UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

INTERNATIONAL COMMERCIAL ARBITRATION

REPORT OF THE WORKING GROUP

Whitehorse, Yukon

August 18, 2012

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The Uniform ICAA – A Solid Foundation for International Commercial Arbitration in Canada

[1] In 1986 the Conference developed the Uniform *International Commercial Arbitration Act* (**Uniform ICAA**). The Uniform ICAA subsequently was implemented, with relatively minor amendments in some cases, through provincial legislation in all provinces and territories other than British Columbia and Québec. While British Columbia was an active participant in the work of the Conference, it enacted its own forms of *International Commercial Arbitration Act* and *Foreign Arbitral Awards Act* before the Conference had completed its work. The BC statute was similar in substance to the Uniform ICAA, but different in form. In Québec, many of the concepts set out in the Uniform ICAA were incorporated into the *Civil Code* and the *Code of Civil Procedure*.

[2] The Uniform ICAA dealt with two principal subjects, namely: the adoption of the UNCITRAL Model Law on Arbitration (**Model Law**)[1] and the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**).[2] The Model Law reflects an international consensus as to the appropriate text of national laws regulating international commercial arbitration. The New York Convention is an important instrument to facilitate international trade by ensuring that arbitration agreements in international commercial agreements are respected by national courts and that foreign arbitral awards are consistently recognized and enforced by national courts.

[3] From the time it first implemented the Model Law and the New York Convention Canada has enjoyed an enviable reputation as a leading member of the international arbitration community. Canadian practitioners and the judiciary have built this reputation

on the legislative foundation that was provided almost three decades ago by the Conference, through the Uniform ICAA.

Why International Commercial Arbitration Matters to Canadians

[4] Arbitration is the preferred method to resolve international commercial disputes for several reasons. First, the parties to international business transactions wish to avoid having to litigate the merits of their disputes before foreign courts, particularly the "home" courts of their counterparties. They seek a neutral forum and an assurance that the national courts of their counterparties will not interfere. Second, they wish to ensure that if they are the successful party they will not have to re-litigate the merits of the dispute in their counterparties' home courts. They seek summary recognition and enforcement of the award wherever their counterparties may have assets. Third, they wish the dispute resolution process to be sufficiently flexible that it can be sensitive to and accommodate potentially differing legal and cultural backgrounds. There are also other benefits or potential benefits that are common to both international and non-international arbitrations – for example, privacy, finality, speed and the ability to choose a decision-maker with appropriate skill and experience.

[5] Since the widespread adoption of the Uniform ICAA Canadians have been able to assure the international business and legal communities that Canada is an "arbitration-friendly state." It has become common practice for Canada to be described in international commentaries as a "Model Law State" and a "New York Convention State." These descriptions, which can be made despite the realities that Canada is a federal state and that legislative power is divided, convey the message that "Canada" has laws that reflect international norms and that its courts will respect the integrity of the arbitral process and recognize and enforce international arbitration awards.

[6] This message has supported the growth of Canada's international trade. It has also resulted in the growth of the community of arbitration practitioners within Canada to the point where many of the world's most respected international arbitrators, academics and

arbitration counsel are Canadians. Increasingly, international arbitrations are "seated" in Canada. A number of home-grown Canadian arbitral institutions have emerged to consolidate and promote our arbitration expertise and resources,[3] and to try to exploit the business opportunity of attracting more international arbitrations, more international arbitration conferences and more involvement by Canadians in international dispute resolution.

The Importance of Modernizing and Re-Harmonizing Arbitration Legislation

[7] There have been significant changes in international arbitration laws and practices since the Canadian legislative framework for international commercial arbitration was established by the Conference through the Uniform ICAA. Canadian courts have interpreted and applied the text of the Uniform ICAA and its variants in British Columbia and Québec. Some anomalies in the implementing legislation from province to province have been identified, and such anomalies may be perceived to be inconsistent with the representation that "Canada" is a Model Law/New York Convention state. Foreign courts have applied and interpreted statutes based wholly or partly on the Model Law and the New York Convention. The Model Law was amended by UNCITRAL in 2006. Other countries have modernized their laws. There is fierce competition among nations now to attract more arbitration business.[4]

A Private Sector Reform Initiative

[8] In 2010 an *ad hoc* group of representatives of Canadian arbitral institutions (**Task Force**) concluded that it was vital for Canada and its provinces to review and update their laws relating to both international and non-international commercial arbitration. In early 2011 the Task Force asked the Conference to approve a two-phase project. The first phase would entail the modernization of the Uniform ICAA and promoting its uniform implementation throughout Canada (acknowledging that differences in form would be required in Québec). The second phase, if endorsed by the Conference, would involve a similar review of Canadian legislation concerning non-international commercial

arbitration. The Conference endorsed the first phase as a project to be undertaken by the Conference.

The Project Team – Core Group and Advisory Board

[9] Gerald W. Ghikas, Q.C., FCI Arb., C. Arb., who had chaired the industry Task Force, was appointed to Chair the Project team. A small but representative "Core Group" was appointed to assume primary responsibility for steering the Project and formulating these recommendations. An "Advisory Board" was assembled comprised of experienced and creative practitioners, academics and institutional leaders from across Canada.

[10] Schedule "A" to this Report lists the members of the Core Group and the Advisory Board and their affiliations.

Steps in the Project

[11] The key steps in the first phase of the Project, which has come to be known as the "International Arbitration Law" or "IAL" Project, are as follows:

- Identify the elements of the 2006 Model Law amendments that should become a part of Canadian law.

- Identify differences in the existing legislation implementing the Model Law (generally, the *International Commercial Arbitration Acts* of the common law provinces, and the *Civil Code* and the *Code of Civil Procedure of Québec*) and consider opportunities for further harmonization or best practices.

- Identify potentially desirable features of international commercial arbitration laws of other states.

- Formulate and present policy recommendations to the Conference and seek its endorsement to proceed with further consultation and to draft recommended amendments to the Uniform ICAA. (August 2012)

- Proceed with further consultation and draft recommended amendments for approval by the Conference. (August 2013)

[12] The Core Group has met by telephone conference approximately every two weeks since mid-January 2012. Each meeting lasted between one and two hours. Minutes of the meetings were prepared, circulated for review and approved. Angus M. Gunn Jr. served as Administrative Secretary.

[13] The Core Group first formulated a number of high level policy recommendations to guide future work. The Core Group then considered the 2006 amendments to the UNCITRAL Model Law (**2006 Amendments**). While the enactment of the Uniform ICAA implemented the original Model Law, implementation of the 2006 Amendments would require new legislation. After discussing each section of the 2006 Amendments and identifying potential issues arising from the amendments, the Core Group prepared an electronic survey and solicited responses from the members of the Advisory Board. The survey text and a summary of survey responses will likely be made available on the ULCC website, but in the meantime can be obtained from Gerald Ghikas (gghikas@blg.com) or Angus Gunn (agunn@blg.com).

[14] The Core Group then considered issues arising from differences in the final text of legislation implementing the Uniform ICAA and the variants noted above. A number of potential best practices and anomalies were identified. These discussions were informed by a preliminary consideration of relevant jurisprudence. The Core Group then conducted a preliminary review of (a) recent legislation from other states and (b) recent amendments to the rules of procedure of several international arbitration institutions.

Policy Recommendations of the Core Group

[15] The Core Group's preliminary policy recommendations to the Conference are as follows:

Policy Recommendation #1 – New Uniform Legislation

The ULCC should prepare a new form of Uniform International Commercial Arbitration Act (**New Uniform ICAA**).

Policy Recommendation #2 – Continue to Build on the Model Law and New York Convention

The New Uniform ICAA should continue to give effect to Canada's ratification of the New York Convention and should be based on the Model Law and the 2006 Amendments, refined as necessary to reflect Canadian law, practice or public policy or to further the objective of keeping Canada at the forefront in the field of international commercial arbitration law.

Policy Recommendation #3 – Follow the UNCITRAL Text Unless Departures are Necessary

As the Model Law and 2006 Amendments text reflects an international consensus and has been adopted verbatim by other jurisdictions, departures from that text should be made only where necessary.

Policy Recommendation #4 – Strive to Reflect a National Consensus

The New Uniform ICAA should reflect a national consensus of relevant stakeholders as to the appropriate legislative regime for international commercial arbitration in Canada, eliminating differences in substance.

Policy Recommendation #5 – Promote Uniformity

The ULCC should strongly endorse the uniform implementation of the New Uniform ICAA by federal, provincial and territorial governments.

The New Uniform ICAA should wherever possible be implemented in the same form, recognizing that in Québec an alternative form of implementation through the *Civil Code* and the *Code of Civil Procedure* may be appropriate

Policy Recommendation #6 – Deal Comprehensively with International Commercial Arbitration Issues

The New Uniform ICAA should be comprehensive so as to reduce or eliminate the circumstances in which other non-uniform legislation may create differences in the international arbitration regimes among Canadian jurisdictions, and thereby potentially lead parties to prefer one jurisdiction in Canada over another when selecting the seat for an international commercial arbitration or the forum in which to enforce international arbitration awards.

Policy Recommendation #7 – Address Reciprocal Enforcement Issues

The New Uniform ICAA should facilitate the summary recognition and enforcement of foreign arbitral awards and international arbitration awards made in Canada that have already been recognized and enforced by a court of competent jurisdiction within Canada in a manner consistent with the *Uniform Enforcement of Canadian Judgments and Decrees Act.*

Policy Recommendation #8 –Harmonization of Approaches to Limitation Periods

The Working Group considers that it is desirable to harmonize limitation periods for commencing international arbitration proceedings and for commencing court proceedings to recognize or enforce international arbitration awards, and recommends that consideration be given to whether existing limitation legislation provides sufficiently consistent rules.

Policy Recommendation #9 - Consider Facilitating Consolidation of Arbitrations

Consideration should be given to facilitating the consolidation of arbitrations without requiring consent of all parties in circumstances where (a) all of the claims in the arbitrations are made under the same arbitration agreement, or (b) the claims are made under more than one arbitration agreement but they are between the same parties or arise out of the same legal relationship, and the arbitration agreements are compatible.

Policy Recommendation #10 – Continue Consultation and Research

Consultation should continue to identify and build consensus and research should continue to identify additional anomalies or best practices that should be addressed through the New Uniform ICAA.

PROPOSED RESOLUTION:

That the Working Group be asked to return to the Section at its 2013 meeting with a draft New Uniform *International Commercial Arbitration Act* to reflect the policy recommendations as adopted by the Section and to deal with supplementary policy issues as contemplated by the Working Group's report.

END NOTES:

[1] The text of the original Model Law can be found at www.uncitral.org.
[2] The text of the New York Convention can be found at www.uncitral.org.
[3] Canadian arbitration institutions include the Arbitration Committee of the Canadian Chamber of Commerce (which serves as the National Committee for Canada of the ICC International Court of Arbitration); the ADR Institute of Canada, Inc (ADRIC); the Toronto Commercial Arbitration Society (TCAS); the Western Canada Commercial Arbitration Society (WCCAS); the Young Canadian Arbitration Practitioners Organization (YCAP); the British Columbia International Commercial Arbitration Centre (BCICAC) and other provincial and regional organizations.
[4] In addition to traditional centres such as London, New York, Paris, Stockholm, Geneva and Hong Kong, arbitration centres have in recent years been established in Singapore, Malaysia, Indonesia, Chile, Australia, Dubai and Mauritius, among other states, with a view to attracting international arbitration business. Typically the establishment of these centres is accompanied and supported by legislative reform, often through adoption of the Model Law.

SCHEDULE "A"

CORE GROUP MEMBERS

OFFICERS

Chair

Gerald W. Ghikas Q.C., **FCIArb., C. Arb.** is a senior commercial arbitration partner at Borden Ladner Gervais LLP's Vancouver office. He Chairs the firm's International Trade and Arbitration Practice. He is a former Chair of ICC Canada, a former Canadian Delegate to UNCITRAL, a former Director of the ADR Institute of Canada, Inc. and a co-founder of WCCAS.

Administrative Secretary

Angus M. Gunn Jr., FCIArb. is a private practitioner in commercial litigation and arbitration with Borden Ladner Gervais LLP in Vancouver. He is a former director of the ADR Institute of Canada Inc. and is currently associated with the LCIA, ICC Canada National Arbitration Committee, WCCAS and YCAP.

BRITISH COLUMBIA

Darin Thompson serves as legal counsel with the provincial Ministry of Attorney General, Civil Policy and Legislation Office.

Debbie Asirvatham is the newest member of the commercial arbitration group at Borden Ladner Gervais LLP's Vancouver office and her research assessing the adoption of the 2006 UNCITRAL Model Law Amendments globally provided an initial platform for discussions leading to the ULCC IAL Project.

ALBERTA

Clark W. Dalton, Q.C. is currently the Projects Coordinator of Commercial Law Projects for the Uniform Law Conference of Canada. He formerly worked with Alberta Justice as the Director of Legal Research and Analysis.

James E. Redmond, Q.C., FCIArb. formerly senior litigation counsel with Fraser Milner Casgrain and predecessor firms. Now carries on practice as an independent arbitrator and mediator. He has extensive experience in commercial arbitration, as chair, party appointed and sole arbitrator, both international and domestic. Listed in a number of publications, including Lexpert, Best Lawyers, WHO'SWHO Legal, and Guide to the World's Leading Commercial Arbitrators. He is associated with ICDR, ICC Canada National Arbitration Committee, LCIA, ITA and WCCAS.

Peter J. M. Lown, Q.C. is the Director of the Alberta Law Reform Institute and formerly a professor at the University of Alberta's Faculty of Law. He is currently the Chair of the Uniform Law Conference of Canada's International Committee and has been influential in several law reform initiatives.

ONTARIO

Anthony Daimsis is a professor at the University of Ottawa's Faculty of Law and coaches their team for the Willem C. Vis Commercial Arbitration Moot. He formerly acted as counsel with an international law firm based in Austria and is currently co-authoring the forthcoming *International Commercial Arbitration and NAFTA Ch 11 Disputes from a Canadian Perspective*.

John A. M. Judge is a senior litigation partner with Stikeman Elliott LLP. His practice includes many cross-border and international disputes and he was recognized in *The Best Lawyers in Canada* 2012 for Alternative Dispute Resolution and International Arbitration. He is experienced in commercial arbitrations both as counsel and as an arbitrator, and has chaired a number of arbitral proceedings, both ad hoc and through ICC, Paris.

John D. Gregory is General Counsel in the Justice Policy Development Branch, Ministry of the Attorney General (Ontario). He a former president of the Uniform Law Conference of Canada. He was a member of the working groups that produced the Uniform International Commercial Arbitration Act and the Uniform Arbitration Act and led the development of their implementing statutes in Ontario.

QUÉBEC

Jean-François Lord serves as legal counsel with Government of Québec, Ministère des Relations Internationales.

Martin J. Valasek is a partner at Norton Rose Canada LLP with an established practice in international arbitration and corporate and commercial litigation. He has extensive experience in dealing with a number of arbitral institutions and arbitral rules. He is affiliated with ICC Canada National Arbitration Committee, YAF, YIAG and YCAP.

CANADA

Manon Dostie serves as legal counsel with Justice Canada, International Private Law Section. She is a representative of Canada at the ULCC and at UNCITRAL.

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