Toronto Commercial Arbitration Society
Arbitration Act Reform Committee

FINAL REPORT

February 12, 2021

INTRODUCTION

In January 2017, the executive committee of the Toronto Commercial Arbitration Society established the Arbitration Act Reform Committee (the "AARC" or the "Committee") as a subcommittee to consider the new *Uniform Arbitration Act 2016* ("UAA") which was adopted by the Uniform Law Conference of Canada in late 2016 and to develop recommendations with respect to possible changes to the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "Act"). The Committee's task is referred to herein as the "Project".

The following were initially appointed to serve on the AARC:

William G. Horton (Chair)
J. Brian Casey (Co-chair)
Joel Richler (Co-chair)
Duncan Glaholt
Cynthia Kuehl
John Lorn McDougall
Stephen R. Morrison
Paul Morrison
Janet Walker

The AARC has been re-constituted from time to time. Its current members are:

William G. Horton (Chair)
J. Brian Casey (Co-chair)
Joel Richler (Co-chair)
John Judge
Doug Harrison
Cynthia Kuehl
Barry Leon
David McCutcheon
John Lorn McDougall
Paul Morrison
Paul Tichauer
Janet Walker

LIST OF ACRONYMS

The following acronyms are frequently used in this Report and its Appendices:

- FCIArb – Fellow of the Chartered Institute of Arbitrators: membership designation demonstrating that the Institute's requirements for experience, knowledge and skills have been met
- IBA – International Bar Association: association of international legal practitioners, bar associations, and law societies based in London, UK
- ICC – International Chamber of Commerce: international dispute resolution institute headquartered in Paris, France
- ICAA – *International Commercial Arbitration Act.* The Ontario statute which applies to international commercial arbitration.
- ICDR – International Centre for Dispute Resolution: the international division of the American Arbitration Association
- LCIA – London Court of International Arbitration: international arbitration institution based in London, UK
- SPPA – *Statutory Powers Procedures Act*, R.S.O. 1990, c. S.22: legislation setting out procedural rules for tribunals in Ontario
- ULCC – Uniform Law Conference of Canada: an Ottawa-based organization which works to harmonize the laws of the provinces and territories of Canada and to propose uniform legislation
- UAA – *Uniform Arbitration Act 2016* ("UAA") which was adopted by the Uniform Law Conference of Canada
- UNCITRAL – United Nations Commission on International Trade Law: a subsidiary body of the U.N. General Assembly responsible for helping to facilitate international trade and investment

STAGE ONE

This stage of the Project was divided into three phases.

The work of the committee was carried out through monthly meetings from March 2017 to June 2018.

Phase 1

In the first phase, the committee met and discussed the general approach to be taken, including whether Ontario should simply adopt the new UAA promulgated by the ULCC, whether the existing Act should be modified in specific areas, or whether Ontario should enact a unified Act for international and non-international commercial arbitrations based on the new *International*

Commercial Arbitration Act, 2017, S.O. 2017, c. 2, Sched. 5 ("ICAA") which was enacted in March 2017. In this phase, members of the committee also expressed, in open format discussions, their individual priorities for areas of, and approaches to, reform.

The following conclusions were reached informally in the first phase:

a) Most, but not all, committee members saw some need for reform particularly to deal with judicial decisions which from time to time did not conform to modern arbitration standards.

b) There was a general view that the UAA, while comprehensive in its approach, was too complex and cumbersome to adopt in its entirety as a workable statute. Nevertheless, the UAA contains a significant body of proposals that had to be considered in detail in any effort to reform legislation applying to non-international commercial[1] arbitrations.

c) Many members felt that the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), as adopted by the ICAA, continues to be an aspirational standard for all commercial arbitration (as it was for the existing version of the Act in 1991) and should continue to be a controlling reference point, or even a platform, for any new legislation dealing with commercial arbitration.

d) It was generally agreed that the Committee would focus only on commercial arbitration, recognizing that the existing Act applies to other types of arbitration as well – notably family law arbitration and statutory arbitrations.

The broader questions of approach to reforming the Act (e.g., whether non-international commercial arbitration should continue to be dealt with in the Act, or whether the ICAA should be expanded to include non-international arbitration) could not be easily answered without a

[1] We have used the term "non-international" to refer to commercial arbitration which does not satisfy the definition of "international" arbitration in the Model Law. The term "domestic arbitration" is arguably more commonly used to denote arbitration that is not international. However, the word "domestic" includes types of arbitration (such as family, consumer and employment) which are domestic in the sense of relating to disputes which affect household or family affairs. Perhaps due to that connotation, the term "domestic", when applied to commercial arbitration, can be confusing in some contexts. Thus, the term "non-international" has been used as a more specific and objective term when considering the issues relating to commercial arbitration within the mandate of the AARC.

detailed examination and discussion of specific topics in relation to the Act, the UAA and the ICAA. The following topics were identified in the first phase as key areas of interest:

1) jurisdiction (especially early determinations of jurisdiction);

2) stays of court proceedings in favour of arbitration;

3) appeals from awards; and

4) recognition and enforcement of awards.

As the appeals topic was the most controversial, and in some senses decisive of the overall values to be brought to bear on consideration of other topics, it was dealt with first. As Ontario, unlike other provinces, already gives parties the contractual right to exclude all appeals from awards, the pivotal issue in Ontario is whether appeals from arbitration awards should be provided on an opt-in or an opt-out basis, that is, whether appeals should be available if the parties make no specific provision in that regard. Through discussions at meetings and by email exchanges, all members of the Committee contributed to a "rolling" chart which summarized the views of Committee members on that issue. There was also a general discussion on other specific topics, such as whether it should be possible to take appeals from awards directly to the Court of Appeal, whether leave to appeal should be required to make an appeal, and whether parties should, by agreement, continue to be able to appeal on questions of mixed fact and law or pure questions of fact.

Following the discussion on appeals, it was decided to divide the Committee into three focus groups, each dealing with one of the three remaining topics. Each focus group was responsible to consider its topic in depth and to report back to the Committee its thoughts, and conclusions, if any, on the assigned topic.

Phase 2

In the second phase, the chart on appeals was completed and each focus group considered the provisions of the existing Act relating to its assigned topic. The comments of each focus group member were tracked and eventually summarized on a chart which was shared with the Committee as a whole. The Committee as a whole discussed each report (chart); however, no formal consensus was recorded at this stage. The results of the focus groups were variable.

The focus group on jurisdiction, which reported first, reported substantial disagreement, especially in relation to s. 48 of the Act and whether it is subject to the *competence-competence* principle. The focus group on enforcement and set aside was in substantial agreement and provided a unified set of comments. The focus group on stays of court proceedings reported a consensus on most issues with some variations.

Phase 3

In the third phase, one committee member took on the task of preparing a specific legislative proposal that encapsulated the discussions (recognizing that no formal record had been kept of all views on all possible permutations and combinations of possible proposals). The committee member who drafted the proposed language served as the proponent for the language.

In order to arrive at a specifically worded legislative proposal for each topic, a legislative procedure was adopted for the meetings. The proponent required a seconder for the proposal. Amendments could be proposed by any Committee member, with a seconder. Proposed amendments were voted on in sequence in order to produce final language adopted by the Committee.

John Lorn McDougall agreed to serve as the Chair *pro tem* to conduct the meetings and hold the votes in the process followed in Phase 3. The Committee extends its thanks to John Lorn McDougall for serving in that capacity.

The broad conclusion of Stage One was that, with reference to the topics of jurisdiction, stays and enforcement/set aside, the provisions of the ICAA were suitable and, in many respects, preferable to the provisions of the Act for commercial cases. It was also felt that the opt-in approach to appeals as proposed in the UAA should be adopted. Based on these conclusions, the Committee decided to consider whether the ICAA could be adapted to provide a single Act for both international and non-international commercial arbitrations seated in Ontario, including an opt-in right of appeal for non-international arbitrations.

The overarching premise of the Project was affirmed to be adherence to the New York Convention and fidelity to the Model Law.

A detailed report of the deliberations of the AARC in Stage One, Phase 3 may be found at **Appendix A**.

STAGE TWO

In Stage Two of the Project, the Committee met monthly from September 2018 to June 2019. At the outset, the Committee re-affirmed that its work in Stage One had pointed to the possibility that a single Act for commercial arbitration was a viable possibility. Reasons for adopting a single Act for commercial arbitration included:

a) perpetual confusion among practitioners and judges between the Act and the ICAA;

b) the complexity of the distinction between the application of the Act and the ICAA;

c) the distinction between international and non-international commercial arbitration is becoming increasingly meaningless in practice;

d) in covering all types of arbitration, the Act inappropriately treats commercial arbitration the same as it does other types of arbitration, such as family, consumer, employment, statutory and religious;

e) commercial arbitration in Ontario would be better served by closer adherence to the Model Law;

f) opt-in rights of appeal (as opposed to default rights of appeal) are more easily justified in commercial arbitration than in other types of arbitration in which party autonomy is less of a reality;

g) major comparator jurisdictions which are most relevant to Ontario (for example, Canada, the US, Quebec, and England) have unified legislation covering both international and non-international arbitration, even though the legislation may make some distinctions between the two;

h) the ICAA lacks elements that are useful in international *ad hoc* arbitrations and which could be added if a consolidated Act were adopted;

i) a single Act with unified terminology and concepts based on international standards would raise the practice and skills of Ontario lawyers and arbitrators to international standards;

j) creating a single Act for commercial arbitration is relatively easy, compared to a revision of the Act on a stand-alone basis, and would avoid the need to develop a consensus with practitioners of other types of arbitration as to the nature of reforms that should be adopted.

A more detailed explanation of these points may be found in **Appendix B** to this report.

The Committee, however, was of the view that no recommendation as to a single, consolidated Act for commercial arbitration could be reached, or justified, unless the Committee had conducted a detailed review of every provision of the Act to determine whether it was needed (as written or in a modified form) in a unified Commercial Arbitration Act ("CAA") based on the Model Law.

In the course of monthly meetings conducted between September 2018 and November 2019, the Committee reviewed every section of the Act and considered whether it was needed in a unified CAA and, if so, whether it needed to be modified or applied only to non-international arbitration. The conclusions of the Committee were maintained in chart form, and are set out in **Appendix C**.

As with Stage One, all conclusions were regarded as tentative and would remain so until the Committee was in a position to deliver its final report. Thus, as with the discussions and tentative conclusions in Stage One, not all of the conclusions reached in Stage Two were necessarily carried into the final recommendations of the Committee.

STAGE THREE

Stage Three of the Project was conducted in monthly, and later bi-weekly, meetings from January 2020 to June 2020. Thereafter, Committee members communicated informally regarding the finalization of this report.

In Stage Three of the Project, the Committee worked on the contents of a new CAA. Stage Three had three aspects which have been developed to some extent concurrently. One aspect focussed

on a discussion of specific topics in the context of a unified CAA. The second aspect related to proposed wording for each of those topics where it was decided to include a related provision in the proposed CAA. The third aspect was the overall form of the CAA.

In the first aspect, using the chart from Stage Two as a guide, the Committee considered, on a topic by topic basis, new provisions that would be added to the ICAA in order to form the new CAA. The Committee also compared the proposed new provisions under consideration to international arbitration statutes in the following jurisdictions:

England
USA
Australia
New Zealand
Singapore
Hong Kong
Germany
British Virgin Islands
Quebec
British Columbia

Topics to be Addressed in the CAA

In dealing with specific topics, there was a consensus that any new CAA would include:

- language that extends the application of the Act to all commercial arbitration in Ontario, whether international or non-international;
- language that makes it clear that commercial arbitration is to be conducted in Ontario to the standards of the Model Law;
- language that extends Model Law references to States to other provinces and territories of Canada, with appropriate modifications;
- language that extends references to laws of this "State" to laws of Ontario and laws of Canada in force in Ontario;
- provisions of the existing ICAA which modify or add to the Model Law;

- an updated limitation provision relating to the enforcement of awards to account for the fact that December 31, 2018 has passed; and
- a transition provision.

There was also a consensus on the following additional technical points:

i. retain the phrase "place of arbitration" in the Model Law;

ii. add a definition of "place of arbitration" which will make it clear that it means the juridical seat of the arbitration;

iii. leave it to the legislative draftspersons to determine the language in which agreements between Ontario, on the one hand, and Canada and other provinces, on the other hand, will be described;

iv. all arbitration agreements will be required to be in writing, including non-international agreements; and,

v. there should be a provision that the appointment of an arbitrator cannot be revoked unilaterally by the party that made the appointment.

The following consensus was reached on additional topics identified for discussion:

1) the definition of "arbitral tribunal" should include an "umpire", given that umpires are used in a number of international and non-international arbitration contexts;

2) the need to include a definition regarding juridical or natural persons should be left to the legislative draftspersons with a notation to the effect that we expect the issue will be addressed by them;

3) the court should be given jurisdiction to grant consequential relief when staying or refusing to stay litigation in favour of arbitration, but only in the non-international context;

4) the default number of arbitrators will be three in international arbitration and one in non-international arbitration;

5) there is no need to make specific reference to the role of third parties or arbitral institutions in the appointment of arbitrators;

6) there is no need to change Model Law provisions relating to the consideration of the nationality of arbitrators or to restrict them to international commercial arbitration;

7) the issue of gender neutrality in language should be left to the legislative draftspersons with a notation to the effect that we expect the issue will be addressed by them;

8) the rules for challenging arbitrators should be as in the Model Law;

9) there is no need to anglicize Latin expressions;

10) tribunals should be given express jurisdiction to decide whether previous proceedings should stand when a substitute arbitrator is appointed, even if one of the parties does not agree;

11) the CAA should include a provision regarding arbitrator immunity, both in terms of liability and compellability. Exceptions should relate to intentional acts taken in bad faith;

12) the word "full" in Article 18 of the Model Law should be changed to "reasonable" (that is, "each party shall be given a reasonable opportunity of presenting" their case);

13) there should be a general statement, as in sections 33 and 34 of the English *Arbitration Act 1996*, as to the discretion of tribunals with respect to matters of procedure and evidence, without adopting a long "laundry list" and without imposing any specific obligations on tribunals;

14) there should be a general direction to tribunals and parties to adopt and implement efficient, cost-effective and proportional procedures having regard to the nature of the dispute;

15) in light of the *Evidence Act*, there is no need to include a provision authorizing tribunals to issue summonses for the personal appearance of witnesses and the production of documents, and to administer oaths;

16) the CAA should include a general direction to the parties to comply with orders and directions of the tribunal;

17) in Article 21 of the Model Law the phrase "received by the respondent" should be changed to "by a respondent" or "by any respondent";

18) there should be no binding provision regarding privacy and confidentiality. There was strong support for a brief provision regarding tribunals' powers to make orders on these topics to alert parties to the need to consider whether arrangements for confidentiality were needed;

19) the combination of the existing consolidation provisions in the two acts is a wording issue;

20) there should be a provision, similar to that in s. 50 of the English *Arbitration Act 1996*, for all commercial arbitrations seated in Ontario to allow the court to extend the time for delivery of awards;

21) the CAA should include a robust statement regarding the scope of arbitral jurisdiction, substantive and remedial;

22) the CAA should contain a provision regarding the jurisdiction of tribunals to award costs subject to the agreement of the parties and applicable law;

23) the CAA should contain a provision regarding the jurisdiction of tribunals to award interest subject to the agreement of the parties and applicable law;

24) the CAA should maintain the current Model Law provision that tribunals may delegate procedural decisions to presiding arbitrators even if none of the parties agree, and that in all other circumstances decisions of the tribunal require the agreement of the majority;

25) the CAA should contain a reference to partial awards;

26) the conclusions reached in Phase 2 should be adopted with the additional clarification that "questions of law" are questions that relate to the laws of Canada and its territories and provinces;

27) in keeping with the concept of party autonomy, appeals should be available on a question of law only if the arbitration agreement so provides; and where this is so, the appeals should be available without leave, and directly to the Ontario Court of Appeal. Appeals as to questions of mixed fact and law or of fact alone should not be allowed. This opt-in right of appeal will apply to all commercial arbitrations seated in Ontario in which the parties have selected Canadian law (as defined) as the applicable law of the contract;

28) the CAA should include a provision regarding the enforcement of awards which would include a simple procedure for the application to the court, provisions applicable where the court does not have jurisdiction to make an order in the same terms as an award, and a provision allowing the court to extend the limitation period for an action in Ontario when it sets aside an award.

The Committee did not deal with the issue of limitation periods for commencing an arbitration. Currently, Ontario limitations law (for example, the *Limitations Act, 2002*, S.O. 2002, and the *Real Property Limitations Act*, R.S.O. 1990) applies to arbitrations under the Act (s. 52) but not to arbitrations under the ICAA. There is a legislative decision to be made regarding the best method of providing for limitation periods with respect to all commercial arbitrations where the law applicable to the limitation period is determined to be the law of Ontario.

Proposed Statutory Language

Where the Committee considered it useful to propose statutory language to implement its conclusions, the Committee, on a consensus basis, approved the language set out in **Appendix D**.

Appendix D also summarizes comparable legislation in other jurisdictions on the points under consideration.

The proposed statutory language is intended to be illustrative of implementing language that may be used. Committee members have varying views as to specific components of each provision. If the Committee's recommendations are considered for adoption, it is anticipated that there will be room for further discussion with the commercial arbitration community on all of the elements of this report.

Form of the proposed CAA

There was considerable discussion within the Committee as to the form a unified CAA should take. Some favoured an integrated CAA, possibly with the Model Law attached as a schedule for reference. Others favoured using the current form of the ICAA and including additional, or modified, provisions to the enabling provisions at the beginning of the CAA.

It was agreed among all that, whatever format was used, there should be an easy way for a reader of the CAA to identify the points of similarity and departure from the Model Law.

It is anticipated that, if the Committee's recommendations are considered for adoption, all views as to the best format for the CAA will be considered by the legislative drafters, bringing to bear legislative standards used by the province.

However, for the purpose of presenting the conclusions of the work of the Committee as a whole in a comprehensive way that can be viewed in a single continuous format, we have attached to this report as **Appendix E** a draft CAA in integrated format with cross-references to the Model Law.

THIS REPORT

The Committee communicated informally regarding the contents of this report and, at a meeting held on February 12, 2021, approved the release of this report to the Executive Committee of TCAS.

CONCLUSION

The Committee expresses its wish that the work it has performed over the last four years will spark a vigorous discussion regarding the improvement of commercial arbitration in Ontario so as to better serve those who conduct commercial arbitrations in Ontario, whether international or non-international. The Committee hopes that its efforts will ensure that the discussion takes place on a substantive and forward-looking basis.