UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

DOMESTIC ARBITRATION LEGISLATION

PRELIMINARY REPORT OF THE WORKING GROUP

Toronto Ontario
August 2014

ULCC DOMESTIC ARBITRATION LEGISLATION PROJECT
Policy Recommendations and Issues for Consideration

Report of the Working Group

August 2014

Background

[1] This is a preliminary report of the activities and proposed future direction of the ULCC Working Group on Arbitration Legislation. The Working Group invites any comment and direction the Conference may wish to provide at this time concerning its work.

[2] The delegates will recall that the formation of the Working Group was approved by the Conference in 2011 to consider possible revisions to both the *Uniform Arbitration Act* and its companion of similar vintage, *the Uniform International Commercial Arbitration Act*. The Working Group recommended and the Conference agreed that its work should be performed in two phases. Phase 1 concerned international arbitration and culminated in March 2014 with the formal adoption by the ULCC of a new *Uniform International Commercial Arbitration Act* (hereinafter, the "**UICAA**"). The Working Group is now engaged in Phase 2 concerning domestic arbitration legislation.

[3] In 1990, the Conference adopted the *Uniform Arbitration Act* (hereinafter, the "**UAA**" or the "**Act**") to serve as a template for provincial and territorial legislation to govern domestic (*i.e*. non-international) arbitration in Canada. The UAA was a significant success. It has been specifically enacted in six provinces, and British Columbia's legislation is also very consistent, having been built on the same model. The jurisprudence concerning the interpretation and application of the Act is voluminous, as arbitration has grown in popularity as an alternative process to the court system for the resolution of, primarily, commercial disputes.

[4] Domestic arbitration practice has grown not only in volume, but also in sophistication and complexity. It has become a mainstream method of dispute resolution in Canada. The number of parties, counsel and arbitrators involved in the process has increased significantly in the past three decades. The ADR Institute of Canada, Inc. was formed through the merger of several predecessor organizations and through provincial affiliates across Canada administers domestic arbitrations under its National Arbitration Rules. The British Columbia International Commercial Arbitration Centre administers a significant volume of domestic arbitrations, as do several other regional organizations.

Overview of Report

[5] This paper describes in **Section "A"** the basic policy orientation that the Working Group is recommending for its continuing work. It welcomes any comments from the Conference on these recommendations.

[6] **Section "B"** describes some of the detailed policy choices that the Working Group has faced in its work to date. Few if any of these choices are final. While comments are welcome now, the Conference may expect to see them reflected in a draft statute to be discussed at its 2015 meeting.

[7] The Working Group is chaired by Gerald W. Ghikas, Q.C., FCI Arb., C. Arb., who also led the phase 1 international arbitration law project. Given the potentially broader implications of the phase 2 domestic arbitration project, the Working Group has increased its membership to allow for additional subject-matter and jurisdictional expertise. **Schedule "I"** to this Report lists the members of the Working Group.

SECTION A:
Policy Recommendations

Policy Recommendation #1: Uniformity

[8] While acknowledging that Quebec's Civil Law regime may require different approaches to some issues, Uniform domestic arbitration legislation across Canada is desirable.

[9] The ULCC recognized the importance of this principle when it created the existing UAA. As was the case then, changes in arbitration law and practice justify a review and update of legislation, but it would be preferable to implement such updates in a harmonized and consistent manner to the extent possible across the country. Over time, there has been some divergence from the Uniform Act in the domestic arbitration legislation as enacted and it appears desirable to reduce disparity while at the same time benefiting from best practices from all jurisdictions.

[10] In addition, the practical importance of uniformity is evidenced by the following:

- **Parties**: Canadian users expect substantial uniformity of approach, regardless of where within the country their arbitration is seated.
- **Practitioners**: Canadian professionals serve as arbitration counsel and as arbitrators across Canada; it has become a national practice.
- **Principles/Procedures**: To varying degrees in parts of Canada, the arbitral process fails to meet user expectations because lawyers and courts have inappropriately tended to emulate court litigation processes. To preserve the effectiveness of arbitration as an accessible

alternative to court litigation, it is desirable to re-state certain common principles or objectives of arbitration, such as proportionality, flexibility and party autonomy.

Policy Recommendation #2: General Application

[11] In the Working Group's view, the new Uniform Act should not be limited in its application to only "commercial" arbitration. It should be a statute of general application with specific exclusions. This appears to be consistent with the approach taken in most provinces and territories. That being said, it may be appropriate to address some aspects of specific types of arbitrations in separate parts of the new Act.

Policy Recommendation #3: An Alternative Regime

[12] The New Uniform Act should recognize that the choice to arbitrate is a choice to participate in an alternative dispute resolution regime, in substitution for court litigation, that is not intended either to replicate court processes or to merely be a precursor to court proceedings.

[13] Depending on the current user consensus (as will be determined through broader consultation), the New Uniform Act should either adopt the international approach to appeal and review of arbitral awards (*i.e*. give no right of appeal or review for errors of fact or law) or provide that there is no right of review or appeal from awards on questions of law or mixed fact and law *unless* the parties expressly agree to such a right (*i.e.* make the default "no appeal or review").

Policy Recommendation #4: Arbitrability & Jurisdiction

[14] The New Uniform Act should take a liberal approach to the issue of arbitrability and the jurisdiction of arbitrators to fashion appropriate relief. Generally, parties should be able to resolve by arbitration any dispute that they could resolve by agreement.

Policy Recommendation #5: Key Values & Flexibility

[15] The New Uniform Act should strike an appropriate balance between endorsing broad procedural flexibility and protecting key arbitral values, to preserve the flexibility required to adapt the process to the requirements of each case. Matters concerning which national norms might be established include the qualification, disqualification and disclosure obligations of arbitrators, the regime for awarding costs and the limits of arbitrator liability.

Policy Recommendation #6: Limits on Judicial Intervention

[16] The New Uniform Act should give clear guidance to the courts on the nature and extent of arbitral powers and the limits of judicial intervention. This is required to ensure respect by the courts for the distinct procedural flexibility of arbitration.

Policy Recommendation #7: Reflect User Expectations

[17] Recognizing the importance of party autonomy in the arbitral context, the New Uniform Act should both reflect and guide user expectations.

SECTION B:
Selected Issues Arising from the Existing *Uniform Arbitration Act*

[18] The Working Group has, as of the date of writing this Report, considered in detail about one-half of the current Uniform Act. This section highlights some key points of discussion to date.

Section 2 – Application of the Act [See Policy Recommendation #2]

- What kinds of disputes, if any, should be excluded from the Act? Are there disputes concerning which the application of only some parts of the Act should be excluded? Are there some kinds of disputes which need their own "Part" in the Act?

- Should the Act apply to family arbitrations? → Probably, but perhaps with some degree of accommodation to the mandatory rules of the enacting jurisdiction's family law (which is not the subject of uniform legislation on most points). Both BC and Ontario have recently amended their arbitration statutes in this line. An initial conversation with the federal/provincial group of senior family law lawyers indicated some interest in the topic but no decisions have been made about how family arbitration may be dealt with in a general arbitration statute. Consultation on this point will continue.

- Should the Act apply to all arbitrations under other statutes, except as expressly excluded? → Probably. While labour arbitrations are a clear area for exclusion, the current practice is to exclude the application of the *Arbitration Act* in the labour relations statutes themselves. The current Uniform Act (s. 2(2)) applies the Act to any arbitration under any other statute, though any special rules of the other statute prevail in event of conflict. This approach should likely be maintained.

- What should the Act say about its application, if any, to international disputes? Should parties to domestic or international disputes be able to opt into or out of the statute that *prima facie* governs their arbitration? Should any attempt be made to save parties from bad drafting and unintended opting in or out, or is that too paternalistic? Can we/should we prevent a party from opting out of one act without also opting into the other?

- Should the Act clearly state that (except for specific sections like enforcement) it only applies where the place of arbitration is in the enacting jurisdiction? Should we articulate the concept of the "seat of arbitration" generally prescribing the procedural law of the arbitration? Do we need to deal with the parties seating an arbitration in one place but specifying the Act of another place?

- How should transitional matters be approached? Should the new Act apply to any arbitration commenced after the Act comes into force, regardless of when the underlying agreement to

arbitrate was made? → Generally speaking, procedural statutes apply to procedures as soon as they come into force, and the Arbitration Act is procedural, not substantive. There was some inclination in the sub-group to have the new Act apply even to arbitrations in course when the Act comes into force; however, members expressed some hesitation over changing expectations for matters such as appeal rights for an arbitration already begun.

Section 3 – Contracting Out [See Policy Recommendation #5]

- The Act sets out a list of provisions from which the parties cannot derogate by agreement. Is that list appropriate?

Sections 5 & 6 – Court Intervention [See Policy Recommendations #3 and #6]

- Would it be useful to say something about the law applicable to the interpretation of an arbitration agreement?

- Should contracts of adhesion be treated differently regarding the ability to 'access' to the courts?

    - The Working Group has noted that arbitration clauses are being widely used in the US, and to some extent in Canada, to compel consumers to waive rights to participate in class actions about claims governed by the arbitration clause. Is it worth considering some special provision to avoid this? Would there be any benefit to establish a regime for class arbitrations?

    - At the time the current Uniform Act was developed, it was decided to leave consumer protection matters to consumer protection statutes (which are not uniform across the country, except on certain narrow topics). The working group may wish to reconsider this principle, given the extensive use of arbitration clauses just mentioned, which was not commonplace in 1990.

- When we look at the sections dealing with the right to seek interim measures from a court, do we need to deal with (and allow court applications for) interim relief that only a court can order (*e.g*. garnishing orders before judgment – which are ex parte in BC)?

- Do we need a provision somewhere that distinguishes between an award and a procedural order and signals that courts cannot or should not second-guess procedural orders of arbitrators?

- Should there be different levels of permissible intervention depending on whether there is one arbitrator or three?

Section 7 – Stays [See Policy Recommendations #3, #4 and #6]

- It is fundamental to the arbitration process and the concept of party autonomy, by which parties can bind themselves to have their disputes decided by arbitration outside the court system, that the applicable legislation contain measures to compel the parties to honour their commitment to arbitrate. Section 7 seeks to do this by making it mandatory that where a party to an arbitration brings a court action regarding a matter covered by the arbitration agreement the court shall stay the action.

- However, difficulties can arise where a party starts an action which includes some claims that come within the scope of an arbitration agreement and others that do not. The existing Uniform Arbitration Act attempts to deal with this problem in ss. 7(3) and (4) by giving the court power to refuse a stay if it finds that the arbitrable and non-arbitrable matters cannot reasonably be separated. The effect of the court's refusal to grant a stay is to override the agreement of the parties to arbitrate and to require them to litigate matters which they had agreed to arbitrate.

- Based on discussions to date, there is consensus among members of the Working Group that these provisions are of central importance and that the new Uniform Act must strike the right balance.

- Nevertheless, certain key issues remain to be addressed such as:

    - How can the Act prevent abuse by parties seeking to circumvent arbitration by including in litigation either (i) non-signatory parties or (i) claims falling outside the scope of the arbitration agreement, while still respecting the agreement to arbitrate and its limits but without unduly impeding access to courts?

    - In what circumstances, if any, should issues of arbitrability be decided by courts versus arbitrators?

Section 8 – Powers of the Court [See Policy Recommendations #3 and #6]

- Does the current Act provide any mechanism to deal with the possibility that respective parties to an arbitration might make contemporaneous applications for interim measures, one to the court and one to the arbitrator? Should it?

- The current ss. 8(4) and 8(5) of the Act deal with consolidation of arbitrations, but only contemplate court intervention where all parties agree. Given the basic principle of party autonomy, should any consideration be given to including a provision which would, in effect, coerce parties to agree to consolidation of arbitrations by measures such as an imposition of costs for failure to agree?

- Should we include provision for class arbitrations where many parties have subscribed to the same agreement containing an arbitration clause?

- In the context of both stays and consolidation, where the underlying issues include a desire to avoid multiplicity of proceedings and inconsistent results, while still respecting the choice of forum, is there any way in which the courts and arbitrators can more effectively share jurisdiction and coordinate their efforts?

Section 9 – Number of Arbitrators [See Policy Recommendations #5 and #7]

- The default under the current Act where the parties have not agreed on a number is one (1). Should the default be one or three?

- Is there any merit in going with three as a default, if we do away with appeals as of right?

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Section 10 – Appointment of Arbitral Tribunal [See Policy Recommendations #5, #6 and #7]

- Rather than immediately defaulting to court appointment, should the court be empowered to establish a mechanism for party appointment, putting the issue back to the parties?

- Should the appointment provision contain some guidelines or standards to be applied by the court when making an appointment?

Sections 13 & 15 – Challenging/Removing the Arbitrator [See Policy Recommendations #3, #5 and #7]

- The key is to prevent parties from "gaming" the system by using pre- or post-arbitration challenges to delay the process. In order to do so:

    - Should we add provisions concerning the immunity of arbitrators from civil liability, absent gross negligence or bad faith or fraud?

    - Should we add a section akin to s. 25 of the UK Act giving arbitrators the right to apply to the court for absolution?

- Under what circumstances should a court be empowered to intervene in the process and remove an arbitrator who is independent and impartial and who meets the contractual qualifications?

    - Fraud or corruption?

    - Mental incompetence?

    - Ill health?

    - Not running a fair hearing?

    - Undue delay?

- Alternatively, should such matters be left to the challenge procedure and/or to setting aside or defending enforcement of award?

Sections 17 & 18 – Jurisdiction of Arbitral Tribunal [See Policy Recommendations #4, #6 and #7]

- Should the Uniform Act clarify whether the arbitral tribunal or the court gets 'first crack' at answering a jurisdictional question. What should the default position be in light of the following recognized different practices / viewpoints:

    - **Approach #1 (SCC)**: The answer depends on what the objection relates to: question of law, question of fact, or question of mixed fact and law.

    - **Approach #2 (International 'A')**: The arbitral tribunal is preferred, particularly if the tribunal is already constituted when the question is raised.

    - **Approach #3 (International 'B')**: There's no need to codify a specific approach. Rather, let courts or tribunals decide depending on when/to whom the question is posed.

- What, if any, time limits should be imposed on raising such questions?

- To the extent that the court must address the question, should the Act specify which court?

- Should we clarify that the grounds to review an objection are the same whether the decision is taken as a preliminary question or dealt with in the final award? Similarly, should we clarify that no appeal lies either from preliminary jurisdictional decision or one contained in the final award?

- Should we incorporate the list contained in the 2006 Model Law regarding the specific orders that may be made by the tribunal with respect to the detention, preservation or inspection of property and documents? In addition or alternatively, should we restrict orders from arbitrators to those that the otherwise applicable courts may order?

Sections 31-33 – Arbitration Awards and Standards [See Policy Recommendations #7]

- Should we clarify that arbitrators may decide the dispute according to some other agreed upon standard apart from the "applicable law"?

- What is the difference between "law" and "rules of law" and how, if at all, should that distinction be clarified or addressed in the new UAA?

Section 45 – Appeals [See Policy Recommendations #3, #5 and #6]

- Given that arbitration is intended to create an alternative regime for dispute resolution but recognizing the varied jurisdictional approaches on the question of appeals, should the new UAA permit appeals of the merits of an arbitral award? At all? On the agreement of the parties?

- Where the parties' agreement is silent on appeal rights, what 'default position' should the UAA establish (*i.e*. an opt-in v. an opt-out regime)?

- Regardless of the parties' agreement, should the scope of appeals be limited to points of law only?

- Should there be some requirement to obtain 'leave to appeal' an arbitral award on its merits? If so, what criteria should guide such applications?

- Recognizing the intended efficiency of arbitration, should appeals be heard directly by the Court of Appeal? Relatedly, what harm or confusion might arise, if certain challenges are brought before a lower court while others are raised directly to the Court of Appeal?

- Should we clarify that arbitrators may decide the dispute according to some other agreed upon standard apart from the "applicable law"?

[19] A number of issues remain to be considered. The Working Group will continue its deliberations in September, subject to any directions that the Conference provides.

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SCHEDULE I:
ULCC DALP – Core Group Members

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