Part 2 of this Act have the same meaning as the corresponding words and expressions in the Convention; and

(b) words and expressions used in Part 3 of this Act have the same meaning as the corresponding words and expressions used in the Model Law.[4]

(3) In the interpretation and application of this Act, regard is to be had to the need to promote uniformity within Canada in the application of similar laws relating to international commercial arbitration.[5]

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[1] New and recommended: see ¶¶[107] to [111].
[2] New and recommended: see ¶¶[107] to [111].
[3] Revised and recommended: see ¶¶[112] and [113].
[4] Revised and recommended: see: ¶¶[114] to [116].
[5] New and recommended: see ¶[158].

PART 2
THE CONVENTION

Application of Convention

2. **(1)** Subject to this Act, the Convention applies in [*enacting jurisdiction*].

(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 legal relationships that are commercial relationships.

(3) For the purposes of article I(1) of the Convention, arbitral awards made in Canada in arbitrations that are considered to be international in the jurisdiction in which they are made shall not be considered as domestic awards.[6]

(4) The Convention applies to arbitral awards made in commercial arbitrations outside Canada even if the award is not considered international.[7]

(5) For the purposes of article I(1) of the Convention, arbitral awards made in Canada in arbitrations that are not considered to be international in the jurisdiction in which they are made shall be considered as domestic awards.[8]

(6) For the purpose of article I(3) of the Convention, it is declared that [*enacting jurisdiction*] will apply the Convention only to the recognition and enforcement of awards made in the territory of Contracting States to the Convention.[9]

*[**NOTE**: Enacting jurisdictions should delete subsection (6) if the reciprocity reservation under the Convention is not to be applicable.]*

Designation of court

3. For the purpose of seeking recognition and enforcement of an arbitral award pursuant to the Convention, application shall be made to the [*name of the court of competent jurisdiction in the enacting jurisdiction*].[10]

Recognition of arbitration agreements

4. For the purposes of article II(2) of the Convention, "agreement in writing" includes an arbitration agreement satisfying the requirements of article 7 of the Model Law or an agreement that satisfies the requirements of [*the electronic commerce statute of the enacting jurisdiction, or other statute concerning electronic functional equivalents of writing*].[11]

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[6] New and recommended: see ¶¶[62] to [67].
[7] New for discussion: see ¶¶[68] and [74] to [76].
[8] New for discussion: see ¶¶[68] to [73].
[9] Revised for discussion: see ¶¶[62] to [67].
[10] Revised and recommended.
[11] New and recommended: see ¶¶[42] to [55].

PART 3
THE MODEL LAW

Application of Model Law[12]

5. **(1)** Subject to this Act, the Model Law applies in [*enacting jurisdiction*].

(2) The Model Law applies to international commercial arbitration agreements and awards made in international commercial arbitrations, whether made before or after the coming into force of this Part.

Meaning of certain terms used in Model Law

6. **(1)** In article 1(1) of the Model Law, an "agreement in force between this State and any other State or States" means an agreement between Canada and any other country or countries that is in force in [*enacting jurisdiction*].[13]

(2) In articles 34(2)(b)(i) and 36(1)(b)(i) of the Model Law, "law of this State" means the laws of [*enacting jurisdiction*] and any laws of Canada that are in force in [*enacting jurisdiction*].[14]

(3) In article 35(2) of the Model Law, "this State" means Canada.[15]

(4) In articles 1(2), 1(5), 27, 34(2)(b)(ii), and 36(1)(b)(ii) of the Model Law, "this State" means [*enacting jurisdiction*].[16]

(5) In article 1(3) of the Model Law, "different States" means different countries and "the State" means the country.[17]

Interpretation of Model Law

7. **(1)** Article 2A of the Model Law is not to be interpreted as adding to the substantive rights and obligations of the parties to a dispute under applicable law, but shall be interpreted as requiring that when interpreting the Model Law regard is to be had to the need to promote observance of good faith in the conduct of an arbitration.[18]

(2) In applying article 2A(1) of the Model Law, recourse may be had to

(a) the Report of the United Nations Commission on International Trade Law on the work of its 18th session (June 3-21, 1985);

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[12] See ¶¶[92] to [98] for discussion of a possible provision with respect to contracting out of the International Act and into a domestic act.
[13] New and recommended: see ¶¶[148] and [149].
[14] New and recommended: see ¶¶[148] and [149].
[15] New and recommended: see ¶¶[148] and [149].
[16] New and recommended: see ¶¶[148] and [149].
[17] New and recommended: see ¶¶[148] and [149].
[18] New for discussion: see ¶¶[150] to [157].

(b) the Report of the United Nations Commission on International Trade Law on the work of its 39th session (June 19-July 7, 2006); and

(c) the International Commercial Arbitration Commentary on Draft Text of a Model Law on International Commercial Arbitration.[19]

Arbitration agreements

8. For the purposes of article 7 of the Model Law, an arbitration agreement will also be considered to be in writing if it satisfies the requirements of [*the electronic commerce statute of the enacting jurisdiction, or other statute concerning electronic commerce functional equivalents of writing*].[20]

Conciliation and other proceedings

9. 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.[21]

Court appointment of arbitrator

10. If the court is to appoint a sole or presiding arbitrator pursuant to the Model Law, then unless the parties have previously agreed to the appointment of a sole or third arbitrator who is of the same nationality as any of the parties, in appointing an arbitrator the court shall consider whether the prospective arbitrator's nationality, residence, and other relationships with the countries of which the parties or the other arbitrators are nationals might give rise to justifiable concerns about the arbitrator's independence or impartiality.[22]

Removal of arbitrator

11. (1) Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the Model Law, any hearing held before the replacement or removal shall be repeated.[23]

(2) With respect to article 15 of the Model Law, the parties may remove an arbitrator at any time before the final award, regardless of how the arbitrator was appointed.

Designation of Court

12. (1) For the purposes of article 6 of the Model Law, the functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3), and 34(2) shall be performed by [*court of competent jurisdiction in enacting jurisdiction*].[24]

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[19] The Working Group is proposing to eliminate the need for these source documents to be published (or re-published) in the *Canada Gazette*.
[20] New for discussion: see ¶¶[42] to [55].
[21] Old, but for a discussion concerning possible deletion see ¶¶[125] to [127].
[22] New for discussion: see ¶¶[83] to [91].
[23] See ¶¶[128] to [135] for discussion concerning the possible modification of this provision.
[24] Revised and recommended.

(2) For the purposes of the Model Law, a reference to "court" or "competent court", where in the context it means a court of [*enacting jurisdiction*], means the [*court of competent jurisdiction in enacting jurisdiction*] except where the context otherwise requires.[25]

Rules applicable to substance of dispute

13. Notwithstanding article 28(2) of the Model Law, if the parties fail to make a designation pursuant to article 28(1) of the Model Law, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances respecting the dispute.[26]

Consolidation of proceedings[27]

14. (1) If the parties to 2 or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, then, unless the parties have agreed to a different procedure, the court may, on application by one party with the consent of all the other parties to those arbitration agreements, order the arbitrations to be consolidated on terms the court considers just and necessary.[28]

(2) If the court orders arbitration proceedings to be consolidated pursuant to subsection (1) and all the parties to the consolidated arbitration proceedings agree as to the choice of the arbitral tribunal for those arbitration proceedings, then that arbitral tribunal shall be appointed by the court.[29]

(3) Unless the parties have agreed to another method of appointment for consolidated proceedings, if the court orders arbitration proceedings to be consolidated pursuant to subsection (1) and all the parties cannot agree to the choice of the arbitral tribunal for those arbitration proceedings, then the court may appoint the arbitral tribunal for those arbitration proceedings.[30]

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

PART 4
GENERAL

Stay of proceedings

15. Where, pursuant to article 11(3) of the Convention or article 8 of the Model Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

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[25] Revised and recommended.
[26] See ¶¶[136] to [140] for discussion about possible addition of guidance concerning the law applicable to the interpretation of the arbitration agreement.
[27] See ¶¶[145]to [147] for discussion of possible expansion of consolidation provisions.
[28] Revised and recommended: see ¶¶[141] to [147].
[29] New for discussion: see ¶¶[141] to [147].
[30] New for discussion: see ¶¶[141] to [147].

Limitation periods

16. (1) An application

(a) to obtain recognition and enforcement of an award under Articles III, IV, and V of the Convention; or

(b) to obtain recognition and enforcement of an award under Articles 35 and 36 of the Model Law

may not be made after [*number*] years have elapsed from the earlier of:

(i) if no proceedings have been commenced at the place of arbitration to set aside the award, the expiry of the time limited for the commencement of such proceedings; and

(ii) if proceedings have been commenced to set aside the award at the place of arbitration within the time limited for doing so, the date on which such proceedings have been concluded.[31]

(2) If the limitation period governing the commencement of arbitration proceedings is to be determined by the law of [*enacting jurisdiction*] then, unless the parties have otherwise agreed, the limitation period is the same as would be applicable to court proceedings and the commencement of the arbitration will have the same effect as the commencement of court proceedings.[32]

Enforcement of Canadian court judgments

17. A judgment of a court of competent jurisdiction in Canada recognizing and enforcing an award under articles III, IV, and V of the Convention or articles 35 and 36 of the Model Law shall be enforced in [*enforcing jurisdiction*] in the same manner as other judgments of that court.[33]

Crown bound

18. (1) This Act binds the Crown.

(2) An award recognized pursuant to this Act is enforceable against the Crown in the same manner and to the same extent as a judgment is enforceable against the Crown.

*[**NOTE**: Enacting jurisdictions should consider whether subsection (2) is required in their jurisdiction.]*

Proof of contracting states

19. (1) In any proceeding, a certificate issued by or under the authority of the Secretary of State for External Affairs of Canada containing a statement that a foreign state is a Contracting State is, in the absence of evidence to the contrary, proof of the truth of the statement without proof of the signature or official character of the person who issued or certified it.

[31] New for discussion: see ¶¶[56] to [59].
[32] New for discussion: see ¶¶[60] to [61].
[33] New and recommended: see ¶¶[77] to [82].

(2) Nothing in this section precludes the taking of judicial notice pursuant to the Evidence Act or any other enactment.

Commencement and Transitional

20. (Proclamation section)[34]

[34] See ¶¶[99] to [103] for discussion of confidentiality provisions and ¶¶[117] to [124] for discussion of possible provisions permitting recognition and enforcement to be sought by way of defence, set-off, and counterclaim.

SCHEDULE A

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

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

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

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

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are 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(l)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

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

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

Article VIII

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

2. This Convention shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the

necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

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

(a) With respect to those articles in this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

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

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

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

Article XV

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

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

SCHEDULE B

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

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

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

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application[1]

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

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

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

(3) An arbitration is international if:

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

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

(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.

WORKING GROUP COMMENT #1*: Ontario does not allow parties to declare that the subject matter of their dispute relates to international commercial arbitration in order to trigger the application of the Act. Ontario elected to depart from Article 1(3)(c) of the UNCITRAL Model Law out of concern that parties would be able to force an arbitration to proceed under an international statute simply by agreement. This*

[1] Article headings are for reference purposes only and are not to be used for purposes of interpretation.
[2] The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions:

change was made before revisions to Ontario's domestic arbitration statute. The Working Group members were satisfied that an anti-avoidance clause is less important in jurisdictions with a modern domestic arbitration statute.

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

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

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

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

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

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

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

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

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

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

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

Article 2 A. International origin and general principles

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

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

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

WORKING GROUP COMMENT #2: *The effectiveness of the Model Law is reduced when it is not applied consistently in various jurisdictions. Therefore, article 2A was introduced in the 2006 Model Law Amendments to promote a uniform understanding and application of the Model Law. The article endorses*

*interpreting the Model Law by reference to internationally accepted principles. This is a new article and it does not replace or correspond to any provision of the 1985 Model Law. UNCITRAL drafted the provision based on the wording found in the 1996 UNCITRAL Model Law on Electronic Commerce and the 1980 United Nations Convention on Contracts for the International Sale of Goods.*i

Article 2A(1) creates a mandate for courts and arbitral tribunals (to the extent that they are called upon to interpret legislation) in Canada to have "regard" to law from other Canadian jurisdictions and other countries for at least persuasive effect (if not more).

In general, the Working Group favoured the notion that international commercial arbitration statutes should be interpreted with reference to their international backdrop. Having Canadian courts interpret such statutes uniformly will help promote Canada's image as an arbitration-friendly jurisdiction. The Working Group did, however, raise concerns over the language used in Article 2A. What does the phrase "regard is to be had" require of the interpreter?

The Working Group sought input from the Advisory Board by way of questionnaire. In general, members of the Advisory Board viewed the phrase "regard is to be had" as imposing an obligation on courts to consider international precedent and the need for harmonization, without being bound to apply international precedent or strictly constrained by domestic law.

The Working Group was satisfied that the language of the 2006 Model Law Amendments should not be altered in this respect and recommended against any change.

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

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

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

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

WORKING GROUP COMMENT #3: *See commentary in Discussion Paper at ¶¶[42] to [55].*

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9. Arbitration agreement and interim measures by court

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

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

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

(2) Failing such determination, the number of arbitrators shall be three.

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

WORKING GROUP COMMENT #4: *See commentary in Discussion Paper at ¶¶[83] to [91] concerning possible changes to this section.*

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

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

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

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

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

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

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

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

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the

agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

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

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

Article 13. Challenge procedure

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

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

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

Article 14. Failure or impossibility to act

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

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

Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in

any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

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

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

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

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

[*Additional 2006 Model Law Amendments Continued on Next Page*]

CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

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

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

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

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

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

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

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

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

WORKING GROUP COMMENT #5*: Under the 1985 UNCITRAL Model Law, arbitrators had a broad power to grant any "interim measures of protection" so long as they were "necessary in respect to the subject matter of the dispute." Protection and necessity were the only required elements. The 2006 Model Law Amendments further develop those requirements. New Articles 17(2)(a) through (d) now provide an apparently exhaustive list of actions that an interim measure may require of an arbitrating party.*

Under new Article 17(2) an "interim measure" can be "in the form of an award or in another form". Article 17H ("Recognition and enforcement") declares that an interim award "shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued". In other words, under Article 17H an "interim measure" can be enforced regardless of its form. To the extent the arbitral procedure involves a scrutiny process over awards (for example, ICC arbitrations), that scrutiny process could be avoided in respect of interim measures that do not take the form of an award. The Working Group considers it desirable that interim measures be capable of being made without triggering the delay of a scrutiny process, while noting that in some instances it may be preferable for the interim measure to be issued in the form of an award.

The Advisory Board was asked for its views on whether permitting interim measures to be enforced even if they are not in the form of an award (as contemplated by Article 17(2) and Article 17H(1)) is a welcome expansion to the traditional limits under the New York Convention regarding the types of instruments that can be enforced. While most Advisory Board members were either supportive of or neutral towards this change, 2 of the 14 respondents did not favour this expansion on the basis that these provisions might create controversy and may not advance the cause of finality.

The Working Group notes that the power under Article 17(2)(a) to "maintain or restore" means that an arbitrator can not only restrain but can also "turn back the clock."

With respect to Article 17(2)(b), the Core Group members questioned the reference to avoiding "current or imminent harm or prejudice to the arbitral process itself." To date, arbitral parties have traditionally relied on the courts to uphold the integrity of the arbitral process. Article 17(2)(b) seems to give arbitrators extended powers to do the same thing. Might this, for example, give jurisdiction to over-ride the parties' choice of counsel if the choice might prejudice the arbitral process?

One thought was that Article 17(2)(b) might be intended to preserve the status quo *in respect of matters that are not* inter partes *(for example, preventing an entity from calling a guarantee under a performance guarantee).*

The Core Group sought feedback from the Advisory Board regarding its views on Article 17(2)(b). Despite the issues identified by the Core Group, the Advisory Board strongly supported Article 17(2)(b) and extending the powers of arbitrators to preserve the integrity of the arbitral process. This article was seen as a straightforward amendment which reinforces the recognition of the arbitral process as an autonomous dispute resolution mechanism which is capable of operating independently from the courts.

The Core Group members agreed that Articles 17(2)(c) and 17(2)(d) did not reflect new concepts and were appropriate. The Working Group has no concerns regarding Articles 17(2)(c) and 17(2)(d).

Article 17 A. Conditions for granting interim measures

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

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

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

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

Section 2. Preliminary orders

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

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

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

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

WORKING GROUP COMMENT #6: *See commentary in Discussion Paper at ¶¶[35] to [41].*

Article 17 C. Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

WORKING GROUP COMMENT #7: *See commentary in Discussion Paper at ¶¶[35] to [41].*

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17 D. Modification, suspension, termination

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

Article 17 E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

WORKING GROUP COMMENT #8: *Unlike Article 17(2)(c), this provision is focused on security for the interim measure itself and not the ultimate award. The Core Group and most members of the Advisory Board view this as a common-sense measure and have no concerns in respect of it. However, one respondent considered that Article 17E(1) and Article 17E(2) did not fit well together and that subsection*

(2) would be sufficient on its own. Another respondent questioned whether Article 17E(2) would be necessary if the regime permitting ex parte *orders is not adopted in Canada.*

Article 17 F. Disclosure

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

WORKING GROUP COMMENT #9: *The Working Group regards this measure as one that flows naturally from the jurisprudence and has no concerns in respect of it. Most members of the Advisory Board also accepted this provision as is. Certain modifications were proposed if the provisions permitting* ex parte *interim measures are not adopted.*

Article 17 G. Costs and damages

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

WORKING GROUP COMMENT #10: *The Working Group has no concerns in respect of this measure. Most members of the Advisory Board also supported this provision, apart from those who opposed the adoption of* ex parte *interim measures and therefore proposed some modification to the wording of this section for that reason. One respondent suggested that the new model statute should allow greater room for discretion as there may be numerous reasons as to why an order should not have been made. The meaning of the phrase "should not have been granted" was the subject of some discussion. The Working Group understands that that phrase does not refer to the erroneous granting of an interim measure, but rather invites a retrospective re-consideration of the merits of the request for an interim measure in the light of additional evidence and findings of the tribunal.*

Section 4. Recognition and enforcement of interim measures

Article 17 H. Recognition and enforcement

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

WORKING GROUP COMMENT #11*: The Working Group regards Article 17H(1) as mirroring for interim awards the grounds for recognition and enforcement of awards. The Working Group has no concerns with this measure. The enforcement of interim measures as awards has already been authorized by Ontario and British Columbia through their existing legislation.*

Section 9 of Ontario's International Commercial Arbitration Act,[3] *provides that "[a]n order of the arbitral tribunal under article 17 of the Model Law for an interim measure of protection and the provision of security in connection with it is subject to the provisions of the Model Law as if it were an award." A similar result may arise in British Columbia in view of the fact that subsection 2(1) of British Columbia's* International Commercial Arbitration Act[4] *defines "arbitral award" to include "an interim arbitral award, including an interim award made for the preservation of property."*

Members of the Advisory Board generally supported the inclusion of Article 17H.

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

***WORKING GROUP COMMENT #12**: The Core Group members did not have any concerns regarding Article 17H(2) and viewed it as a common sense measure.*

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

***WORKING GROUP COMMENT #13**: The Core Group members queried whether Article 17H(3) was simply declaratory of the common law confirming the courts' ability to require the posting of security in respect of interim measures. The answer may depend on how the Model Law is read by the court giving recognition or enforcement. Those who seek to construe the Model Law as a complete code in this arena have argued that the superior courts possess no inherent jurisdiction in Model Law matters.*

Most members of the Advisory Board agreed that new Article 17H(3) is simply declaratory of the inherent jurisdiction that the superior courts would have to order security in any event. One respondent thought the court's power should be clarified while another wanted to avoid referring to domestic courts in international arbitration matters.

One respondent also noted that Article 17H(3) provides cautionary restraint on a successful applicant for interim relief from going outside the arbitration process to advertise its success.

[3] *Supra*, note 2.
[4] *Supra*, note 1.

Article 17I. Grounds for refusing recognition or enforcement[5]

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

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

(i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

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

WORKING GROUP COMMENT #14*: The Working Group considered the power conferred by new Article 17I(b)(i) desirable. Members of the Advisory Board were somewhat more divided. 5 respondents indicated that they opposed the section or would require some refinement. One respondent speculated that courts would pay little attention to this provision. Another opposed the inclusion of Article 17H and therefore found Article 17I to be unnecessary. Another respondent agreed with the concept behind Article 17I but found the provision to be very awkward and recommended that the Working Group revisit the language.*

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

Section 5. Court-ordered interim measures

Article 17J. Court-ordered interim measures

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

***WORKING GROUP COMMENT #15**: This section was added to clarify that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that a party to such an arbitration agreement is free to approach the court with a request to order interim measures. Court-ordered interim measures are enforceable and provide parties with another protective tool to preserve the status quo until the tribunal is convened and able to issue an interim measure.*

The Core Group members had no concerns in respect of this provision, noting that this Article seems to clarify Article 9 of the existing Model Law ("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"). Article 17J's reference to "the specific features of international arbitration" seemed reminiscent of new Article 2A(2)'s reference to "the general principles on which this Law is based".

Half of the Advisory Board respondents did not favour the inclusion of Article 17J or would require some refinements. One respondent expressed a desire to keep the courts out of the arbitral process. Others found the provision to be superfluous given the courts' inherent jurisdiction to issue such measures.

Members of the Advisory Board were asked for their views on how "consideration of the specific features of international arbitration" might affect a court's exercise of its powers to issue interim measures under Article 17J. Most expressed concern about the uncertain scope of this requirement. Some hoped the language would encourage courts to:

- *(a) defer to the tribunal where possible;*
- *(b) proceed on the basis that the parties have agreed to rules which are the source of an interim measure;*
- *(c) limit their role to supporting the arbitral process;*
- *(d) consider the enforcement issue in a less parochial manner than de novo applications brought before the court; and*
- *(e) consider the interests of the users of the international arbitration system.*

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. Equal treatment of parties

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

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20. Place of arbitration

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

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

Article 21. Commencement of arbitral proceedings

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

Article 22. Language

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

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

Article 23. Statements of claim and defence

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

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

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

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

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

Article 25. Default of a party

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

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

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

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

Article 26. Expert appointed by arbitral tribunal

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

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

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

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

Article 27. Court assistance in taking evidence

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

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29. Decision-making by panel of arbitrators

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

Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

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

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

Article 32. Termination of proceedings

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

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

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

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

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

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33. Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.[6]

(Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)

Article 36. Grounds for refusing recognition or enforcement

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

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

[6] The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

(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 2

COMPARISON OF LANGUAGE OF EXISTING AND PROPOSED NEW UNIFORM *INTERNATIONAL COMMERCIAL ARBITRATION ACT*

Existing Uniform *International Commercial Arbitration Act*	Proposed New Uniform *International Commercial Arbitration Act*
	PART 1 **INTERPRETATION**
Interpretation 1. (1) In this Act, "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 A; "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 B. (2) Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the Convention and the International Law, as the case may be.	***Definitions*** 1. (1) In this Act: (a) "Commercial arbitration" means an arbitration arising out of a commercial relationship. (b) "Commercial relationship" means any legal relationship of a commercial nature, whether contractual or not, and includes, but is not limited to, a relationship arising out of the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail, or road. (c) "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 A; (d) "Model Law" means the Model Law On International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on June 21, 1985 as amended by the United Nations Commission on International Trade Law on 7 July 2006 as set out in Schedule B.

Existing Uniform *International Commercial Arbitration Act*	Proposed New Uniform *International Commercial Arbitration Act*
	(2) Except as otherwise provided in this Act: (a) words and expressions used in Part 2 of this Act have the same meaning as the corresponding words and expressions in the Convention; and (b) words and expressions used in Part 3 of this Act have the same meaning as the corresponding words and expressions used in the Model Law. (3) In the interpretation and application of this Act, regard is to be had to the need to promote uniformity within Canada in the application of similar laws relating to international commercial arbitration.
PART I – FOREIGN ARBITRAL AWARDS	**PART 2** **THE CONVENTION**
Application of convention 2. (1) Subject to this Act, the Convention applies in *[enacting jurisdiction]*. (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 (a) the recognition and enforcement of arbitral awards made in another Contracting State, whether the award is made before or after the State becomes a Contracting State; and (b) differences arising out of commercial legal relationships, whether contractual or not. [**NOTE:** *Jurisdictions not wishing to base Part I on a reciprocal basis should delete paragraph (a). Jurisdictions not wishing to restrict the application of Part I to commercial transactions should delete paragraph (b).*]	***Application of Convention*** 2. (1) Subject to this Act, the Convention applies in [*enacting jurisdiction*]. (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 legal relationships that are commercial relationships. (3) For the purposes of article I(1) of the Convention, arbitral awards made in Canada in arbitrations that are considered to be international in the jurisdiction in which they are made shall not be considered as domestic awards. (4) The Convention applies to arbitral awards made in commercial arbitrations outside Canada even if the award is not considered international. (5) For the purposes of article I(1) of the Convention, arbitral awards made in Canada in arbitrations that are not considered to be international in the jurisdiction in which they are made shall be considered as domestic awards. (6) For the purpose of article I(3) of the Convention, it is declared that [*enacting jurisdiction*] will apply the Convention only to the recognition

Existing Uniform *International Commercial Arbitration Act*	Proposed New Uniform *International Commercial Arbitration Act*
	and enforcement of awards made in the territory of Contracting States to the Convention. *[**NOTE**: Enacting jurisdictions should delete subsection (6) if the reciprocity reservation under the Convention is not to be applicable]*
Application to court 3. For the purpose of seeking recognition of an arbitral award pursuant to the Convention, application shall be made to the (*name of the court*) Court.	***Designation of court*** 3. For the purpose of seeking recognition and enforcement of an arbitral award pursuant to the Convention, application shall be made to the [*name of the court of competent jurisdiction in the enacting jurisdiction*].
	Recognition of arbitration agreements 4. For the purposes of article II(2) of the Convention, "agreement in writing" includes an arbitration agreement satisfying the requirements of article 7 of the Model Law or an agreement that satisfies the requirements of [*the electronic commerce statute of the enacting jurisdiction, or other statute concerning electronic functional equivalents of writing*].
PART II – INTERNATIONAL COMMERCIAL ARBITRATION	**PART 3 THE MODEL LAW**
Application of international law 4. (1) Subject to this Act, the International Law applies in *(enacting jurisdiction)*. (2) The International Law applies to international commercial arbitration agreements and awards, whether made before or after the coming into force of this Part.	***Application of Model Law*** 5. (1) Subject to this Act, the Model Law applies in [*enacting jurisdiction*]. (2) The Model Law applies to international commercial arbitration agreements and awards made in international commercial arbitrations, whether made before or after the coming into force of this Part.
Reciprocity 5. With respect to the recognition and enforcement of awards arising from an international commercial arbitration, the International Law applies only to awards made in	***Meaning of certain terms used in the Model Law*** 6. (1) In article 1(1) of the Model Law, an "agreement in force between this State and any other State or States" means an agreement between Canada and any other country or countries that is in force in [*enacting jurisdiction*].

Existing Uniform *International Commercial Arbitration Act*	Proposed New Uniform *International Commercial Arbitration Act*
(a) a Contracting State within the meaning of the Convention; (b) those territorial units outside Canada that are prescribed by regulation; and (c) those provinces and territories of Canada that are prescribed by regulation. [**NOTE:** *Jurisdictions not wishing to base Part II on a reciprocal basis should delete section 5*.]	(2) In articles 34(2)(b)(i) and 36(1)(b)(i) of the Model Law, "law of this State" means the laws of [*enacting jurisdiction*] and any laws of Canada that are in force in [*enacting jurisdiction*]. (3) In article 35(2) of the Model Law, "this State" means Canada. (4) In articles 1(2), 1(5), 27, 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, "this State" means [*enacting jurisdiction*]. (5) In article 1(3) of the Model Law, "different States" means different countries and "the State" means the country.
	Interpretation of Model Law 7. (1) Article 2A of the Model Law is not to be interpreted as adding to the substantive rights and obligations of the parties to a dispute under applicable law, but shall be interpreted as requiring that when interpreting the Model Law regard is to be had to the need to promote observance of good faith in the conduct of an arbitration. (2) In applying article 2A(1) of the Model Law, recourse may be had to (a) the Report of the United Nations Commission on International Trade Law on the work of its 18th session (June 3-21, 1985); (b) the Report of the United Nations Commission on International Trade Law on the work of its 39th session (June 19-July 7, 2006); and (c) the International Commercial Arbitration Commentary on Draft Text of a Model Law on International Commercial Arbitration.
	Arbitration agreements 8. For the purposes of article 7 of the Model Law, an arbitration agreement will also be considered to be in writing if it satisfies the requirements of [*the electronic commerce statute of the enacting jurisdiction, or other statute concerning electronic commerce functional equivalents of writing*].

Existing Uniform *International Commercial Arbitration Act*	Proposed New Uniform *International Commercial Arbitration Act*
Conciliation and other proceedings 6. 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.	***Conciliation and other proceedings*** 9. 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.
	Court appointment of arbitrator 10. If the court is to appoint a sole or presiding arbitrator pursuant to the Model Law, then unless the parties have previously agreed to the appointment of a sole or third arbitrator who is of the same nationality as any of the parties, in appointing an arbitrator the court shall consider whether the prospective arbitrator's nationality, residence, and other relationships with the countries of which the parties or the other arbitrators are nationals might give rise to justifiable concerns about the arbitrator's independence or impartiality.
Removal of arbitrator 7. (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.	***Removal of arbitrator*** 11. (1) Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the Model Law, any hearing held before the replacement or removal shall be repeated. (2) With respect to article 15 of the Model Law, the parties may remove an arbitrator at any time before the final award, regardless of how the arbitrator was appointed.
	Designation of Court 12. (1) For the purposes of article 6 of the Model Law, the functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3), and 34(2) shall be performed by [*court of competent jurisdiction in enacting jurisdiction*].

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	(2) For the purposes of the Model Law, a reference to "court" or "competent court", where in the context it means a court of [*enacting jurisdiction*], means the [*court of competent jurisdiction in enacting jurisdiction*] except where the context otherwise requires.
Rules applicable to substance of dispute 8. 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.	***Rules applicable to substance of dispute*** 13. Notwithstanding article 28(2) of the Model Law, if the parties fail to make a designation pursuant to article 28(1) of the Model Law, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances respecting the dispute.
Consolidation of proceedings 9. (1) The (*name of the court*) Court, upon application of the parties to two 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; (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 paragraph (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 two or more arbitration proceedings from agreeing to consolidate those arbitration proceedings and taking such steps as are necessary to effect that consolidation.	***Consolidation of proceedings*** 14. (1) If the parties to 2 or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, then, unless the parties have agreed to a different procedure, the court may, on application by one party with the consent of all the other parties to those arbitration agreements, order the arbitrations to be consolidated on terms the court considers just and necessary. (2) If the court orders arbitration proceedings to be consolidated pursuant to subsection (1) and all the parties to the consolidated arbitration proceedings agree as to the choice of the arbitral tribunal for those arbitration proceedings, then that arbitral tribunal shall be appointed by the court. (3) Unless the parties have agreed to another method of appointment for consolidated proceedings, if the court orders arbitration proceedings to be consolidated pursuant to subsection (1) and all the parties cannot agree to the choice of the arbitral tribunal for those arbitration proceedings, then the court may appoint the arbitral tribunal for those arbitration proceedings. (4) Nothing in this section shall be construed as preventing the parties to two or more arbitration

Existing Uniform *International Commercial Arbitration Act*	Proposed New Uniform *International Commercial Arbitration Act*
	proceedings from agreeing to consolidate those arbitration proceedings and taking such steps as are necessary to effect that consolidation.
Court 10. (1) The functions referred to in article 6 of the International Law shall be performed by the *(name of the court)* Court. (2) For the purposes of the International Law, a reference to "court" or "competent court", where in the context it means a court in *(enacting jurisdiction)*, means the *(name of court)* Court except where the context otherwise requires.	See section 12, *supra*.
PART III – GENERAL	**PART 4** **GENERAL**
Stay of proceedings 11. Where, pursuant to article 11(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.	***Stay of proceedings*** 15. Where, pursuant to article 11(3) of the Convention or article 8 of the Model Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.
	Limitation periods 16. (1) An application (a) to obtain recognition and enforcement of an award under Articles III, IV, and V of the Convention; or (b) to obtain recognition and enforcement of an award under Articles 35 and 36 of the Model Law may not be made after [*number*] years have elapsed from the earlier of: (i) if no proceedings have been commenced at the place of arbitration to set aside the award, the expiry of the time limited for the commencement of such proceedings; and

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	(ii) if proceedings have been commenced to set aside the award at the place of arbitration within the time limited for doing so, the date on which such proceedings have been concluded. (2) If the limitation period governing the commencement of arbitration proceedings is to be determined by the law of [*enacting jurisdiction*] then, unless the parties have otherwise agreed, the limitation period is the same as would be applicable to court proceedings and the commencement of the arbitration will have the same effect as the commencement of court proceedings.
	Enforcement of Canadian court judgments 17. A judgment of a court of competent jurisdiction in Canada recognizing and enforcing an award under articles III, IV, and V of the Convention or articles 35 and 36 of the Model Law shall be enforced in [*enforcing jurisdiction*] in the same manner as other judgments of that court.
Crown bound 12. (1) This Act binds the Crown. (2) An award recognized pursuant to this Act is enforceable against the Crown in the same manner and to the same extent as a judgment is enforceable against the Crown. [**NOTE:** *Jurisdictions should consider whether subsection (2) is required in their jurisdiction.*]	***Crown bound*** 18. (1) This Act binds the Crown. (2) An award recognized pursuant to this Act is enforceable against the Crown in the same manner and to the same extent as a judgment is enforceable against the Crown. [**NOTE***: Enacting jurisdictions should consider whether subsection (2) is required in their jurisdiction.*]
Proof of contracting states 13. (1) In any proceeding, a certificate issued by or under the authority of the Secretary of State for External Affairs of Canada containing a statement that a foreign state is a Contracting State is, in the absence of evidence to the contrary, proof of the truth of the statement without proof of the signature or official character of the person who issued or certified it.	***Proof of contracting states*** 19. (1) In any proceeding, a certificate issued by or under the authority of the Secretary of State for External Affairs of Canada containing a statement that a foreign state is a Contracting State is, in the absence of evidence to the contrary, proof of the truth of the statement without proof of the signature or official character of the person who issued or certified it.

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(2) Nothing in this section precludes the taking of judicial notice pursuant to the Evidence Act or any other enactment. [**NOTE:** *Jurisdictions not wishing to base the Act on a reciprocal basis should delete section 13.*]	(2) Nothing in this section precludes the taking of judicial notice pursuant to the Evidence Act or any other enactment.
	Commencement and transitional 20. (Proclamation section)
Aids in interpretation 14. (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 18th session (June 3-21, 1985); (b) the International Commercial Arbitration Commentary on Draft Text of a Model Law on International Commercial Arbitration; as published in the Gazette.	See section 7, *supra*.
Regulations 15. The *(Regulation making authority)* may (a) cause to be published in the Gazette the names of Contracting States to the Convention; (b) by regulation (i) prescribe the territorial units and the provinces and territories of Canada for the purpose of section 5; (ii) prescribe rules of court; (iii) *(other further authority).* [**NOTE:** *Jurisdictions not wishing to base the Act on a reciprocal basis should delete paragraph (a) and subparagraph (b)(i).*]	