

UNIFORM LAW CONFERENCE OF CANADA

WORKING GROUP ON ARBITRATION LEGISLATION

**DOMESTIC ARBITRATION IN CANADA:
PROPOSALS FOR A NEW UNIFORM
ARBITRATION ACT**

**Report of Working Group on
Arbitration Legislation**

Yellowknife, Northwest Territories

August 2015

Report

[1] Several years ago the Uniform Law Conference of Canada established a Working Group to recommend changes to the ULCC's *Uniform International Commercial Arbitration Act* and *Uniform Arbitration Act*, each of which has been widely implemented by provincial and territorial legislation. Phase One (International) of the project culminated with ULCC approval of a new *Uniform International Commercial Arbitration Act* in March 2014.

[2] This Report concerns Phase Two, proposals for a new *Uniform Arbitration Act* for domestic arbitrations in Canada (**New UAA**).

[3] The Phase Two Working Group began its work in late 2013. It reviewed the existing Uniform Arbitration Act (**Existing UAA**) section by section and recorded preliminary comments of members of the Group concerning issues for consideration. The Working Group then delegated to six sub-groups the responsibility to research and discuss in greater detail the issues that had been identified, and to bring back to the Working Group options for possible improvements to the text of the Existing UAA.

[4] A Steering Committee, comprised of the chairs of the various sub-groups then met by conference telephone, initially twice a month, and then twice a week, to review the issues in detail and prepare (i) a draft preliminary text for the New UAA for discussion purposes (ii) a June 2015 **Discussion Paper** identifying policy issues arising from the draft text and (iii) an on-line **Survey** to solicit comments on the policy issues. Because the Working Group did not have access to translation services, the Discussion Paper and Survey were distributed only in the English language

[5] The Discussion Paper and a link to the on-line Survey were then widely distributed within Canada, to members of arbitral institutions, university faculty and corporate counsel. The Survey results and other commentary were then compiled and reviewed by the members of the Steering Committee.

[6] Although the Working Group had hoped to be able to present the preliminary draft of legislation and Discussion Paper to the Conference at this time, this is not possible due to the requirement for translation. The Working Group therefore wishes to use this opportunity to obtain comment and approval from the Conference with respect to the policy issues that emerged from its work.

[7] Appended to this Report is the list of the Survey questions (slightly revised to eliminate cross-references to unavailable text). At the meeting in Yellowknife representatives of the Working Group will review these questions with delegates, provide information concerning the Survey results, identify policy options and seek guidance from the Conference. With that guidance, the Working Group will refine the preliminary text, ask for that text to be edited by

legislative drafters and then present the final text, duly translated, to the ULCC for approval at its 2016 meeting.

We thank the Uniform Law Conference of Canada you for its support of this important project.

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LIST OF THE SURVEY QUESTIONS

PART 1 – INTRODUCTORY MATTERS

- SQ1 Is it appropriate to include a statement of the purposes and objectives of the Act?*
- SQ2 Do you agree that the definition of award should not refer expressly to “interim award”?*
- SQ3 Do you agree that the definition of “arbitrator” should include an umpire?*
- SQ4 Do you agree that parties to an international arbitration agreement should have the ability to “opt-in” to this Act by agreement in writing?*
- SQ5 Do you agree that the applicability of the Act to family arbitrations is best left to be dealt with by family law legislation?*
- SQ6 Do you agree that parties should be able to contract out of the requirement for arbitrators to be independent?*
- SQ7 Do you agree that parties should be able to contract out of the requirement that arbitrators be impartial?*

PART 2 – COURT INTERVENTION

- SQ8 Do you agree with the following proposed new formulation of circumstances in which the court may grant a stay of an arbitration?*

Where court proceedings are commenced and another party to the court proceeding alleges the matter is the subject of an arbitration agreement, the court on request made before a party has taken any other steps in the court proceeding, may stay the proceeding and refer the parties to arbitration, unless the court finds that:

- (a) the court proceeding is not in respect of any matter that is the subject of an arbitration agreement;*
- (b) a party against whom the arbitration agreement is sought to be enforced entered into the arbitration agreement while under a legal incapacity;*
- (c) the arbitration agreement does not exist or is null and void or unenforceable; or*
- (d) the dispute is not capable of being the subject of arbitration under [enacting jurisdiction] law.*

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SQ9 Do you agree that former subsections 7(5) and (6) should not be carried forward into the new Act?

SQ10 Do you think that the court should have the power to over-ride a commitment to arbitrate and to require that all claims be litigated in court where not doing so would result in a multiplicity of proceedings concerning related matters and potentially inconsistent results?

PART 3 – ARBITRATION AGREEMENTS

SQ11 Do you think it would be useful to include a provision describing how the law applicable to the arbitration agreement should be identified?

SQ12 Do you agree that consolidation of arbitrations should only occur where the parties have agreed to consolidate?

SQ13 Do you agree that it is helpful to have a provision in the new Uniform Act allowing a court to enforce consolidation agreements?

SQ14 Do you agree that the following proposed provisions provide useful direction to a court as to when and when not to make an order for consolidation?

1. If all parties to the arbitral proceedings have agreed to consolidate the proceedings but have not agreed, through the adopting of procedural rules or otherwise,

- (a) to the designation of parties as claimants or respondents or a method for making those designations; or*
- (b) to the method for determining the composition of the arbitral tribunal*

the court may make an order deciding either or both of those matters.

2. If the arbitral proceedings are under different arbitration agreements, no order shall be made unless, by their arbitration agreements or otherwise, the parties have agreed

- (a) to the same place of arbitration or a method for determining a single place of arbitration for the consolidated proceeding within [enacting jurisdiction];*
- (b) to the same procedural rules or a method for determining a single set of procedural rules for the conduct of the consolidated proceedings; and*
- (c) either to have the consolidated proceedings administered by the same*

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arbitral institution or to have the consolidated proceedings not be administered by any arbitral institution.

3. *In making an order in either situation, the court may have regard to any circumstances that it considers relevant, including:*
 - (a) *whether one or more arbitrators have been appointed in one or more of the arbitral proceedings;*
 - (b) *whether the applicant delayed applying for the order; and*
 - (c) *whether any material prejudice to any of the parties or any injustice may result from making an order.*

PART 4 – COMMENCEMENT OF ARBITRAL PROCEEDINGS

SQ15 Do you agree that the running of time for limitation period purposes should be tolled if a claim is pursued in the wrong venue in the first instance and the limitation legislation of the enacting jurisdiction applies? (This approach would be ineffective to alter the limitation law of another jurisdiction.)

SQ16 Do you agree that the failure to give a concise description of the matter in dispute should not render an originating notice ineffective to commence arbitral proceedings?

SQ17 Do you agree that the arbitral tribunal, once constituted should have the power to stay or suspend proceedings until a concise description of the matter in dispute is provided?

SQ18 Do you agree that it is useful to include a provision to make it clear that the arbitral tribunal, rather than the court, is to decide defences based on limitation periods?

SQ19 Do you believe that, in addition to giving effect to legal defences to the strict of enforcement contractual limitation periods, there should be a general discretionary power in the court or the arbitral tribunal to extend a contractual time limit for the commencement of arbitral proceedings?

PART 5 – CONSTITUTING THE ARBITRAL TRIBUNAL

SQ20 Do you think that proposed subsection 14(4) gives sufficient direction to the court?

SQ20 Do you think that for the procedure for the appointment of arbitrators by the Court (where no arbitral institution administers the arbitration):

- a. *If the parties have simply failed to agree on a process for constituting the arbitral*

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- tribunal, or*
- b. if there is an agreed process but one or more of the participants in the appointment process fails to act*

it is sufficient direction to the court that:

when appointing an arbitral tribunal the court shall have due regard:

- a. to the nature of the dispute,*
- b. to any qualifications required by the agreement of the parties, and*
- c. to such considerations as are likely to secure the appointment of an independent and impartial arbitral tribunal*

and that there be no appeal from such an order?

SQ21 Do you think that this section of the Act should address the rare circumstance where the number of arbitrators is not one or three?

SQ22 Do you agree that the “independence and impartiality” language to describe the standard is appropriate?

SQ23 Do you agree that it is sufficient to require disclosure by arbitrator candidates of circumstances of which they are aware?

SQ24 Do you agree that a provision for arbitrator immunity is appropriate?

PART 6 – REMOVAL AND REPLACEMENT OF ARBITRATORS

SQ25 Do you agree that a removal decision by an institution should be reviewable by the court unless the parties have contracted out of such a review?

SQ26 Do you agree that the arbitral tribunal should make the decision whether proceedings need to be repeated after a substitute arbitrator is appointed?

PART 7 – JURISDICTION OF THE ARBITRAL TRIBUNAL

SQ27 Do you agree that a preliminary decision on jurisdiction should be in the form of an award?

SQ28 Do you agree that the right to seek a review by the court should apply to negative as well as positive jurisdictional rulings?

SQ29 Do you agree that, as a general rule, if jurisdiction is decided as a preliminary matter, and the court has reviewed that decision, it should not be open to any party to later

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raise the same jurisdictional objection to attack the award on the merits or as defence to its enforcement?

PART 8 – POWERS AND DUTIES OF THE ARBITRAL TRIBUNAL AND THE PARTIES

SQ30 Do you agree that it is not appropriate to mandate “equal treatment” of the parties?

SQ31 Do you agree that it is appropriate to require that parties be given a “reasonable” rather than a “full” opportunity to present their cases?

SQ32 Do you think that there is benefit to including a provision setting out the general duty of parties?

SQ33 Do you think that the risk of creating an additional ground to challenge an award is such that it would be better to simply empower the arbitral tribunal to impose costs sanctions if it concludes that the proceedings have not been conducted efficiently or in good faith?

SQ34 Do you agree that the Act should not deal with the question of whether persons representing parties to arbitral proceedings (a) must be lawyers and (b) if lawyers, must be qualified to practice under the laws of the place of arbitration.

SQ35 Do you agree that arbitrators should not be statutorily obliged to apply rules of evidence?

SQ36 Failing party agreement and subject to the mandatory requirements of the Act do you agree that it is better to leave decisions concerning procedural matters to the arbitral tribunal, rather than specifying default procedures?

SQ37 Do you agree that it is more appropriate to provide for termination, rather than dismissal of claims, if a claimant or counter-claimant defaults?

SQ38 Subsections 27(1) and (4) of the Existing Uniform Act empower an arbitral tribunal to “dismiss” a claim for default. Do you agree with a proposal to allow suspension or termination of arbitral proceedings, rather than dismissal, while expressly authorizing a costs award contemporaneously with termination?

In the alternative to ordering termination or suspension of the proceeding, if a party fails to comply with procedural directions or otherwise fails to participate, the arbitral tribunal is authorized to continue the proceeding and make an award based on whatever evidence is presented to it.

SQ39 Do you agree that any awards already made should remain valid and enforceable if an arbitral proceeding is terminated?

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SQ40 Do you agree that permission of the arbitral tribunal should be obtained before a party can take steps to compel the participation of a third party witness?

SQ41 Do you think that third parties should only be compellable to give evidence to the arbitral tribunal and not be compellable to provide “discovery” evidence?

SQ42 Do you agree that it is appropriate to allow arbitral tribunals to directly request the assistance of courts outside the enacting jurisdiction to compel evidence?

SQ43 Do you agree that the arbitral tribunal should have the power to appoint an expert after consultation with, but without the agreement of, the parties?

SQ44 Do you agree with the requirement for a tribunal-appointed expert’s declaration of independence and impartiality?

SQ45 Do you think that arbitrators should be statutorily prohibited from acting as mediators in the same case?

SQ46 Do you favour expressly authorizing separate caucusing in a mediation by an arbitrator? (per NSW)

SQ47 Do you favour requiring party consent to the arbitrator continuing as such after a mediation? (per NSW)

SQ48 Do you think that an express right to withdraw on the grounds that they are no longer impartial is needed to protect arbitrators who have agreed to act as mediators?

PART 9 – INTERIM MEASURES

SQ49 Do you favour including a power to make ex parte Preliminary Orders in the proposed New Act?

PART 10 – AWARDS AND TERMINATION OF ARBITRAL PROCEEDINGS

SQ50 Do you think that the new Act should carry forward the provision that absent a majority the Chair’s decision governs?

SQ51 Do you agree that a provision allowing arbitrators to refuse delivery of an award until paid is appropriate?

SQ52 Do you agree that a provision allowing for payment into court when there is a fee dispute is appropriate?

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SQ53 Do you agree that a provision allowing a court to extend the time for delivery of the award in cases of substantial injustice is appropriate?

SQ54 Do you think that there should be added to the Act a default statutory time limit for the delivery of an award?

SQ55: Do you agree with the addition of an express power to make an additional award?

SQ56: Do you agree that there is no need for a separate provision authorizing “interim awards”?

SQ57 Do you agree that the new Act should allow arbitrators to award costs based on actual reasonable legal fees and expenses?

SQ58 Do you agree that arbitrators should be empowered to make awards of costs during the course of the proceeding to sanction conduct that has unnecessarily increased another party’s costs?

SQ59 Do you agree that the arbitral tribunal should be required to quantify costs, and should not have the option of referring the quantification to a court taxing officer?

SQ60 Do you agree that a “fair value” standard should not be able to be used to trump an express agreement between the parties and an arbitrator concerning compensation?

SQ61 Do you agree that, unless the parties have agreed that fees are to be fixed or reviewed by an institution, the new Act should provide for a summary court determination of arbitrator compensation?

SQ62 Do you think that there is any benefit to including a provision in the new Act setting out when an arbitral proceeding is “terminated.”

SQ63 Do you think that the Act should define “termination” or explain its legal consequences, in terms of such matters as res judicata etc?

PART 11 – RECOURSE AGAINST AND ENFORCEMENT OF AWARDS

SQ64 Do you think that there should be no right to appeal an arbitration award?

SQ65 Do you think that parties should be precluded from appealing arbitration awards on questions of fact or mixed fact and law?

SQ66 If there is to be a right to appeal on questions of law, should it be available only if the parties so agree (i.e. opt-in)?

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SQ67 If there is to be a right to appeal on questions of law, should the parties be able to opt-out of the right of appeal?

SQ68 Do you favour the idea that appeals on questions of law should go directly to the court of appeal, subject to a leave requirement?

SQ69 Do you agree that Subsection 57(1)(g) (there is a justifiable doubt as to the independence or impartiality of the arbitral tribunal) should be included as a ground to set aside an award?

SQ69 Do you agree that if there is a justifiable doubt as to the independence or impartiality of the arbitral tribunal, this should be included as a ground to set aside an award? This is in the existing Uniform Act (s. 46(1)(h)) but it is proposed that there be a change of the wording from “apprehension of bias” to “the applicant has justifiable doubts as to the independence or impartiality of a member of the arbitral tribunal.” An applicant would be required to advance such a challenge promptly and not sit on it to await the outcome of the arbitration.

SQ70 Do you agree that if the award made as a result of fraud or corruption by a member of the arbitral tribunal or was obtained by fraudulent behaviour by a party or its representatives in connection with the conduct of the arbitral proceeding that these should be included as grounds to set aside an award?

SQ71 Do you agree that the grounds for resisting enforcement should be narrower than the grounds for setting aside, so that unsuccessful parties must pro-actively bring any challenge to the award at the place of arbitration?

SQ72 Do you agree that a 10-year limitation period should apply to the commencement of proceedings to enforce an award?

PART 12 – ADDITIONAL PROVISIONS

SQ73 Do you agree that the new Act should declare arbitral proceedings to be confidential, subject to stated exceptions?

SQ74 Do you agree that the arbitral tribunal should not be authorized to over-ride a confidentiality agreement between the parties?