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UNIFORM LAW CONFERENCE OF CANADA

UNIFORM ARBITRATION ACT (2016)

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*Uniform Arbitration Act (2016)****UNIFORM ARBITRATION ACT (2016)*****PART 1 – PURPOSE, APPLICATION AND INTERPRETATION****Purpose**

- 1 The purpose of this Act is to facilitate the use of arbitration as an alternative to court proceedings by recognizing the following principles:
- (a) subject to minimum requirements from which they may not derogate, parties should be free to agree on the procedure by which their disputes are to be resolved;
 - (b) courts should not intervene in arbitral proceedings except as expressly authorized by this Act.

Commentary: This Section is new.

Definitions

- 2 In this Act:

“**arbitral tribunal**” means a sole arbitrator or a panel of arbitrators, and includes an arbitrator or panel appointed for the purposes of an agreed appeal or review process; (« *tribunal arbitral* »)

“**award**” means a final decision of an arbitral tribunal concerning all or part of the dispute, including a final decision concerning jurisdiction or costs, but does not include a procedural order or decision; (« *sentence arbitrale* »)

“**give**”, in relation to a record, includes to deliver or serve;

“**international arbitration**” means

- (a) an arbitration to which the [*enactment implementing the Uniform International Arbitration Act*] applies, or
- (b) if the place of arbitration is another province or territory in Canada, an arbitration considered to be an international arbitration under the laws of that province or territory; (« *arbitrage international* »)

“**mandatory provision**” means a provision of this Act referred to in section 4(2) (a) through (n). (« *disposition impérative* »)

“**party**”, except in section 7 [*stay of court proceedings*], means a person who is a party to an arbitration agreement or arbitral proceeding. (« *partie* »)

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Commentary: The definition of “arbitral tribunal” replaces the definition of “arbitrator.” All other definitions are new.

Application of Act

- 3 (1) This Act does not apply to an international arbitration, unless the parties to the international arbitration agree in writing to the application of this Act.
- (2) This Act, other than sections 5 [*waiver of objection*], 7 [*stay of court proceedings*] 38(7), [*production of evidence from non-parties*], 50 [*enforcement of interim measures*], 52 [*grounds for refusing enforcement of interim measures*], 52 [*court interim measures*], 69 [*enforcement of awards*] and 70 [*limitation period for enforcement proceedings*] does not apply unless the place of arbitration is within [*enacting jurisdiction*].
- (3) The place of arbitration is within [*enacting jurisdiction*] if the arbitration agreement
 - (a) names [*enacting jurisdiction*] or a place within [*enacting jurisdiction*] as the place or seat of arbitration,
 - (b) does not name a place or seat of arbitration, but provides that the arbitration laws of [*enacting jurisdiction*] are applicable to the dispute,
 - (c) does not name a place or seat of arbitration, or specify the jurisdiction whose arbitration laws are applicable to the dispute, but provides that the laws of [*enacting jurisdiction*] are applicable to the substance of the dispute, or
 - (d) empowers a person or body to name the place of arbitration, and the person or body names [*enacting jurisdiction*] or a place within [*enacting jurisdiction*] as the place of arbitration.
- (4) If another enactment authorizes or requires arbitration, this Act applies with any modifications necessary to give effect to the other enactment.

Commentary: This new uniform *Act* has been drafted as one of general application. Enacting jurisdictions should consider whether, and, if so, to what extent, it should apply to specific subject matters such as family law or labour law. They should consider whether any exceptions to the application of this new *Act* are best included in this legislation or in other specialized legislation establishing alternative dispute resolution regimes. They also should consider whether any further steps (beyond subsection 3(4)) are required to harmonize other legislation mandating arbitration with this statute. The Uniform International Commercial Arbitration Act (**ICAA**) defines when an arbitration is considered to be “international” and, thus, governed by the ICAA. Subsection 3(1), above, makes it clear that if the arbitration is “international” the new (domestic) *Act* does not apply, unless the parties agree in writing that the domestic *Act* rather than the ICAA applies. Parties may therefore opt out of the ICAA and into the domestic *Act* if they do so in writing. A complementary provision should

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be included in the ICAA as enacted. The rest of Section 3 sets out the implications of the choice of the place of arbitration.

Provisions of Act may be altered by agreement

- 4 (1) Subject to subsection (2), the parties to an arbitration agreement may agree that a provision of this Act does not apply or applies as modified by the agreement, to a dispute arising under the arbitration agreement.
- (2) An arbitration agreement may not disapply or modify the following provisions of the Act:
 - (a) section 3 [*application of Act*];
 - (b) section 4 [*provisions may be altered by agreement*];
 - (c) section 6 [*court intervention limited*];
 - (d) section 7 [*stay of court proceedings*];
 - (e) section 12 [*Scott v Avery clauses*];
 - (f) section 20(1) [*impartiality of arbitrator*]
 - (g) section 23(1)(a), (e) and (f) [*removal of arbitrator in certain circumstances*]
 - (h) section 28 [*general duties of arbitral tribunal*];
 - (i) section 38 (4) [*application to set aside subpoena*]
 - (j) section 59 [*binding nature of award*];
 - (k) section 64 [*recourse limited*];
 - (l) section 65 [*appeals on questions of law*];
 - (m) section 66 [*setting aside awards*];
 - (n) section 69 [*enforcement of awards*];
 - (o) section 73 [*crown bound*];
 - (p) section 74 and 75 [*transitional*]..
- (3) In the event of a conflict between a mandatory provision of this Act and an arbitration agreement, the mandatory provision prevails.
- (4) For certainty, an agreement under subsection (1) may be express or may arise by implication.

Commentary: Consistent with the objective of respecting party autonomy with respect to procedural matters, this section allows parties to contract out of the non-mandatory provisions of the Act.

Waiver of objection

- 5 A party who proceeds with an arbitral proceeding knowing that a non-mandatory provision of this Act or a requirement under an arbitration agreement has not been complied with is deemed to have waived the right to object, unless the party states an objection to the non-compliance without undue delay or, if a time-limit is provided therefor, within the time limit.

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Commentary: This is based on the UNCITRAL Model Law on International Commercial Arbitration (Model Law) and the previous *Uniform Arbitration Act*.

PART 2– COURT INTERVENTION

Court intervention limited

6 No court may intervene in matters governed by this Act, except as expressly provided by this Act.

Commentary: Consistent with the objective of limiting undue court involvement in arbitration proceedings, this section is essentially the wording of Section 6 of the previous *Uniform Arbitration Act*. Because of concerns arising from several decisions in which courts had decided that they retained discretion to intervene in arbitral proceedings despite the clear wording of the section, the ULCC amended Section 6 to read as follows:

No court may intervene in matters governed by this Act, except as provided by this Act and *for the following purposes*:

- (a) *to assist the arbitration process;*
- (b) *to ensure that an arbitration is carried on in accordance with the arbitration agreement;*
- (c) *to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;*
- (d) *to enforce awards.*

The added words were intended to reinforce the limitation on court intervention to those matters specifically set out in the Act. However, since that amendment, there have been cases in several jurisdictions where the added subsections have been interpreted as giving the court a broader discretion to intervene. The approach taken in the new Act is to revert to a clear general prohibition on court intervention subject only to intervention expressly authorized by another provision of the Act.

Stay of court proceedings

- 7**
- (1) A party to a court proceeding may apply for a stay of the court proceeding, in whole or in part, on the grounds that the court proceeding is in respect of a matter that is the subject of an arbitration agreement.
 - (2) An application under subsection (1) shall be made before the applicant has taken any other steps in the court proceeding, unless the court determines that there was reasonable justification for the delay and that any prejudice can be addressed through an award of costs.
 - (3) On an application under subsection (1), the court shall stay the court proceeding unless the court finds that

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- (a) the court proceeding is not in respect of any matter that is the subject of an arbitration agreement,
- (b) a person against whom the arbitration agreement is sought to be enforced entered into the arbitration agreement while under a legal incapacity,
- (c) the alleged arbitration agreement does not exist, is void or is unenforceable, or
- (d) the dispute is not capable of being the subject of arbitration under [enacting jurisdiction] law.
- (4) Unless otherwise ordered by the court, a person may commence or continue an arbitral proceeding in relation to the dispute while an application under subsection (1) is before the court.
- (5) If the court stays the court proceeding in whole or in part without making a finding concerning the existence of a circumstances described in subsection (3) (a) through (d), an arbitral tribunal is not precluded from determining whether the circumstance exists.
- (6) If the court finds that one or more of the circumstances described in subsections (3) (a) through (d) exists in respect of all or some of the matters in the court proceeding, then, in respect of those matters,
 - (a) the court proceeding continues,
 - (b) no person may commence an arbitral proceeding in relation to the dispute, and
 - (c) if a person has brought an arbitral proceeding in relation to the dispute, the arbitral proceeding is terminated and anything done in the arbitral proceeding is without effect.
- (7) A party may appeal a decision of a court under this section.

Commentary: The requirement that courts stay court proceedings concerning matters that are the subject of an arbitration agreement is central to preserving the integrity of the arbitral process. In *Dell Computer Corp v Union des consommateurs* 2007 SCC 34 the Supreme Court of Canada held that, except in very limited circumstances (where it is possible to decide the issue on the basis of documents and pleadings filed by the parties without having to hear evidence or make findings about its relevance and reliability) consistent with the *competence competence* principle a court should refer all issues concerning jurisdiction, including issues relating to the validity or applicability of the arbitration agreement, to the arbitral tribunal. That finding was informed by an analysis of the language of the UNCITRAL Model Law and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (New York Convention).

Under the previous *Uniform Arbitration Act*, a court was empowered to refuse a stay if it considered that there was undue delay or the matter is a proper one for default or summary judgment. Under the new text these circumstances would no longer justify

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refusing a stay.

Subsections 7(5) and (6) of the previous *Uniform Arbitration Act* stated:

- (5) The court may stay the proceedings with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
 - (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
 - (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.
- (6) There is no appeal from the court's decision.

This provision suggests that where a court finds that it is not “reasonable” to separate matters required to be arbitrated from those not required to be arbitrated, the court could refuse a stay, and that the court’s finding on that issue is final and binding. The new text deletes subsections 7(5) and (6). This is consistent with the approach recommended by the Alberta Law Reform Institute.

PART 3 – ARBITRATION AGREEMENTS

Arbitration agreement

- 8** (1) Two or more persons may make an arbitration agreement to resolve, by arbitration, a matter that
 - (a) is the subject of a dispute, or
 - (b) may be the subject of a dispute in the future.
- (2) For certainty, an arbitration agreement
 - (a) need not be in writing,
 - (b) need not relate to the interpretation, application or performance of a contract, and
 - (c) may, but need not, be part of another agreement.

Commentary: Section 8 combines the former definition of “arbitration agreement” and parts of former Section 5. Subsection 5(2) of the previous *Uniform Arbitration Act* now appears as Section 9. Subsection 5(4) of the previous *Uniform Arbitration Act* is carried forward as Section 12.

It is not necessary to include in the Act a provision to authorize the formation of arbitration agreements by electronic communications, because the Act expressly does not require that arbitration agreements be in writing.

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It is sometimes necessary to determine whether an arbitration agreement exists and, if so, on what terms. This can give rise to the question of what law is applicable to the notionally, or perhaps actually, separate arbitration agreement. Enacting jurisdictions may want to consider adding a section to address that issue. Art. 3121 of the Civil Code of Quebec states:

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.

An alternative provision might be:

Failing any designation by the parties, an arbitration agreement is governed by the law of the place of arbitration or, where that law invalidates the agreement, the law applicable to the substantive contract.

Modification of arbitration agreement

- 9** If the parties to an arbitration agreement make a subsequent agreement regarding how disputes or prospective disputes to which the arbitration agreement applies shall or may be arbitrated, the subsequent agreement is deemed to be a modification of the original arbitration agreement.

Commentary: Section 9 carries forward the substance of subsection 5(2) of the previous uniform Act.

Separability of arbitration agreement

- 10** An arbitration agreement which forms or was intended to form part of another agreement shall not be regarded as non-existent, void or unenforceable solely because that other agreement is non-existent, void or unenforceable, and it shall in those circumstances be deemed to be a distinct agreement.

Commentary: Section 10 is new, although Canadian Courts consistently have recognized and applied the principle of separability. The text provides that the arbitration agreement is not invalid solely because the commercial agreement is invalid. There may be cases where an alleged arbitration agreement is ineffective for other reasons.

Specific reference not required to incorporate arbitration clause

- 11** For certainty, if an agreement incorporates a record that includes an arbitration agreement, then the arbitration agreement also is incorporated.

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Scott v. Avery clauses

- 12** An agreement which provides that a matter be adjudicated by arbitration before it may be the subject of a court proceeding is an arbitration agreement in respect of the matter.

Commentary: Section 12 carries forward subsection 5(4) of the previous uniform Act.

Arbitration rules by reference

- 13** If an arbitration agreement incorporates arbitration rules by reference, those rules form part of the arbitration agreement.

Commentary: Section 13 is new. It makes clear that procedural rules incorporated by reference form part of the arbitration agreement.

Agreements to consolidate

- 14** (1) If all parties to two or more arbitral proceedings have agreed to consolidate those proceedings, and a dispute arises in relation to the consolidation, a party may apply to [*enacting jurisdiction to insert name of relevant court*] for an order that the proceedings be consolidated as agreed to by the parties, unless
- (a) the party has not yet exhausted an agreed procedure regarding disputes in relation to consolidation of arbitral proceedings, or
 - (b) an application is prohibited by an agreed consolidation procedure.
- (2) For certainty, subsection (1) does not prohibit parties from consolidating arbitral proceedings without a court order.
- (3) On an application under subsection (1), if all parties to the arbitral proceedings have agreed to consolidate the proceedings but have not agreed, by adopting 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, subject to subsection (4), make an order deciding either or both of those matters.
- (4) If the arbitral proceedings are under different arbitration agreements, no order shall be made for consolidation on an application under subsection (1) 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*];

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- (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 arbitral institution or to have the consolidated proceedings not be administered by any arbitral institution.
- (5) In making an order for consolidation under this section, 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.
- (6) A court decision under this section may not be appealed.

Commentary: The section mirrors the wording of the new *Uniform ICAA*, Section 9.

PART 4 – COMMENCEMENT OF ARBITRAL PROCEEDINGS

Commencement of Proceedings

- 15**
- (1) If the parties have agreed how arbitral proceedings are to be commenced, then arbitral proceedings shall be commenced in accordance with that agreement.
 - (2) If the parties have not agreed how arbitral proceedings are to be commenced, then a party may commence arbitral proceedings by
 - (a) giving to the other party or parties to the arbitration agreement a notice appointing an arbitrator or requesting the other party or parties to the arbitration agreement to participate in the appointment of an arbitral tribunal,
 - (b) if the arbitration agreement gives a person who is not a party to the arbitration agreement the power to appoint an arbitrator or arbitral tribunal, giving to that person a notice requesting the person to exercise the power of appointment and giving a copy of the notice to any other party, or
 - (c) giving to the other party or parties to the arbitration agreement a notice demanding arbitration.
 - (3) A person receiving a notice under section (2) may give the party who commenced the arbitral proceeding a written request for a concise description of the matter in dispute, unless such a description is already included with the notice.
 - (4) A party receiving a request under subsection (3) shall comply with the request no more than 10 days after receipt.

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- (5) An arbitral tribunal may extend the time in subsection (4) before or after it expires.
- (6) A failure to comply with subsection (4) does not render a notice given under subsection (2) ineffective, but an arbitral tribunal may stay the arbitral proceeding until subsection (4) is complied with.

Commentary: It is important to have certainty as to how to commence arbitral proceedings and when they are deemed to commence. New subsection 15(1) adds a clear statement that if an arbitration agreement or rules incorporated by reference state how and when arbitral proceedings are commenced, the agreement of the parties is determinative. Subsection 15(2) uses the concept of “giving” a document rather than “serving” or “delivering.” “Give” is defined in the definitions.

Section 15 omits section 24 of the previous uniform *Act* which stated:

- 24 A notice that commences an arbitration without identifying the dispute is deemed to refer to arbitration all disputes that the arbitration agreement entitles the party giving the notice to refer.

Subsections 15(3) and (4) allow a responding party to request a concise description of the matter in dispute to which the commencing party must reply within ten days. The subsections do not render a deficient notice ineffective to commence an arbitral proceeding, but gives the arbitral tribunal, once constituted, the power to stay or suspend proceedings.

Limitation Periods

- 16 (1) The law with respect to limitation periods applies to commencing an arbitral proceeding as if it were a court proceeding.
- (2) If a party alleges that a claim to which an arbitration agreement applies is barred for failure to commence arbitration proceedings within the time provided by the arbitration agreement or the applicable limitation period, the arbitral proceeding shall continue and the arbitral tribunal shall determine whether the claim is barred.

Commentary: Section 16 makes the limitations regimes for arbitration and court proceedings the same. Subsection (2) makes clear that the arbitral tribunal is empowered to decide limitations defences, including defences that the arbitration was not commenced within a time limited by the arbitration agreement.

Commencement of proceedings in wrong forum

- 17 (1) If a court stays a court proceeding under section 7 [*stay of court proceedings*] and the claim that was the subject of the court proceeding is made in an arbitral proceeding no more than 30 days after the stay, the

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limitation period applicable to the claim is suspended from the date the claim was made in the court proceeding to the date the claim is made in the arbitral proceeding

- (2) If an arbitral proceeding is commenced and
 - (a) a claim made in the arbitral proceeding is dismissed or the arbitral proceeding is suspended or terminated in respect of a claim because the arbitral tribunal or a court determines in accordance with this Act that the claim may not be made in an arbitral proceeding, or
 - (b) an award made in respect of a claim is set aside by a court of competent jurisdiction, because it determines that the claim may not be made in arbitral proceedings, or
 - (c) a court of competent jurisdiction refuses to enforce the award because it determines that the claim may not be made in arbitral proceedings,

and the claim is made in court proceedings no more than 30 days after the determination of the court or arbitral tribunal, any limitation period applicable to that claim under the [*enacting jurisdiction to insert name of its Limitations Act*] is suspended from the date that the claim was made in the arbitral proceeding to the date the claim is made in the court proceeding.

Commentary: Section 17 tolls the limitation period for arbitral or court proceedings if a claim is pursued in the wrong venue in the first instance and the limitation legislation of the enacting jurisdiction applies. It would be ineffective to alter the limitation law of another jurisdiction.

PART 5 – CONSTITUTING ARBITRAL TRIBUNALS

Number of arbitrators

- 18** If the parties have not agreed on the number of arbitrators, an arbitral tribunal is composed of one arbitrator.

Commentary: This provision is carried forward from the previous uniform *Act*.

Procedure for appointment of arbitrators

- 19** (1) Unless the parties have agreed on a process for the appointment of the arbitral tribunal or, where required, for the selection of a chair,
 - (a) if the arbitral tribunal is composed of one arbitrator and the parties are unable to agree on the arbitrator, a party may apply to the [*enacting jurisdiction to insert name of court*] for the appointment of the arbitrator;
 - (b) if there are 2 parties and the arbitral tribunal is composed of 3 arbitrators,

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- (i) each party may appoint one arbitrator, and the party-appointed arbitrators may agree on the third arbitrator, but
 - (ii) if a party fails to appoint an arbitrator within 30 days of receipt of a request to do so from the other party or if the 2 party-appointed arbitrators fail to agree on the third arbitrator within 30 days of the appointment of the later-appointed arbitrator, a party may apply to the [*enacting jurisdiction to insert name of court*] for the appointment of any unappointed arbitrator, and
 - (iii) the third arbitrator shall serve as chair;
 - (c) in any other case, a party may apply to the [*enacting jurisdiction to insert name of court*] for an appointment that cannot be agreed to by all the parties.
- (2) If the parties have agreed to an appointment procedure, and
- (a) a party fails to act as required under the procedure,
 - (b) the parties or arbitrators are unable to reach an agreement required under the procedure, or
 - (c) a person, other than a party, fails to perform a function required under the procedure,
- a party may apply to the [*enacting jurisdiction to insert name of court*] for directions or for an order appointing any unappointed arbitrators.
- (3) When appointing an arbitrator or an arbitral tribunal the court shall consider
- (a) the nature of the dispute,
 - (b) any qualifications required by the agreement of the parties, and
 - (b) what will most likely result in the appointment of an independent and impartial arbitral tribunal.
- (4) A court decision under this section may not be appealed.

Commentary: Section 19 deals with two related subjects: first, what is to happen if the parties have simply failed to agree on a process for constituting the arbitral tribunal and, second, what if there is an agreed process but one or more of the participants in the appointment process fails to act.

Independence and impartiality

- 20**
- (1) An arbitrator shall be impartial and shall act impartially.
 - (2) An arbitrator shall be independent of the parties.
 - (3) Before accepting an appointment as arbitrator, a person shall disclose to all parties any circumstances of which the person is aware that might give rise to justifiable doubts as to the person's impartiality or independence.

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- (4) An arbitrator who becomes aware of circumstances that might give rise to justifiable doubts as to the arbitrator's impartiality or independence shall as soon as practicable disclose the circumstances to all the parties.

Commentary: The standard required under the UNCITRAL Model Law, the new *Uniform International Commercial Arbitration Act* and most institutional rules, and endorsed by the International Bar Association, is expressed by stating that arbitrators must be independent and impartial and must disclose any circumstances that may give rise to justifiable doubts as to independence or impartiality. The previous uniform *Act* referred not only to that test but also to a "reasonable apprehension of bias" test. Although the two expressions have been considered to be co-extensive, the text uses the "independence and impartiality" expression to define the applicable standard.

There are differences of view as to extent to which candidates for appointment as arbitrator are bound to make inquiries to identify unknown connections between themselves and the parties, and the extent to which parties have an onus to direct the arbitrator concerning such inquiries. Candidates for arbitrator appointments who are members of law firms normally do not base disclosures solely on personal knowledge, but rather perform conflicts checks to discover connections between their firms and the parties that the parties might consider relevant. Candidates who recently left a law firm normally disclose their past connection to the firm and state whether they can perform and, if so, have or have not performed, a conflicts check of their former firm's records.

These usual practices, and others, may not be caught by the bare requirement for disclosure of circumstances of which the candidate is "aware." Although there were diverse views on the subject, on balance it was concluded that the language of the provision should not be expanded to require arbitrators to make specific inquiries. The precise steps that parties and arbitrators should take are fact and case specific. Arbitral institutions (e.g. IBA and CIArb.) have published guidelines establishing norms and detailed exceptions to meet disclosure obligations. Those evolving guidelines provide sufficient guidance to the profession.

Immunity of Arbitrators

- 21** No action may be brought against an arbitrator for anything done or omitted to be done in his or her capacity as an arbitrator, unless the act or omission is in bad faith or the arbitrator has engaged in intentional wrongdoing.

Commentary: This is a new provision, modelled on the provisions of the *Uniform Commercial Arbitration Act 2010* (Australia) and the *Arbitration Act, 1996* (England). A similar provision appears in the new Quebec Code of Civil Procedure.

PART 6 – REMOVAL AND REPLACEMENT OF ARBITRATORS

No revocation of appointment

22 Subject to this Part, a party to an arbitral proceeding may not revoke the appointment of an arbitrator unless all other parties consent.

Commentary: This section is carried forward from the previous uniform *Act*.

Challenge and removal of arbitrator

- 23** (1) A party to an arbitral proceeding may apply to the [*enacting jurisdiction to insert name of court*] for removal of an arbitrator only on the grounds that
- (a) the arbitrator is not impartial or there are circumstances that give rise to justifiable doubts as to the arbitrator's impartiality,
 - (b) the arbitrator is not independent or there are circumstances that give rise to justifiable doubts as to the arbitrator's independence,
 - (c) the arbitrator does not possess the qualifications required under the arbitration agreement,
 - (d) the arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to the arbitrator's physical or mental capacity,
 - (e) the arbitrator has committed a corrupt or fraudulent act, or
 - (f) the arbitrator has delayed unduly in conducting the arbitration such that substantial injustice has been or will be caused to the party.
- (2) On an application under subsection (1) the court shall order the removal of the arbitrator if the court finds:
- (a) that one or more of the circumstances described in subsection (1) (a) to (f) exists; and
 - (b) in the case of an application under either of subsections (1)(b) and (c), that the applicant has not waived the requirement on which the applicant relies
- (3) A party may not apply under subsection (1) unless the party has exhausted all recourse under any agreed process for removal of an arbitrator.
- (4) If there is no agreed process for removal of an arbitrator, a party may not apply to the court for the removal of an arbitrator on the grounds described in subsection (1) (a), (b) or (c) unless
- (a) within 15 days after the earlier of
 - (i) the date on which the intended applicant became aware of the circumstance relied upon; and
 - (ii) the date on which the intended applicant ought to have known of those circumstances if it had made reasonable inquiries;

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- the party gives to the arbitral tribunal and the other parties a written statement requesting the arbitral tribunal to remove the arbitrator and setting out the circumstances and reasons for the request,
- (b) the arbitral tribunal refuses to remove the arbitrator, and
 - (c) the application to the court is made within 15 days after the arbitral tribunal's refusal to remove the arbitrator.
- (5) An arbitral tribunal that receives a request for the removal of an arbitrator must expeditiously decide the issue, and communicate its decision to the parties.
 - (6) An arbitral tribunal is conclusively deemed to have refused to remove an arbitrator if it does not decide a request for removal within 15 days after receiving a written statement under subsection (4)(a).
 - (7) For certainty, while an application under subsection (1) is pending the arbitral tribunal, including the challenged arbitrator, may continue an arbitral proceeding, unless the *[enacting jurisdiction to specify court]* orders otherwise.
 - (8) A court decision under this section may not be appealed.

Commentary: The previous uniform *Act* contained two sections dealing with removal of arbitrators: first Section 13 dealing with challenges based on lack of independence and impartiality or agreed qualifications; second, Section 15 dealing with removal for incapacity, fraud and corruption or undue delay. The new Section 23 combines these two concepts in a single section dealing with removal of arbitrators by the court. As many institutional arbitration rules establish other procedures for arbitrator removal and replacement, the new *Act* requires those procedures to be exhausted. The right to seek court assistance on the grounds set out in subsections 23(1)(a), (e) and(f) is a mandatory provision.

Termination of arbitrator's mandate

- 24**
- (1) An arbitrator's mandate terminates if
 - (a) the arbitrator resigns or dies,
 - (b) all parties agree to terminate the arbitrator's appointment,
 - (c) the arbitrator is removed under section 23 *[challenge and removal of an arbitrator]* or by another process agreed to by the parties, or
 - (d) the arbitral proceeding terminates.
 - (2) For certainty, an arbitrator's resignation or a party's agreement to terminate an arbitrator's mandate does not imply acceptance of the validity of any reason advanced for challenging or removing the arbitrator.

Commentary: This provision is carried forward in modified form from the previous uniform *Act*.

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Appointment of substitute arbitrator

- 25** (1) If an arbitrator's mandate terminates under section 24(1)(a), (b) or (c) [*termination of arbitrator's mandate*], the arbitral tribunal shall be reconstituted by appointing a substitute arbitrator under the process used to appoint the arbitrator whose mandate terminated.
- (2) The reconstituted arbitral tribunal may determine if steps taken before the reconstitution of the arbitral tribunal should be repeated.

Commentary: Subsection 25(1) is based on the UNCITRAL Model Law, but the text has been revised for clarity. The previous uniform *Act* contained additional provisions for court involvement to appoint a substitute arbitrator. This is considered to be unnecessary as it is clear that the court could be involved in a substitute appointment to the same extent as it could be involved in an original appointment.

PART 7 – JURISDICTION OF ARBITRAL TRIBUNALS**Arbitral tribunal may determine own jurisdiction**

- 26** (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration, including whether
- (a) the arbitral proceeding is in whole or in part in respect of a matter that is not the subject of the arbitration agreement,
 - (b) a person 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 void or unenforceable, or
 - (d) the dispute is not capable of being the subject of arbitration under [*enacting jurisdiction*] law.
- (2) A person who has an objection to the arbitral tribunal's jurisdiction must state the objection as soon as practicable after the matter alleged to be beyond the arbitral tribunal's jurisdiction arises during the arbitration.
- (3) An arbitral tribunal may decide an objection to jurisdiction
- (a) in a partial award issued before deciding other matters in dispute, or
 - (b) as part of the final award.

Commentary: Consistent with the previous uniform *Act*, the UNCITRAL Model Law and relevant jurisprudence, Section 26 confirms the authority of the arbitral tribunal to rule on its own jurisdiction. Subsection 1 has been expanded to ensure that it is clear that the same jurisdictional issues which the court may have declined to decide on a stay application (see Section 7) can be decided by the arbitral tribunal.

The provisions require that decisions concerning jurisdiction be decided either by a separate partial award or as part of an award deciding other substantive issues.

*Uniform Arbitration Act (2016)***Application to court regarding jurisdiction**

- 27** (1) A party may apply to [enacting jurisdiction to insert name of court] to set aside a partial award issued under section 26 (3) (a) [partial award of an arbitral tribunal on its own jurisdiction].
- (2) An application under subsection (1) may not be made more than 30 days after the applicant receives the partial award.
- (3) If the court determines that the arbitral tribunal's decision with respect to jurisdiction was not correct, the court's determination may be further appealed to [enacting jurisdiction to insert name of appellate court] with leave of that court.
- (4) An application under subsection (1) or an appeal under subsection (3) do not act as a stay of the arbitral proceeding.
- (5) A final decision under subsections (1) and (3) is, unless it states otherwise, final and binding for all purposes, including for the purposes of an application for leave to appeal an award under section 65 [appeals on questions of law], an application to set aside an award under section 66 [setting aside awards] or an application to enforce an award under section 69 [enforcement of awards].
- (6) For certainty, if
- (a) a party objects to the jurisdiction of an arbitral tribunal under section 26 (2),
 - (b) the arbitral tribunal decides against the objection by a partial award under section 26 (3) (a), and
 - (c) the objecting party does not apply to court under this section, the party may rely on the same objection in an application under sections 65, 66 or 69.

Commentary: Where an arbitral tribunal decides an objection to its jurisdiction at an early stage, the previous uniform *Act*, similar to the UNCITRAL Model Law, allowed an application to a court to “decide the matter” if, but only if, the arbitral tribunal decides that it does have jurisdiction. No standard of review was specified. A decision by an arbitral tribunal that it does *not* have jurisdiction was not open to review.

Section 27 takes a different approach. Like the *Uniform International Commercial Arbitration Act*, it allows applications to the court to review both negative and positive jurisdictional decisions by an arbitral tribunal. However, the only decision open to the court is to set aside or refuse to set aside the jurisdiction award, applying the correctness standard usually used to review jurisdictional findings.

There has been some doubt as to whether a party who is unhappy with a ruling on jurisdiction as a preliminary matter should get “two kicks at the can;” first applying under the present section while the arbitration is ongoing, and then, if unsuccessful, raising the jurisdictional issue again when the final merits award is sought to be

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enforced or set aside. Subsection 27(5) makes it clear that, as a general rule, there is to be only “one kick at the can.” The sole exception to the general rule is that, when deciding an application or appeal concerning a partial award on jurisdiction, a court may, if the result of its finding is that there is jurisdiction, state that the jurisdiction issue may be revisited at the enforcement/set-aside stage. The Working Group considered that this power would be exercised by the court in very limited circumstances, for example, if the court is concerned that additional evidence and argument concerning the substance of the dispute might result in a different conclusion on the question of jurisdiction.

PART 8 – POWERS AND DUTIES OF ARBITRAL TRIBUNAL AND PARTIES

General duties of arbitral tribunal

- 28** An arbitral tribunal shall give each party a reasonable opportunity to present its case and to answer any case presented against it.

Commentary: The previous uniform *Act* required that the parties be treated equally and fairly, and stated that each party shall be given an opportunity to present its case and defence. The UNCITRAL Model Law also emphasizes equality of treatment. However mandatory “equal” treatment is sometimes invoked to justify, for example, a demand that hearing time be divided equally or that one party should not be granted an extension of time not needed by the other.

Although it is difficult to argue against a fairness requirement, the difficulty with embodying “fairness” as a statutory minimum standard is that it invites second-guessing. What is fair in any situation is matter of subjective judgment.

It was concluded that the appropriate mandatory requirement is that each party be given a “reasonable opportunity” to present its case or answer. This approach was considered to be consistent with the concept of proportionality now invoked by the rules of court in a number of provinces.

General duties of parties

- 29** A party shall participate in an arbitral proceeding efficiently and in good faith, in accordance with the agreement of the parties and the orders and directions of the arbitral tribunal.

Commentary: This section is new. Both the Australian and English legislation impose a duty similar to the duty stated in Section 29. Under the proposed new Quebec legislation the parties will be directed to “co-operate” in the conduct of the proceeding. The benefit of Section 29 is that it provides a statutory standard of party behaviour.

*Uniform Arbitration Act (2016)***Legal or other representation**

- 30** A party may appear or act in person or, subject to [*enacting jurisdiction to insert name of any statute regulating legal representation in arbitral proceedings*], may be represented by another person.

Commentary: This is a new provision to make it clear that a party need not be represented by a lawyer in arbitral proceedings, unless legislation regulating the practice of law so requires. This is thought to be consistent to the objective of facilitating the use of arbitration as an alternative to court proceedings.

Law applicable to substance of dispute

- 31** (1) The law applicable to the substance of a dispute is the law designated by the parties.
- (2) If the parties have not designated the law applicable to the substance of a dispute, the arbitral tribunal may choose the applicable law.
- (3) An arbitral tribunal shall decide the substance of a dispute in accordance with the applicable law, including any equitable rights or defences arising under that law.
- (4) An arbitral tribunal may grant the same relief or remedies as a court of competent jurisdiction under the applicable law, including orders of specific performance, injunctions, declarations or other equitable remedies.

Commentary:) None of the basic concepts present in Sections 31 are new, although they are expressed for clarity in different language than was used in the previous uniform *Act*.

Subsection 31(3) makes it clear that where equitable rights and defences are part of the applicable law, they also must be applied. This is done to avoid any misconception that arbitrators cannot grant equitable remedies. Similarly, Subsection 31(4) empowers the arbitral tribunal to grant whatever remedies are available under the applicable law.

Conflict of laws

- 32** A designation by the parties of the law of a jurisdiction refers to the jurisdiction's substantive law and not to its conflict-of-laws rules, unless the parties expressly state that the designation includes the conflict-of-laws rules.

Commentary: Section 32 is carried forward from the previous uniform *Act*.

Application of specific agreed standards

- 33** Despite section 31 [*law applicable to the dispute*], if all parties agree, an arbitral tribunal may resolve a dispute acting *ex aequo et bono*, as *amiable compositeur* or by applying some other standard.

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Commentary: Section 33 is new, although it replicates the substance of provisions found in the UNCITRAL Model Law.

Hearing location

- 34 (1) Except as provided in this section, any in-person hearing to receive oral evidence or oral submissions shall take place at
- (a) a location agreed by the parties, or
 - (b) if the parties have not agreed on a location, at a location determined by the arbitral tribunal.
- (2) An arbitral tribunal may receive oral evidence or oral submissions at any location by telephone, video-conference or other electronic means.
- (3) An arbitral tribunal may meet wherever it considers appropriate for consultation among its members
- (4) An arbitral tribunal may conduct an inspection of goods, other property or records or receive evidence of a witness at any location.

Commentary: The approach described in Section 34 is consistent with modern practice and technology. The *Act* distinguishes between the concepts of “place of arbitration” and the location at which hearings take place, which may or may not be at the place of arbitration.

Evidence

- 35 (1) An arbitral tribunal need not apply legal rules of evidence, other than rules concerning privilege.

Commentary: The previous uniform *Act* stated:

- 21(1) In an arbitration, the arbitrator shall admit all evidence that would be admissible in a court and may admit other evidence that he or she considers relevant to the issues in dispute.
- (2) The arbitrator may determine the manner in which evidence is to be admitted.

Section 35 has been revised to give arbitrators maximum flexibility in admitting or not admitting evidence. It deletes the aspect of the previous subsection 21(1) that requires an arbitrator to admit all evidence that would be admitted in a court.

Procedural matters

- 36 (1) Subject to this Act and any agreement of the parties, an arbitral tribunal may establish procedures and make procedural orders for the conduct of an arbitral proceeding.
- (2) For certainty, and without limiting subsection (1), an arbitral tribunal may make the following orders:

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- (a) concerning statements of position or pleadings, including when they should be given, their form and content, and whether amendments are allowed;
- (b) requiring security for the arbitral tribunal's fees and expenses;
- (c) requiring a party to provide security for costs that may be incurred by another party;
- (d) concerning the determination of some matters in dispute before other matters in dispute;
- (e) giving directions for the preservation of evidence;
- (f) subject to privilege, requiring a party to produce records or information;
- (g) establishing protocols for searching for and producing electronically-stored records, and allocating the costs of implementing the protocols;
- (h) giving directions in relation to any property which is the subject of the arbitral proceeding or as to which any question arises in the proceeding, and which is owned by or in the possession of a party
 - (i) for the inspection, photographing, preservation, custody or detention of the property by the arbitral tribunal, an expert or a party, or
 - (ii) for taking samples from, or making observation of any test or experiment conducted upon, the property;
- (i) concerning the form in which evidence and argument is presented
- (j) regarding the confidentiality of the arbitral proceedings, including pleadings, evidence, transcripts, orders, awards, and the fact of the arbitration, and providing for sanctions against parties for failure to observe confidentiality requirements;
- (k) allowing the use of video or telephone-conferencing or other technology permitting the examination of witnesses who are not physically present at an evidentiary hearing;
- (l) allocating hearing time between the parties;
- (m) excluding witnesses or potential witnesses from attending any part of an oral evidentiary hearing;
- (n) concerning the language or languages to be used in the proceedings, whether translations of any records are to be supplied and allocating the costs of interpreting or translating evidence;
- (o) varying a procedural order, including by shortening or extending a time limit established by the order, before or after the time limit has expired.'

Commentary: Section 36 is in part new and in part an amalgam of a number of provisions of the previous uniform *Act*. The arbitral tribunal is given wide powers and

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flexibility to determine a fair and efficient procedure having regard to the circumstances of the dispute. Default procedures have not been specified.

Subsection 20(2) of the previous uniform *Act* (which allowed a multi-person tribunal to delegate procedural questions to the chair without party consent) has not been carried forward. Subsection 25(7) of the previous *Act* (stating that the court may enforce a procedural order) has not been carried forward. The benefits of having court recourse are outweighed by the risk of encouraging undue court intervention into procedural matters that are at the heart of arbitral tribunal's mandate.

Party default

- 37 (1) In this section,
- “claim” means
- (a) with respect to a party who commenced the arbitral proceeding, the matters put in dispute by that party, and
 - (b) with respect to a party who brings a counterclaim in arbitral proceedings, the matters put in dispute by the counterclaim. (« demande »)
- “procedural time limit” means a time limit set by enactment, agreement of the parties or order of the arbitral tribunal for taking a procedural step. (« délai de procédure »)
- (2) If a party who commenced arbitral proceedings or brought a counterclaim fails to comply with a procedural time limit, the arbitral tribunal may
- (a) terminate the arbitral proceeding in relation to the party’s claim, or
 - (b) suspend the arbitral proceeding in relation to the party’s claim, pending fulfilment of conditions.
- (3) If a party fails to comply with a procedural time limit, the arbitral tribunal may continue the arbitral proceeding and make an order it considers appropriate, including an order
- (a) that the party is precluded from taking a procedural step, or
 - (b) drawing inferences of fact against the party.
- (4) If a party fails to produce evidence as required or otherwise fails to participate in an arbitral proceeding, the arbitral tribunal may continue the proceeding and make an award based on the evidence presented to it.
- (5) If an arbitral proceeding is terminated under subsection (2) the arbitral tribunal may award costs as it considers appropriate.
- (6) Unless the arbitral tribunal determines otherwise at the time of termination, an award made before termination or suspension of an arbitral proceeding under this section remains valid and enforceable.

Commentary: Subsections 27(1) and (4) of the previous uniform *Act* empowered an arbitral tribunal to “dismiss” a claim for default. Subsection 37(2) allows suspension

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or termination of arbitral proceedings, rather than dismissal, while expressly authorizing (see s. 37(5)) 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, under Subsection 37(4) the arbitral tribunal is authorized to continue the proceeding and make an award based on whatever evidence is presented to it.

Subsection 37(6) is new.

Production and evidence from non-parties

- 38 (1) If an arbitral tribunal determines that a person, other than a party, should give evidence or produce records, the arbitral tribunal may
- (a) issue a subpoena to a person in *[enacting jurisdiction]* requiring the person to give evidence or produce for inspection records in the person's possession or control, or
 - (b) request a court of competent jurisdiction to assist the arbitral tribunal by requiring a person in or outside *[enacting jurisdiction]* to give evidence or produce for inspection records in the person's possession or control.
- (2) A subpoena under subsection (1) (a) must set out and a request under subsection (1) (b) must propose the following, as applicable:
- (a) the time, place and manner in which the person is to give evidence;
 - (b) the records the person is to produce;
 - (c) the time, place and manner of production and copying;
 - (d) conditions for the payment of the expenses of the person named in the request.
- (3) A subpoena under subsection (1) (a) has the same effect as if it were issued in a court proceeding.
- (4) A subpoena under subsection (1) (a) may be set aside on application by the person named in the subpoena to the arbitral tribunal or the *[enacting jurisdiction to insert name of court]*.
- (5) A party may apply to *[enacting jurisdiction to insert name of court]* for an order providing the assistance described in a request issued under subsection (1)(b).
- (6) If an application is brought to the court under subsection (5), the court shall, after requiring such notice to the person named in the request as it finds appropriate, and if satisfied that the conditions proposed are reasonable, make one of the following:
- (a) if the person named in the request is within *[enacting jurisdiction]*, an order that the person attend to give evidence or produce records as described in the request;

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- (b) if the person named in the request is not within [*enacting jurisdiction*] a request for assistance to another court of competent jurisdiction.
- (7) A party to an arbitral proceeding in which
 - (a) the place of arbitration is within another province or territory,
 - (b) the arbitration is not considered to be an international arbitration under the laws of the place of arbitration, and
 - (c) the arbitral tribunal has issued a request substantially conforming to the requirements of a request under subsection (1)(b)
 may apply to [*enacting jurisdiction to insert name of court*] for an order providing the assistance described in the request and the request shall be enforced in the manner and to the extent provided under the [*enacting jurisdiction to insert name of its Interprovincial Subpoena Act or equivalent legislation*] as if it were a subpoena issued by a court of the place of arbitration.
- (8) A court decision under this section may not be appealed.

Commentary: The previous uniform *Act* allowed a party, without notice to or permission of, the arbitral tribunal, to “serve” a notice on a third party which is said to have the “same effect” as a similar notice issued in court proceedings. To ensure that the mandate of the arbitral tribunal to control the proceedings is met and to protect the privacy of the proceedings, before purporting to draw third parties into the process the arbitral tribunal should be given an opportunity to satisfy itself that the persons may have information that is relevant, material and not readily obtainable by some other means, and that the benefit of having the evidence justifies any delay or other negative impacts on the arbitral process.

Subsection 38(1)(a) requires the arbitral tribunal to authorize the issuance of a subpoena.

Subsection 38(1)(b) allows an arbitral tribunal to ask for the assistance of any court of competent jurisdiction, including the court in the enacting jurisdiction. If the witness is within the enacting jurisdiction, the arbitral tribunal may either authorize a subpoena and await its results or, for example, if there is good reason to believe that the witness will not respond to the subpoena, simply ask the court to make an order directed to the witness.

The person in question may not be within the jurisdiction of the court of the enacting jurisdiction. Subsections 38(1)(b) and 38(6)(b) authorize a tribunal to either issue a request directly to a foreign “court of competent jurisdiction” (in which case its effectiveness would depend on the law of the relevant foreign jurisdiction) or apply to the local court for the issuance of letters of request or some other process that might be recognized and enforced by a foreign court.

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Subsection 38(7) requires courts in the enacting jurisdiction to provide assistance to non-international arbitral tribunals seated elsewhere in Canada, with a view to avoiding the need for seeking assistance from two Canadian courts. If this part of the new *Act* is implemented across Canada, when a witness is within the jurisdiction of a Canadian court outside the place of arbitration, an application can be made directly to that court.

Non-compellability

- 39** Despite section 38 [*evidence from non-parties*], a person may not be compelled to produce information, property or records or to give evidence in an arbitral proceeding that the person may not be compelled to produce or give in a court proceeding.

Commentary: Section 39 carries forward Section 30 of the previous uniform *Act*.

Tribunal-appointed experts

- 40** (1) An arbitral tribunal may, after consultation with the parties, appoint an expert to report to the arbitral tribunal and the parties on an issue.
 (2) The arbitral tribunal may order a party to give the expert relevant information or to produce, or to provide access to, relevant records, goods or other property for inspection.
 (3) The arbitral tribunal may order the expert, after giving the expert's report, to participate in a hearing at which the parties may question the expert on the report and present evidence on issues arising from the report.
 (4) The costs of an expert appointed under this section shall be borne by the parties as directed by the arbitral tribunal.

Commentary: Section 28 of the previous uniform *Act* authorized an arbitral tribunal to appoint an expert, without requiring the consent of, or consultation with, the parties before doing so. As a minimum the arbitral tribunal should consult with the parties before appointing an expert. The parties can contract out of this section if they wish to deny the arbitral tribunal this power.

Independence and impartiality of experts

- 41** (1) An expert appointed by a party to give evidence in an arbitral proceeding or appointed under section 40 [*tribunal appointed experts*] shall sign a written statement stating that the expert is
 (a) impartial and,
 (b) except as disclosed in the statement, independent of the parties.
 (2) The expert shall give the statement to the arbitral tribunal and to the parties.

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Commentary: The previous uniform *Act* did not require that a tribunal-appointed expert be independent and impartial. Current arbitration practice is to impose such a requirement.

Mediation and conciliation

- 42**
- (1) If the parties and the arbitral tribunal agree, the arbitral tribunal may use mediation, conciliation or another technique to assist the parties to settle a matter in dispute.
 - (2) An arbitrator may not be challenged or removed because the arbitral tribunal participated in a process under subsection (1).
 - (3) For certainty, subsection (2) applies if the arbitration process continues after or concurrently with a process under subsection (1).

Commentary: There was a divergence of opinion as to whether the new *Act* should prohibit, permit or encourage arbitrators to also act as mediators in the course of an arbitration. Section 35 of the previous uniform *Act* left the choice to the legislatures, by including two optional provisions. If the parties consent, Option A allowed arbitrators to be mediators and then resume the role of arbitrator. Option B prohibited arbitrators from serving as mediators in the same case. While it is generally preferable for commercial arbitrators, at least, not to play a dual role, modern Canadian domestic practice is that, provided that suitable precautions are taken, “mediation-arbitration” should not be prohibited.

Subsection 42(1) requires the agreement of all parties and the arbitrators. This is intended to empower arbitrators to decline accepting a dual role if they have concerns.

Subsection 42(2) is consistent with Option A in the previous uniform *Act*, and is intended to prevent a party from seeking to engage in mediation as a tactic to de-rail arbitration proceedings.

PART 9 – INTERIM MEASURES

Powers of Arbitral Tribunal Concerning Interim Measures

- 43**
- (1) An arbitral tribunal may, on application by a party, grant interim measures before the issuance of an award.
 - (2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, 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, harm to the arbitral process,
 - (c) preserve assets that are the subject matter of the dispute or out of which a subsequent award may be satisfied, or

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- (d) preserve evidence.

Commentary: This Section is taken from the UNCITRAL Model Law. Subsection (c) has been modified to expressly include preservation of property that is the subject matter of the dispute.

Preliminary orders

- 44**
- (1) A party may, without notice to any other party, apply for
 - (a) an interim measure and
 - (b) a preliminary order directing a party to the arbitration agreement not to frustrate the purpose of the interim measure.
 - (2) The arbitral tribunal may grant the preliminary order if notice of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the interim measure.

Specific regime for preliminary orders

- 45**
- (1) After an arbitral tribunal makes a determination in respect of an application under section 44 [*preliminary orders*], as soon as practicable the arbitral tribunal shall give notice to all parties of
 - (a) the application for an interim measure,
 - (b) the application for a preliminary order,
 - (c) the preliminary order, if any, and
 - (d) all other communications, including by indicating the content of any oral communication, between a party and the arbitral tribunal in relation to the applications.
 - (2) The arbitral tribunal shall as soon as practicable give a party against whom a preliminary order is directed an opportunity to present its case.
 - (3) The arbitral tribunal shall decide as soon as practicable on any objection to the preliminary order.
 - (4) A preliminary order expires 21 days after the date on which it is issued.
 - (5) An 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.
 - (6) A preliminary order is not subject to enforcement by a court.

Commentary: (Sections 44 and 45). These sections are taken from the UNCITRAL Model Law. In relation to international commercial arbitration there has been controversy concerning whether arbitral tribunals should be empowered to hear *ex parte* applications, due to the consensual nature of arbitration. The predominant view is that with appropriate limitations and safeguards such as those set out in the Act, parties will benefit from being able to obtain short-lived *ex parte* orders to preserve the *status quo*.

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Modification, suspension and termination of interim measures

- 46** (1) On application by a party, an arbitral tribunal may modify, suspend or terminate an interim measure or preliminary order.
- (2) An arbitral tribunal may make an order modifying, suspending or terminating an interim measure or preliminary order on its own initiative if
- (a) the arbitral tribunal first notifies all the parties, and
 - (b) extraordinary circumstances justify the arbitral tribunal acting on its own initiative.

Commentary: The section is taken from the UNCITRAL Model Law.

Provision of security

- 47** (1) An arbitral tribunal may require a party requesting an interim measure to provide security as a condition of granting the interim measure.
- (2) Unless an arbitral tribunal is satisfied that security is inappropriate or unnecessary, the arbitral tribunal shall require a party applying for a preliminary order to provide security as a condition of granting the preliminary order.

Commentary: The section is taken from the UNCITRAL Model Law.

Disclosure

- 48** Until the party against whom a preliminary order has been requested has had an opportunity to present its case in relation to the preliminary order
- (a) the arbitral tribunal may require a party to disclose a material change in the circumstances on the basis of which the measure was granted, and
 - (b) the party that applied for the preliminary order shall disclose to the arbitral tribunal all circumstances that might be relevant to the arbitral tribunal's determination whether to grant or maintain the order.

Commentary: Although re-worded for clarity, this section is taken from the UNCITRAL Model Law.

Costs and damages

- 49** (1) If an arbitral tribunal determines that an interim measure should not have been granted, the party that applied for the measure is liable for costs and damages caused by the interim measure.
- (2) If an arbitral tribunal determines that a preliminary order should not have been granted, the party that applied for the order is liable for costs and damages caused by the preliminary order.

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- (3) An arbitral tribunal may make an award under this section at any point during an arbitral proceeding.

Commentary: The section is taken from the UNCITRAL Model Law.

Enforcement of interim measures

- 50** (1) Unless otherwise provided by the arbitral tribunal, a party may apply to [enacting jurisdiction to insert name of court] to enforce an interim measure.
- (2) The applicant shall inform the court of any termination, suspension or modification of the measure, or of any application to terminate, suspend or modify the measure.
- (3) The court may order the applicant to provide security if
- (a) the arbitral tribunal has not already made a determination with respect to security, or
 - (b) security is necessary to protect the rights of persons other than the parties.
- (4) A party may appeal a court decision under this section.

Commentary: The Section substantially mirrors the equivalent stipulation in the UNCITRAL Model Law.

Grounds for refusing enforcement of interim measures

- 51** A court may refuse to enforce an interim measure if
- (a) any of the circumstances set forth in section 66 (1) [*setting aside awards*] apply,
 - (b) the party seeking the enforcement of the measure has not complied with a condition imposed by the arbitral tribunal, or
 - (c) an application is pending before the arbitral tribunal to terminate, suspend or modify the interim measure.

Commentary: The Section is based on the UNCITRAL Model Law.

Court interim measures

- 52** (1) The [enacting jurisdiction to insert name of court] has the same powers with respect to the detention, preservation and inspection of property, interim injunctions, the appointment of receivers and other interim measures in relation to an arbitral proceeding as it has in a court proceeding.
- (2) For certainty, an application by a party to a court under this section is not a waiver of an arbitration agreement.
- (3) A party affected by an order of a court under section 50 [*enforcement of interim measures*] or subsection (1) may apply to the court to vary or set

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aside the order if there is a material change in the circumstances that were the basis of the order.

Commentary: The prevailing approach in most arbitral rules, and that provided for in the UNCITRAL Model Law, is that there should be concurrent jurisdiction between the court and arbitral tribunal to issue interim measures. This is the approach taken in the previous uniform *Act* and it has been continued in the text set out above. Subsection 52(3) is new.

PART 10 – AWARDS AND TERMINATION OF ARBITRAL PROCEEDINGS

Majority decision

53 If an arbitral tribunal is composed of more than one arbitrator, the award of a majority of the arbitrators is the award of the arbitral tribunal.

Commentary: A provision similar to this appeared in the previous uniform *Act*.

Form of award

54

- (1) An award shall be in writing.
- (2) An arbitral tribunal shall give reasons for an award, unless the award is consented to by all parties.
- (3) An award shall state the place of arbitration and the date on which it is made.
- (4) A failure to comply with subsection (3) is a clerical mistake which may be corrected under section 57 [*corrections, clarifications and additional awards*].
- (5) All arbitrators in the arbitral tribunal shall sign an award.
- (6) Despite subsection (5), a majority of the arbitrators may sign an award if the award includes an explanation for the omission of the signatures of the other arbitrators.

Commentary: This provision is substantially the same as several provisions in the previous uniform *Act*.

Delivery of award to parties

55

- (1) The arbitral tribunal shall give an originally signed or certified true copy of the award to each party.
- (2) Despite subsection (1), unless [*enacting jurisdiction to insert name of court*] orders otherwise, an arbitral tribunal may withhold an award from the parties if it has not received full payment of its fees and expenses.
- (3) A time limit for giving the award is extended until security is provided for an amount claimed under subsection (2).

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- (4) If the arbitral tribunal refuses or fails to give an award, a party may, upon notice to the other parties and the arbitral tribunal, apply to [enacting jurisdiction to insert name of court] for one or more of the following orders:
 - (a) an order that the arbitral tribunal give the award on the payment into court of all or part of the fees and expenses demanded;
 - (b) a summary determination of the amount of the fees and expenses properly payable to the arbitral tribunal under section 62(2);
 - (c) an order that the fees and expenses as determined be paid out of the money paid into court;
 - (d) directions as to how the balance of the money paid into court be paid out.
- (5) A decision of a court under subsection (4) may not be appealed.

Commentary: This is a new provision modelled on one found in the *Arbitration Act, 1996* (England). It is intended to balance the interest of the parties in being able to dispute arbitrators' fees in domestic cases while also obtaining the award against the interest of arbitrators in ensuring that payment of fees is properly secured before the award is issued.

Extension of time for award

- 56 (1) An arbitral tribunal or a party may apply to [enacting jurisdiction to insert the name of court] for an order extending the time within which the arbitral tribunal is required to make an award.
- (2) The court shall make the order if satisfied that a substantial injustice would otherwise be done.
 - (3) An order under this section may not be appealed.
 - (4) An order under subsection (2) may be made before or after the expiry of the time within which the arbitral tribunal is required to make the award.

Commentary: This provision is based on one in the previous uniform *Act*, but has been expanded to make it clear that an arbitral tribunal, as well as a party, may apply to the court for an extension of time, and to add the "substantial injustice" requirement.

Corrections, clarifications and additional awards

- 57 (1) The arbitral tribunal may
 - (a) on its own initiative, no more than 30 days after giving the award, or
 - (b) on the application of a party made no more than 30 days after the receipt of the award,
 correct an award to remove a typographical error, clerical mistake, error of calculation or error arising from an accidental slip or omission.

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- (2) A party may, no more than 30 days after the receipt of the award, request the arbitral tribunal to clarify or interpret a specific passage, statement or part of the award.
- (3) If the arbitral tribunal considers that an application or request made under subsection (1) (b) or (2) is justified, it shall make the correction or give the clarification or interpretation no more than 30 days after the application or request.
- (4) A correction, clarification or interpretation under subsection (3) is part of the award.
- (5) No more than 30 days after the receipt of an award, a party may apply to the arbitral tribunal to make an additional award in respect of a claim, including a claim for interest or costs, which was presented to the arbitral tribunal for decision, but
 - (a) was not dealt with in the award and
 - (b) concerning which the arbitral tribunal did not expressly reserve its jurisdiction.
- (6) If the arbitral tribunal considers an application under subsection (5) to be justified, it shall make the additional award no more than 60 days after the application.

Commentary: This section deals with three distinct situations which often arise after the issuance of an award – (i) corrections (ii) clarifications and (iii) additional awards to address matters that should have been but were not decided by the award. Such provisions appear in the UNCITRAL Model Law. The previous uniform *Act* dealt only with corrections and clarifications.

Partial awards

58 The arbitral tribunal may make an award finally deciding a matter in dispute, while retaining jurisdiction to decide another matter in dispute.

Commentary: The concept of more than one final award is present in the previous uniform *Act*. A final decision concerning a matter in dispute should be decided by a final award. If appropriate, individual issues or claims can be finally decided by a partial award. The powers of an arbitral tribunal to grant interim measures of protection, and provisions concerning the enforcement of such measures are set out exhaustively in another part of the *Act*. The authority of the arbitral tribunal to decide procedural issues by procedural orders (which are not awards) is also described elsewhere.

Binding nature of award

59 Unless it is set aside or varied under this Act, an award binds the parties.

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Commentary: This provision is carried forward, with a slight change in wording, from the previous uniform *Act*.

Costs

- 60**
- (1) The arbitral tribunal may make an award requiring a party to pay another party all or part of the other party's costs of the arbitral proceeding.
 - (2) A party's costs include all amounts the party has paid or incurred in connection with the arbitral proceeding for
 - (a) actual reasonable legal fees, including disbursements,
 - (b) reasonable expert witness fees, including disbursements,
 - (c) the fees and expenses of the arbitral tribunal,
 - (d) reasonable expenses for hearing facilities, translation or transcription of evidence or other similar expenses, and
 - (e) applicable taxes.
 - (3) If the arbitral tribunal makes an award under subsection (1), the arbitral tribunal shall summarily determine the amount of costs.
 - (4) If the arbitral tribunal finds that the conduct of a party unnecessarily increased another party's costs of the arbitration, the arbitral tribunal may make an award of costs requiring the party to pay to the other party an amount the arbitral tribunal considers to be a reasonable estimate of the increased costs.
 - (5) An award of costs under subsection (4) may be made at any time during the arbitral proceeding and may be made payable at any time.
 - (6) If a party makes an offer to another party to settle the dispute or part of the dispute and the offer is not accepted, the arbitral tribunal may take that fact into account when awarding costs of the arbitration.
 - (7) The content of an offer to settle shall not be communicated to the arbitral tribunal unless the arbitral tribunal has issued a final award determining all aspects of the dispute other than costs.

Commentary: It is generally accepted that arbitrators have discretion when awarding costs. There is a divergence of practice and legislation across Canada concerning the quantification of costs in domestic arbitrations.

The parties are free to agree on whether costs should be recoverable at all and, if so, on what basis. Party autonomy militates against imposing a cap on cost recovery akin to that typically imposed by rules of court. Subject to any agreement to the contrary, the new *Act* allows recovery of up to the full amount of a parties' actual, reasonable legal fees and expenses in connection with the arbitration.

Subsection 60(3) requires arbitrators to fix the amount of costs payable. The provision in the previous uniform *Act* allowing arbitrators to refer quantification to an appropriate court officer has not been carried forward as that process is less efficient

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Subsection 60(4) is new. It gives arbitrators the express power to make costs awards during the proceeding to sanction conduct that has unnecessarily increased another party's costs.

Subsections 60(6) and (7) carry forward from the previous uniform *Act* the concept of offers to settle being factored into costs awards.

Arbitral tribunal's fees and expenses

- 61** (1) Except as otherwise agreed, the fees and expenses payable to an arbitrator shall be set at the sum of
- (a) the fair value of the services performed, and
 - (b) the necessary and reasonable expenses actually incurred by the arbitrator.
- (2) A party or an arbitrator may apply to *[enacting jurisdiction to insert name of court]* for a summary determination of the fees and expenses payable if
- (a) the party alleges the fees and expenses paid to or demanded by the arbitrator exceed the amount owing, or
 - (b) the arbitrator alleges the party has failed to pay fees and expenses owed.
- (3) An application under subsection (2) shall be made no later than 60 days after the earlier of the following, if applicable:
- (a) the date on which payment was demanded;
 - (b) the date on which payment was made.
- (4) If a party fails to pay fees or expenses found to be payable under subsection (2) or if an arbitrator fails to reimburse fees or expenses in excess of the amount found to be payable within 14 days of the finding, the court may enter judgment for the unpaid amount.
- (5) A decision of a court under subsections (2) and (4) may not be appealed.

Commentary: If the parties have agreed, by adopting institutional rules or otherwise, that an institution shall fix or review an arbitrator's fees and expenses, then there should be no basis for court involvement. If the parties have agreed on the basis of the arbitrator's remuneration, then that agreement should prevail and the fees should not be open to challenge on the basis that they do not represent fair value – “fair value” should be a default measure for compensation.

Absent some other agreed procedure, either a party or an arbitrator should be able to obtain a summary determination from a court of whether the remuneration paid or payable complies with the agreed compensation or, absent agreement, with the “fair value” standard. “Taxation” of arbitrator's accounts in the same manner as lawyers accounts may not always be appropriate, as there are significant differences in the duties of arbitrators to the parties and the duties of lawyers to a client.

*Uniform Arbitration Act (2016)***Termination of proceeding**

- 62** (1) An arbitral proceeding terminates when
- (a) the arbitral tribunal makes an award in accordance with this Act, determining the matters in dispute that were referred to arbitration and,
 - (i) no proceedings under sections 57 [*corrections clarifications and additional awards*], 65 [*appeals on questions of law*] and 66 [*setting aside awards*] are taken and the time for taking them has elapsed, or
 - (ii) all proceedings under sections 57, 65 or 66 have been completed and no court has referred a matter to the arbitral tribunal for decision,
 - (b) the arbitral tribunal declares the arbitral proceeding is terminated, or
 - (c) the parties agree that the arbitral proceeding is terminated.
- (2) The arbitral tribunal may issue an order declaring an arbitral proceeding to be terminated if
- (a) all claims in the arbitral proceeding are withdrawn or abandoned, unless a party objects to the proposed order for termination and the arbitral tribunal is satisfied that the objecting party has a legitimate interest in continuing the proceedings, or
 - (b) the continuation of the proceeding is unnecessary or impossible.
- (3) If an arbitral proceeding is terminated under subsection (2) the arbitral tribunal may, if requested to do so by a party, award costs.
- (4) The mandate of an arbitral tribunal terminates with the termination of the arbitral proceeding.

Commentary: The provision is consistent with that of the previous uniform *Act*.

Interest

- 63** (1) An arbitral tribunal shall order pre-award interest in the same manner as a court orders pre-judgment interest under [*Court Order Interest Statute*].
- (2) Post-award interest is calculated in the same manner as post-judgment interest under [*Court Order Interest Statute*].

Commentary: This Section ensures that an arbitrators powers and duties with respect to interest awards are co-extensive with those of a court.

PART 11 – RE COURSE AGAINST AND ENFORCEMENT OF AWARDS

Court intervention limited

- 64** No decision, order or award of an arbitral tribunal may be appealed to or be reviewed or set aside by a court, except as provided in this Act.

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Commentary: It is of the utmost importance to achieve the objectives of the Act that court recourse from arbitral awards be strictly limited.

Appeals on questions of law

- 65**
- (1) If an arbitration agreement provides that an appeal to a court may be brought on a question of law, an appeal may be brought to [*enacting jurisdiction to insert name of appellate court*] on a question of law arising out of an award, with leave of that court.
 - (2) A provision of an arbitration agreement purporting to allow
 - (a) an appeal on a question of law to a court other than [*enacting jurisdiction to insert name of appellate court*], or
 - (b) an appeal to a court on a question of mixed fact and law, is an agreement providing that an appeal may be brought to [*enacting jurisdiction to insert name of appellate court*] on a question of law.
 - (3) The [*enacting jurisdiction to insert name of appellate court*] may decide whether an arbitration agreement provides that an appeal may be brought on a question of law.
 - (4) A provision of an arbitration agreement purporting to allow an appeal to a court on a question of fact has no effect.
 - (5) On an application for leave under subsection (1), the [*enacting jurisdiction to insert name of appellate court*] may grant leave if
 - (a) the question of law significantly affects the rights of a party,
 - (b) granting leave may prevent a miscarriage of justice,
 - (c) the question of law is of importance to a class or body of persons of which the applicant is a member, or
 - (d) the question of law is of general or public importance.
 - (6) The [*enacting jurisdiction to insert name of appellate court*] may attach conditions to an order granting leave.
 - (7) On an appeal, the [*enacting jurisdiction to insert name of appellate court*] may
 - (a) confirm, vary or set aside the award, or
 - (b) remit the award to the arbitral tribunal with directions.

Commentary: The previous uniform *Act* allowed parties to appeal to a court of first instance on questions of law, with leave of that court, or without leave if the arbitration agreement expressly authorized such appeals or all parties consent.

The previous uniform *Act* also permitted parties to appeal to a court of first instance on questions of fact or mixed questions of law and fact, without leave, if such appeals are authorized by the arbitration agreement. A party could not appeal to the court, however, on a question of law “which the parties expressly referred to the arbitral

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tribunal for decision.” The decision of the court of first instance could then be further appealed to the court of appeal, with leave of that court.

There is a broad consensus that appeals on questions of fact or mixed fact and law should not be allowed. Section 65 (subject to a transitional provision) prohibits appeals on questions of fact or on questions of mixed fact and law, even if the parties have agreed to allow such appeals.

Among the members of the ULCC Working Group and survey respondents more than half supported also barring appeals on questions of law. There was also substantial support for preserving such a right of appeal. If such appeal rights are to be available, the preponderant view was that it should be on an “opt-in” rather than an “opt out” basis.

Subsection 65(1) of the new *Act* assumes that appeals on questions of law will be permitted, on an “opt-in” basis. Because this is a significant change from the previous regime in many jurisdictions, a transitional provision is recommended (see Section 74) to preserve the previous regime for arbitration agreements made before the new *Act* is enacted.

The new *Act* implements a more streamlined appeal process, to the Court of Appeal (with leave of that court) rather than to a court of first instance. This should reduce unduly protracted post-award litigation.

Setting aside awards

- 66** (1) A party may apply to the [*enacting jurisdiction to insert name of court*] to set aside an award.
- (2) The court may set aside an award only on the following grounds:
- (a) a person entered into the arbitration agreement while under a legal incapacity;
 - (b) the arbitration agreement does not exist, is void or is unenforceable;
 - (c) the award deals with a dispute not falling within the terms of the arbitration agreement or contains a decision on a matter that is beyond the scope of the arbitration agreement;
 - (d) the composition of the arbitral tribunal was not in accordance with the arbitration agreement or this Act;
 - (e) the dispute is not capable of being the subject of arbitration under [*enacting jurisdiction*] law;
 - (f) the applicant was not given proper notice of the arbitration or of the appointment of an arbitrator;
 - (g) there is a justifiable doubt as to the independence or impartiality of the arbitral tribunal;

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- (h) the applicant was not given a reasonable opportunity to present its case or to answer the case presented against it;
- (i) the award was the result of fraud or corruption by a member of the arbitral tribunal or was obtained by fraudulent behaviour by a party or its representative in connection with the conduct of the arbitral proceeding.
- (3) If the court finds that the grounds described in subsections (2)(c) or (e) apply in respect of only part of the subject-matter of the award, the court may set aside the award in part.
- (4) The court may not set aside an award on grounds referred to in subsection (2) (g) if, before the award was made,
 - (a) the applicant failed to follow the applicable procedure required by the arbitration agreement or this Act for seeking the removal of the arbitrator based on the circumstances it relies upon to seek to set aside the award, or
 - (b) the court has previously determined that substantially the same circumstances as are relied upon to set aside the award were not sufficient to justify the removal of the arbitrator.
- (5) The court may not set aside an award if the applicant is deemed under section 5 [*waiver of right to object*] to have waived the right to object on the grounds on which the applicant relies.
- (6) A party may appeal a court decision under this section.

Commentary: The statutory jurisdiction of a court to set aside all or part of an award is discretionary, and is limited to instances where the process was fundamentally flawed in a one or more specific ways. Parties should not be able, by contract, to exclude the set-aside remedy, although they may be precluded by their conduct from asserting certain of the grounds for setting aside. This is consistent with the UNCITRAL Model Law.

Subsection 66(2)(a) is carried forward from the previous uniform *Act*.

Subsections 66(2)(b)(c) and (d) are carried forward, with slight modification, from the previous uniform *Act*. These grounds for setting aside are expressed in the same language as is used in Section 7, defining the findings which a court might make to justify refusing a stay of court proceedings.

Subsection 66(2)(e) is carried forward from the previous uniform *Act*.

Subsection 66(2)(f) and subsection 66(1)(h) are a modified version of a provision that appeared in the previous uniform *Act*.

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Section 46(1)(g) of the previous uniform *Act* includes the following ground for setting aside an award:

“the procedures followed in the arbitration did not comply with this Act.”

The new *Act* has few mandatory procedural requirements. It has been suggested that non-compliance with procedure may set the bar too low for setting aside an award. On balance, the Working Group considered that the risk that an award might be set aside or of wasteful applications to set aside, due to inconsequential failures to follow procedural steps, outweighs the benefit of preserving this separate ground for setting aside.

Subsection 66(1)(g) provides for the following ground to set aside an award:

“there is a justifiable doubt as to the independence or impartiality of the arbitral tribunal;”

Although this ground does not appear in the UNCITRAL Model Law, the Working Group concluded that it should be carried forward from the previous uniform *Act*, changing the wording from “apprehension of bias” to “justifiable doubts etc.” to be consistent with other provisions of the new *Act*.

Subsections 66((4) and (5) limit the circumstances in which certain of the grounds for setting aside may be invoked. Although there are changes in the language for purposes of clarity, the concepts are carried forward from the previous Uniform *Act*.

Time limit for appeals and applications to set aside

- 67** (1) Subject to subsection (2), an appeal under section 65 [*appeals on questions of law*] or an application to set aside an award under section 66 [*setting aside awards*] must be commenced no more than 30 days after the appellant or applicant receives the award, correction, clarification or additional award on which the appeal or application is based.
- (2) If the applicant alleges corruption or fraud, an application to set aside the award under section 66 must be commenced within 30 days after the date on which the applicant first knew or reasonably ought to have known of the circumstances relied upon to set aside the award.

Commentary: The 30-day time limit is carried forward from the previous uniform *Act*. The *Uniform International Commercial Arbitration Act* provides for a 90-day time limit for applications to set aside, as that is the period specified in the UNCITRAL Model Law. The Working Group did not think it appropriate to extend the time limit for set-aside applications under the new domestic *Act*. It is preferable to have the same time limit for both applications to set aside and for appeals.

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Appeal of decision of [enacting jurisdiction to insert name of court]

68 If this Act states that a party may appeal from the [enacting jurisdiction to insert name of court] the appeal may be made to the [enacting jurisdiction to insert name of appellate court] with leave of that court.

Commentary: This provision makes it clear that in those cases where an initial court order is appealable, leave is required.

Enforcement of awards

69 (1) A party may apply to the [enacting jurisdiction to insert name of court] to enforce an award made in an arbitral proceeding with a place of arbitration in Canada.

(2) An application to enforce an award shall be made on notice to the person against whom enforcement is sought.

(3) An application to enforce an award shall be accompanied by an original or certified copy of the award and evidence as to whether

- (a) the time limited for commencing an appeal or an application to set aside the award at the place of arbitration has elapsed,
- (b) there is a pending appeal or application to set aside the award,
- (c) a stay of enforcement of the award has been issued, or
- (d) the award has been set aside.

(4) The court shall enforce the award, unless

- (a) the award has been set aside by a court of competent jurisdiction,
- (b) the dispute is not capable of being the subject of arbitration under [enacting jurisdiction] law,
- (c) the court does not have the jurisdiction to grant the relief sought,
- (d) the time limited for commencing an appeal or an application to set aside the award under the laws of the place of arbitration has not yet elapsed, or
- (e) there is a pending appeal or application to set aside the award, or a stay of enforcement of the award has been issued, at the place of arbitration.

(5) If subsection (4) (d) or (e) apply, the court may order that enforcement of the award is stayed for a time and on conditions, including conditions as to the deposit of security.

(6) Unless the court otherwise orders, a court decision to enforce an award has the same effect as a court judgment granting the remedy described in the award.

(7) A party may appeal a court decision under this section.

Commentary: Section 69 is carried forward, with modifications, from the previous uniform Act. It requires a court to enforce awards made in non-international arbitrations where the place of arbitration is in Canada.

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If the award has been set aside by a court of competent jurisdiction at the place of arbitration, it cannot be enforced. If proceedings to appeal or set aside the award at the place of arbitration are pending, or if the time limit for their commencement has not yet expired, the court may stay the enforcement proceeding or, if it determines that there has been undue delay in commencing or continuing an appeal or application to set aside, enforce the award.

If a stay is granted, the court may require the posting of security. Otherwise, the only substantive defences to an application for enforcement are that the dispute is, in whole or in part, not capable of being the subject of arbitration under the enforcing jurisdiction's law or the court does not have jurisdiction to grant the relief or remedy granted by the award.

The structure of the *Act* therefore requires a party who intends to resist enforcement to timely initiate an appeal or set aside proceeding at the place of arbitration, rather than simply waiting for steps being taken to enforce the award. If timely steps to appeal or set aside the award are not taken, enforcement can be resisted only on more narrow grounds than might have been raised to set the award aside. This approach was present in the previous uniform *Act*. It is different from the approach taken in the UNCITRAL Model Law with respect to international awards. (A party to an international award can choose not to initiate set aside proceedings and then raise as defences to enforcement proceedings the same grounds as it could have raised on an application to set aside the award.)

The previous uniform *Act* contained the following provision (S.50(7)) which is not carried forward into the new *Act*:

- (7) If the award gives a remedy that the court does not have jurisdiction to grant or would not grant in a proceeding based on similar circumstances, the court may,
 - (a) grant a different remedy requested by the applicant; or
 - (b) in the case of an award made in (enacting jurisdiction), remit it to the arbitral tribunal with the court's opinion, in which case the arbitral tribunal may award a different remedy.

The Working Group concluded that in Canada there are no material differences in the subject-matter jurisdiction of the superior courts of first instance. The Working Group also was particularly concerned about leaving it open to a court to find that the court "would not have granted [a remedy granted by the award] in similar circumstances" and allowing the court to remit matters back to the arbitral tribunal on that basis.

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Subsection (6) is intended to give more guidance as to the meaning and effect of an award being “enforced” by a court, and the form in which judgments granting enforcements may be made. Generally, if a court pronounces a judgment declaring that the award is enforced, that judgment is to be construed and enforced as if it granted the relief or remedy described in the award. Because there is a risk that an award may not have been written in a way that facilitates enforcement (e.g. without a concise statement of the disposition of the claims), the court has a discretion to re-state the relief or remedy granted by the award in a way that will facilitate enforcement proceedings.

Limitation period for enforcement proceedings

- 70** (1) No application for enforcement of an arbitral award may be brought more than 10 years after the following, as applicable:
- (a) if no appeal or application to set aside the award is brought, the date on which the time limit for appealing or setting aside the award expires;
 - (b) if an appeal or application to set aside the award is brought, the date on which proceedings at the place of arbitration to appeal or set aside the award conclude.
- (2) This section applies despite [*description of jurisdiction’s limitation statute*].

Commentary: Provincial/territorial drafters will need to check whether their jurisdiction’s limitation statute operates despite/notwithstanding other statutes.

Section 70 establishes a ten-year limitation period for applications seeking recognition and enforcement of awards.

This is longer than the time limit under limitations legislation of some jurisdictions, and longer than the two-year limitation period under the previous uniform *Act*. It is, however, consistent with the limitation period under the ULCC’s new *Uniform International Commercial Arbitration Act*. It is important to ensure that the limitation periods for recognition and enforcement of domestic arbitral awards are no longer than those for international awards, to avoid any argument that that Canada is in breach of its obligations under the New York Convention.

PART 12 – ADDITIONAL PROVISIONS

Confidentiality

- 71** All proceedings, evidence and information in connection with an arbitral proceeding are confidential, except to the extent that disclosure is
- (a) required by law,
 - (b) authorized by agreement of the parties,

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- (c) authorized by a court of competent jurisdiction, or
- (d) necessary for the purposes of preparing and presenting a claim or defence in the arbitral proceeding or enforcing a right under this Act and not prohibited by an agreement of the parties;—

Commentary: Parties often assume that arbitral proceedings are confidential. However, there is some uncertainty in the law in Canada as to the extent that arbitral proceedings are confidential, absent an express agreement of the parties. The Working Group concluded that it would be consistent with widely held user expectations to establish a general rule that arbitral proceedings are confidential, while also providing exceptions.

Delivery

- 72 (1) If the parties have agreed on a method for giving a record, then a record shall be given in accordance with the agreement.
- (2) If the parties have not agreed on a method for giving a record, a record may be given to an individual by
- (a) leaving it with the individual,
 - (b) leaving it at the individual's last-known place of business, habitual residence or mailing address,
 - (c) sending it electronically to an address or number specified by the individual for the purpose,
 - (d) by sending it to the individual's last-known place of business, habitual residence or mailing address by registered letter or another means which provides a record of receipt, or
 - (e) after the arbitral tribunal has been constituted, in such other manner as the arbitral tribunal directs.
- (3) If the parties have not agreed on a method for giving a record, a record may be given to a corporation
- (a) by leaving it with an officer, director or agent of the corporation,
 - (b) by leaving it at a place of business of the corporation with a person who appears to be in control or management of the place,
 - (c) by sending it electronically to an address or number specified by the corporation for the purpose,
 - (d) by any other means provided by applicable law, or
 - (e) after the arbitral tribunal has been constituted, in a manner the arbitral tribunal directs.
- (4) If the parties have not agreed on a date on which receipt of a record is deemed to occur, then, unless the addressee establishes that the addressee, acting in good faith, did not actually receive it until a later date,
- (a) a record given under any of subsections (3)(a), (b) and (c) or (4) is deemed to have been received on the date it is given;

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- (b) a record given under subsection (3)(d) is deemed to have been received 5 days after it is sent.
- (5) If it is satisfied that it is impractical or impossible to give a record in the manner described in subsections (1) or (2), a party may apply to the *[enacting jurisdiction to insert name of court]* for an order authorizing an alternative method of giving the record.
- (6) In an order under subsection (5), the court shall state the date on which receipt of the record is deemed to occur.
- (7) This section does not apply to the service or delivery of records in respect of court proceedings.

Commentary: Although there are substantial changes in the language and organization of the section, section 72 carries forward concepts that are present in the previous uniform Act.

Crown Bound

- 73** This Act binds *[description of the Crown/Government applicable in jurisdiction]*.

Commentary: This provision may not be required in some jurisdictions.

PART 13 – TRANSITION

Applicability to arbitration agreements entered into before Act comes into force

- 74**
- (1) Subject to this section, this Act applies to an arbitral proceeding commenced on or after the date this section comes into force, whenever the arbitration agreement under which the arbitral proceeding is commenced was made.
 - (2) This Act applies to an arbitral proceeding authorized by an enactment if the arbitral proceeding is commenced after the date this section comes into force.
 - (3) The following provisions of this Act do not apply in respect of arbitration agreements made before this section comes into force:

Commentary: Enacting jurisdictions should consider including a transitional provision governing appeals from arbitral awards if appeal rights under new section 66 are more restrictive than appeal rights under the existing statute.

Limitation period

- 75** Despite section 70 *[limitation period for enforcement]*, if an arbitral award is made before the coming into force of this section, but no application for

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enforcement of that award is brought before that day, a party may not bring an application for enforcement of the award after the earlier of the following

- (a) the date determined under section [*limitation period for enforcement*] or
- (b) the date on which the limitation period that applied in respect of the recognition or enforcement of the arbitral award before the coming into force of this Act would have expired.

Commencement

76 The provisions of this Act come into force on the date of [Royal] Assent.