APPENDIX A

Detailed Report Re: Stage One, Phase 3

PRINCIPAL CONCLUSIONS

The following are some of the principal conclusions reached at this stage of the Project.

Jurisdiction

1) On jurisdictional matters it is preferable in commercial arbitrations to follow the provisions of the ICAA and the Model Law as the role of the court in determining issues of jurisdiction is more clearly defined by the statutory language and the case law.

2) The provision of the new ICAA which does not limit the right of appeal to positive jurisdictional rulings should apply in all commercial arbitrations.

3) Appeals on preliminary rulings as to jurisdiction should go directly to the Court of Appeal. This anticipates the adoption of the ULCC recommendation that would have all appeals go directly to the Court of Appeal. It also eliminates the problem of preliminary jurisdictional rulings having lesser appeal rights than final jurisdictional rulings.

4) Does not force the loser to appeal the preliminary ruling. Allows the loser to reconsider after it receives the tribunal's ruling:

    a. whether the jurisdictional issue truly can be determined separately from the determinations of fact;

    b. whether it wants to directly or indirectly disrupt the arbitration while it is in progress;

    c. whether it might not eventually accept jurisdiction based on whether it sees the outcome as acceptable, or inevitable.

5) Makes it clear that if jurisdictional objection is dealt with by the Court on an appeal from a preliminary ruling, it cannot be raised again during enforcement or set aside proceedings.

6) Incorporates the old section 48, but expresses the effects in the negative. Makes it clear that declaratory relief as to validity is only available consistently with other jurisdictional and stay provisions and principles. After an award is rendered, the sections relating to enforcement and set aside take over, so it is not necessary to make the provision applicable to that phase, as does the current s. 48.

TOPIC SUMMARY

Jurisdiction

Members of the Jurisdiction Focus Group were Bill Horton, Steve Morrison and Paul Morrison.

The jurisdiction focus group addressed sections 7 and 48 of the Act, in comparison with sections 26 and 27 of the UAA, and section 11 of the ICAA coupled with Article 16 of the Model Law.

There were significant differences of opinion within the focus group, especially with respect to s. 48 of the Act. The two points of view are represented on the following chart:

View #1	View #2
Re Section 17 of the Act: Although the existing Act and the new ICAA say more or less the same thing, it is better to more closely track the wording of the Model Law where the same thoughts are being expressed. The new ICAA (as with the old ICAA) keeps together the ideas of jurisdiction to determine the existence of an arbitration agreement and the idea that the arbitration agreement is	Re Section 17 of the Act: If we end up with a combined piece of legislation dealing with both domestic and international arbitration, then we are better off with a single provision dealing with jurisdictional challenges. If we continue to have separate legislation, however, then we should not change the existing wording in the domestic Act, since we have an existing body of case law interpreting that language. The benefit to be gained by conforming the

View #1	View #2
separate from the main agreement in which it may be found. In the existing Act, the baseline provision is that a jurisdictional issue must be raised by no later than the hearing. The UAA provides no baseline but just says that the jurisdictional objection must be raised "as soon as it arises". This is potentially vague in many situations. The new ICAA provides the best solution in setting the baseline at the filing of the statement of defence and then providing for jurisdictional issues to be raised, or allowed to be raised, at a later date.	language would not be sufficient to outweigh the loss of the benefit of that jurisprudence.
The existing Act and the new ICAA both provide for appeals from both positive and negative jurisdictional decisions and that, if an appeal is taken from the partial award on jurisdiction, there is no further appeal to an appellate court. The UAA makes it clear that an objecting party that does not challenge a jurisdictional ruling in a partial award preserves the right to raise the same issue at the enforcement stage. The UAA also provides that, if a jurisdictional ruling in a partial award is appealed, there is a right of appeal, with leave, to the Court of Appeal. Section 27 of the UAA should be incorporated into the new Act and also into the new ICAA. Another advantage of having a single Act is that this could be done quite seamlessly. There is no reason why there should be a lesser right of appeal on a jurisdictional issue depending upon when the tribunal makes the decision. Also, it is good to provide an incentive, or at least no downside, if a party wants to wait until the arbitration is over in order to appeal the jurisdictional ruling.	A party should not be able to sit on its rights until the final award has been issued. If the initial ruling on jurisdiction is ultimately found to be incorrect by an appellate court, the parties will have wasted an enormous amount of time and money on an improper arbitration. Adopting a wait-and-see approach is unfair to the other party. If a party is serious about its jurisdictional objection, it should have to bring its appeal at the earliest point in the process. In a similar vein, there should be an amendment that requires an arbitrator or arbitration panel to rule on jurisdiction (rather than leave it to the final award), except in cases where the issue cannot be determined on a preliminary basis. In other words, the default position should be to deal with jurisdiction as early as possible in the process.
Re Section 48 of the Act:	Re Section 48 of the Act:

View #1	View #2
Questions relating to the existence or validity of the arbitration agreement are subject to the principle of "competence-competence" as explicitly set out in s. 17(1) of the Act and in all modern arbitration jurisprudence. The exceptions to this are set out in the *Dell Computer* case (2007 SCC 34) and the *Dancap* case (2009 ONCA 135), not in s. 48. To suggest otherwise in relation to jurisdictional challenges of any kind is highly retrograde. A significant objective of the competence-competence principle is to minimize what I describe as on-ramp and off-ramp congestion which interferes with the effectiveness of arbitration. In an individual case, it is always arguable that the courts might as well just decide jurisdiction first. However, giving effect to that notion on a systematic basis simply encourages the strategic use of such challenges to undermine the value of arbitration. This concern was resolved by the introduction of the competence-competence principle. Section 48 of the Act does not alter the competence-competence principle, although it obviously does create some potential for confusion because it does not expressly say so, unlike the English Arbitration Act which, at s. 32, makes this relationship clear. Section 48 does not create any new or different right. At common law, it was always possible for anyone to apply to the court for a declaration as to anything. There is no reason to believe that the principles regarding the exercise of judicial discretion that are set out in *Dell Computers* and *Dancap* would not apply to an application under s. 48. If they did not apply, that would be a torpedo in the side of the most significant	It is not true that a party can achieve the same relief under section 7 as under section 48. The former section allows a party to apply to the court to stop a civil action in circumstances where it asserts the existence of an applicable agreement to arbitrate. By contrast, section 48 allows a party to apply to the court to stop an arbitration in circumstances where it asserts that no valid arbitration agreement exists. The two sections are corollaries of each other. The removal of section 48 would leave a party with no means of opposing being wrongfully forced into an arbitration, before participating in that arbitration. Merely by serving a notice of arbitration, one party could force the opposing party to engage and pay for the services of an arbitrator to determine the validity of the alleged arbitration agreement. Given that this would be a legal question, this might be a very different arbitrator than someone with subject matter expertise that that party would choose to engage to deal with the underlying substance of the dispute, if the arbitration agreement were determined to be valid. We need to remind ourselves that arbitration is a matter of private contract between two parties. It is neither a God-given nor constitutionally-guaranteed right. On the other hand, access to due process in our courts is constitutionally guaranteed, and a party to an alleged arbitration agreement should maintain the right to access our publicly-funded courts if it disputes the validity of that alleged agreement. A decision in this regard is best made by an individual who has no financial interest in the outcome. There is already a prevalent view amongst many counsel that an arbitrator will be predisposed to uphold validity and find jurisdiction, if the alternative means giving up the retainer. In maintaining respect for arbitration generally, perception may be more important than reality.

View #1	View #2
progress in arbitration law made in the last half century.	

The legislative language for the jurisdiction provisions was proposed by Bill Horton. The following extracts from explanatory notes that were provided along with the proposed language may assist in understanding the issues addressed in the proposed text:

Extracts from Explanatory Notes

Following extensive discussions within the Committee as a whole and after undertaking the process described above for Phase 3, the Committee adopted the following provisions to replace s. 17 and s. 48 of the Act:

Proposed Provisions re Jurisdiction

Arbitral tribunal may rule on own jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

Independent agreement

(2) For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail, for that reason alone, the invalidity of the arbitration clause.

Time for objections to jurisdiction

(3) A plea that the arbitral tribunal does not have jurisdiction to conduct the arbitration shall be raised not later than the submission of the statement of defence. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

Parties' appointment of arbitrator no bar to objection

(4) A party is not precluded from raising such a plea by the fact that the party has appointed, or participated in the appointment of, an arbitrator.

Tribunal ruling on jurisdiction

(5) The arbitral tribunal may rule on a plea referred to in paragraph (3) of this article either as a preliminary question or in an award on the merits.

Review by court

(6) If the arbitral tribunal rules on the question of jurisdiction as a preliminary matter, any party may appeal, within thirty days after having received notice of that ruling, to the Court of Appeal to decide the matter.

Arbitration may continue

(7) While such appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Applications to the court respecting validity of arbitration [Section 48]

(8) The Court shall not grant any application to declare the arbitration is valid based upon a plea that has not been determined by the arbitral tribunal unless:

(a) The applicant has not participated in the arbitration, and

(b) The determination of the application [requires no more than a cursory review of the facts.]

The foregoing provisions were approved unanimously by the Committee members present subject to:

(a) A subsequent decision to be made as to whether the proposed sub-section (8) will be included in the jurisdiction section or the stay section;

(b) The language in parentheses in 8(b) being settled in the course of the discussion of the stay sections; and

(c) A formal notation that one [absent] member considers that s. 48 should be removed but not replaced by any other provision and that one [absent] member prefers that s. 48 not be removed or changed.

However, in the course of subsequent discussions regarding whether subsection (8) above (replacing s. 48) should be incorporated into provisions regarding jurisdiction or provisions regarding stay of court proceedings, the Committee revisited the issue and decided (with one dissenting vote) that s. 48 should be removed from the Act with no replacement.

Enforcement and Setting Aside of Awards

Joel Richler, Duncan Glaholt and Cynthia Kuehl acted as the focus group for the Enforcement and Setting Aside of Awards.

The focus group prepared a unified set of comments as follows:

Subcommittee Comments:

The subcommittee focused on a comparison of the existing statutory language and the provisions of article 36 of the Model Law, with attention paid to recommendations reflected in the Uniform Act.

As a general comment, there does not appear any particular issue in relation to the current act that cries out for legislative change. The following points of difference between the current act, the Uniform Act and the Model Law should, however, be considered.

The opening language of the Model Law presupposes no right of appeal, and thus cannot be used in the domestic act unless all appeal rights are removed.

We note that the Model Law is consistent with the current act in that the courts have a discretion to set aside an award if any of the stated grounds are met. The Uniform Act has not changed this.

Article 34(2)(a) makes it clear that the applicant has the onus of proof; this is only implicit in section 46 of the current act.

The existing ground set out in section 46(1)(1) of the current act (legal capacity) is included in article 34(2)(a)(i). The Model Law uses the expression "some incapacity", whereas the current act uses the expression "under a legal incapacity". Similar language is used in the Uniform Act.

The existing ground set out in section 46(1)(2) of the current act (validity or existence of the arbitration agreement) is cast in broader terms than article 34(2)(a)(i) in that the latter only refers to legal validity. The Model Law language is broader, however, in that it refers to validity "under the law to which the parties have subjected it". While this language may not

be required in a domestic context, it is possible to subject an arbitration agreement to the law of another jurisdiction. The ULCC language uses the words “does not exist”, “void” and “unenforceable”.

The existing ground set out in section 46(1)(3) of the current act (jurisdiction) resembles article 34(2)(a)(iii) of the Model Law save that the latter provides that where matters “can” be severed, only aspects of the award beyond jurisdiction of the tribunal may be set aside. Severability is dealt with in section 46(2) of the current act, which uses the following phrase: “where it is reasonable to separate …”. The Uniform Act closely adheres to the Model Law and does not use the word “reasonable”

The existing ground set out in section 46(1)(4) of the current act (composition of the tribunal) is comparable to article 34(2)(a)(iv) and substantially the same as the language of the Uniform Act. The Model Law, however, refers to inconsistencies between a manner of appointment that is inconsistent with mandatory provisions of the Model law.

The existing ground set out in section 46(1)(5) of the current act (arbitrability) is dealt with in article 34(2)(b)(i) of the Model Law. The language of the Uniform Act is almost the same as that of the current act. The Model Law clarifies that arbitrability is to be determined not only under Ontario law but also under the laws of Canada that are in force in Ontario.

Also, as to arbitrability, article 34(2)(b)(ii) adds conflict with Ontario public policy as a set aside ground.

The existing ground set out in section 46(1)(6) of the current act (fair and equal treatment, opportunity to present case or defence and proper notice of arbitration or appointment of tribunal) is dealt with in article 34(2)(a)(ii) of the Model Law. These matters are dealt with in sections 66(2)(f) and (h) of the Uniform Act. The language of the current act is more precise than

that of the Model Law; the latter does not speak of an ability to defend a case. The Uniform Act modifies the right to present a case and defend by use of the word “reasonable”.

The existing ground set out in section 46(1)(7) of the current act (procedure) is not mentioned in the Model Law and has not been continued in the Uniform Act. The commentary to the Uniform Act states that the ULCC believed that non-compliance with procedure set a bar that was too low for having an award set aside and that the risk that an award might be set aside, or for wasteful applications to have an award set aside, due to inconsequential failures to follow procedural steps, would outweigh the benefit of preserving this as a separate set aside ground.

The existing grounds set out in section 46(1)(8) and (9) of the current act (arbitrator corruption and bias, award obtained by fraud) do not appear in the Model Law, presumably because this ground would be covered by the public policy ground set out in article 34(2)(b)(ii) or the “ability to present a case” ground set out in article 34(2)(a)(ii). The analogous provisions in the Uniform Act are much to the same effect, but use more modern language (“justifiable doubt as to the independence or impartiality of the tribunal”).

Section 46(3) of the current act provides for waiver of the right to set aside on the basis of jurisdiction and arbitrability. There is no equivalent to this in article 4 of the Model Law.

Section 46(4) of the current act imposes a restriction on the corruption/bias ground based upon a party’s failure to act on the challenge provisions of section 13 or where an unsuccessful challenge was made. Section 46(5) then provides for a restriction based upon deemed waiver. Section 46(6) then provides for an exception to deemed waiver where a failure to object was justified. There are no analogous provisions to this effect in article 34. The provisions of the Uniform Act are to the same effect (with no provision

to an exception where there is a failure to object), but with more cumbersome language.

Sections 46(7) and (8) of the current act enable the court to remove arbitrators, give directions about the conduct of arbitrations and remit awards back to tribunals. Article 34(4) of the Model Law is different. It provides that the court may suspend the setting aside application in order to permit the tribunal an opportunity to resume proceedings or to take other action “as in the arbitral tribunal’s opinion will eliminate the grounds for setting aside”. This appears not to be addressed in the Uniform Act.

Section 47 of the current act provides for a 30-day time limit for the commencement of set aside applications (except that there is no time limit for corruption or fraud). The Model Law provides for a 3-month time limit (article 34(3)). The Uniform Act provides for a 30-day time limit, provided that for allegations of fraud or corruption, the 30 days run from first actual or imputed knowledge of the fraud or corruption.

Section 49 of the current act provides for an appeal from a set aside decision to the Court of Appeal, with leave of that court. No such right of appeal is provided for by the Model Law.

Section 50(2) of the current act deals with formalities associated with enforcement applications. While the language is different in the Uniform Act, the provisions are substantially the same.

Similarly, the language of the current act as to the enforcement of awards made in Ontario and elsewhere in Canada (sections 50(3) and (4)) resemble the analogous provisions in the Uniform Act.

The enforcement provisions in the Model Law differ in substance from those in the current act and the Uniform Act. Under the latter, it is incumbent on respondents who wish to resist enforcement to take set aside proceedings. Under the Model Law, respondents can sit back and, in

opposition to enforcement applications, raise as defences the same grounds that would have availed in a set aside application.

Section 50(7) of the current act empowers the court to grant different remedies or remit matters back to tribunals “with the court’s opinion” where an award gives a remedy that the court does not have jurisdiction to grant or would not grant in similar circumstances. These powers have not been continued in the Uniform Act, the ULCC being concerned about giving the courts power to, in effect, interfere with the arbitral process. There are no such provisions in the Model Law.

The following proposal for statutory language was put forward by Joel Richler:

Proposed Language for Enforcement/ Set Aside

Setting aside award

1 (1) On a party’s application, the court may set aside an award on any of the following grounds:

a) party entered into the arbitration agreement while under a legal incapacity.

b) The arbitration agreement does not exist, is void or is unenforceable under the law to which the parties have subjected it or, failing any indication thereon, under the law of Ontario.

c) The award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

d) The composition of the arbitral tribunal was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act.

e) The subject-matter of the dispute is not capable of being the subject of arbitration under the law of Ontario and any laws of Canada that are in force in Ontario, or recognition or enforcement of the award would be contrary to the public policy of Ontario.

f) The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or 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, the award was the result of fraud or corruption by a member of the arbitral tribunal or the award was obtained by fraudulent behaviour by a party or its representative in connection with the conduct of the arbitral proceeding.

h) The award is a family arbitration award that is not enforceable under the *Family Law Act*.

Restriction

(2) The court shall not set aside an award on grounds referred to in subsection (1)(c) if the party has waived the right to object to its inclusion or agreed that the arbitral tribunal has power to decide what disputes have been referred to it.

Idem

(3) The court shall not set aside an award on grounds referred to in subsection (1)(g) if the party had an opportunity to challenge the arbitrator on those grounds under section [•] before the award was made and did not do so, or if those grounds were the subject of an unsuccessful challenge.

Deemed waiver

(4) The court shall not set aside an award on a ground to which the applicant is deemed under section [•] to have waived the right to object.

Court Powers

(5) The court, when asked to set aside an award, may, where appropriate and if so requested by a party, suspend the application to set aside an award for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Time limit

2 (1) Subject to subsection (2), an application to set aside an award must be commenced within thirty days after the applicant receives the award, correction, explanation, change or statement of reasons on which the application is based.

(2) If the applicant alleges corruption or fraud, an application to set aside the award 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.

Enforcement of award

Application

3 (1) A person who is entitled to enforcement of an award made in Ontario or elsewhere in Canada may make an application to the court to that effect.

Formalities

(2) The application shall be made on notice to the person against whom enforcement is sought, in accordance with the rules of court, and shall be supported by the original award or a true copy.

Duty of court, award made in Ontario

(3) The court shall give a judgment enforcing an award made in Ontario unless,

(a) the thirty-day period for commencing an appeal or an application to set the award aside has not yet elapsed;

(b) there is a pending appeal, application to set the award aside or application for a declaration of invalidity;

(c) the award has been set aside or the arbitration is the subject of a declaration of invalidi-ty; or

(d) the award is a family arbitration award.

Duty of court, award made elsewhere in Canada

(4) The court shall give a judgment enforcing an award made elsewhere in Canada unless,

(a) the period for commencing an appeal or an application to set the award aside provided by the laws of the province or territory where the award was made has not yet elapsed;

(b) there is a pending appeal, application to set the award aside or application for a declaration of invalidity in the province or territory where the award was made;

(c) the award has been set aside in the province or territory where it was made or the arbitration is the subject of a declaration of invalidity granted there;

(d) the subject-matter of the award is not capable of being the subject of arbitration under Ontario law; or

(e) the award is a family arbitration award.

Pending proceeding

(5) If the period for commencing an appeal, application to set the award aside or application for a declaration of invalidity has not yet elapsed, or if such a proceeding is pending, the court may,

(a) enforce the award; or

(b) order, on such conditions as are just, that enforcement of the award is stayed until the period has elapsed without such a proceeding being commenced, or until the pending proceeding is finally disposed of.

Speedy disposition of pending proceeding

(6) If the court stays the enforcement of an award made in Ontario until a pending proceeding is finally disposed of, it may give directions for the speedy disposition of the proceeding.

Powers of court

(7) The court has the same powers with respect to the enforcement of awards as with respect to the enforcement of its own judgments.

The proposal was adopted unanimously by the Committee.

Stays of Court Proceedings

The members of the focus group on stays of proceedings were Janet Walker, Brian Casey and John Lorn McDougall.

The following chart maps out the statutory provisions compared and related comments generated within the focus group:

MODEL LAW ARTICLE 8	PROPOSED UNIFORM ACT	PRESENT ONTARIO ACT	COMMENTS
	4 (2) An arbitration agreement may not disapply or modify the following provisions of the Act: … (d) section 7 *[stay of court proceedings]*;		**View #1:** Superfluous **View #2:** Not needed. **View #3:** Agree.
(1) A court before which an action is brought in a matter which is the subject of an arbitration	**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,	7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in	**View #1:** Does this need to be enshrined? Does the mention of "in whole or in part" invite the court to keep the whole proceeding rather

MODEL LAW ARTICLE 8	PROPOSED UNIFORM ACT	PRESENT ONTARIO ACT	COMMENTS
agreement shall, …refer the parties to arbitration …	on the grounds that the court proceeding is in respect of a matter that is the subject of an arbitration agreement.	which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.	than create a multiplicity? **View #2:** I prefer the present Act's wording. I agree with View #1 that "whole or in part" may create difficulties. **View #3:** Agree with View #2.
… if a party so requests not later than when submitting his first statement on the substance of the dispute,…	(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.	**Exceptions** (2) However, the court may refuse to stay the proceeding in any of the following cases: 4. The motion was brought with undue delay.	**View #1:** Invitation to do harm to competence-competence to invite the court to engage in an extensive discretionary exercise concerning delay/waiver. **View #2:** I am not sure there is much distinction between the present act and the proposed change. **View #3:** Prefer present Act.
…unless it finds that the agreement is null and void, inoperative or incapable of being performed. …	(3) On an application under subsection (1), the court shall stay the court proceeding unless the court finds that (a) the court proceeding is not in	(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,	**View #1:** Does breaking out the reasons for denying a stay add anything to the "null and void, inoperative or incapable of being performed" standard?

MODEL LAW ARTICLE 8	PROPOSED UNIFORM ACT	PRESENT ONTARIO ACT	COMMENTS
	respect of any matter that is the subject of an arbitration agreement,	(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.	**View #2:** I think the big issue here is whether the present language permits the court to keep to itself all matters in dispute if it is not "reasonable to separate" them. This needs to be clarified. The proposed Act uses confusing language. The Model Law might be preferable as claims not covered by the arbitration agreement can still go to court because they are not part of the "agreement" but there is no ability to stay the arbitration unless the agreement is null and void, inoperative or incapable of being performed. … **View #3:** Prefer Model Law.
	(b) a person against whom the arbitration agreement is sought to be enforced entered into the arbitration	(2) However, the court may refuse to stay the proceeding in any of the following cases: 1. A party entered into the arbitration	

MODEL LAW ARTICLE 8	PROPOSED UNIFORM ACT	PRESENT ONTARIO ACT	COMMENTS
	agreement while under a legal incapacity,	agreement while under a legal incapacity.	
	(c) the alleged arbitration agreement does not exist, is void or is unenforceable, or	2. The arbitration agreement is invalid.	
	(d) the dispute is not capable of being the subject of arbitration under [*enacting jurisdiction*] law.	3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.	
		5. The matter is a proper one for default or summary judgment.	**View #2:** I agree this needs to go. It is antithetical to the concept of two discrete justice systems and abrogates the parties' agreement. **View #3:** Agree.
(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or	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	(3) An arbitration of the dispute may be commenced and continued while the motion is before the court.	**View #2:** The proposed Act permits the court to enjoin arbitral proceedings while the matter is before the court. This is not permitted under either the Model Law or present Act and could create mischief.

MODEL LAW ARTICLE 8	**PROPOSED UNIFORM ACT**	**PRESENT ONTARIO ACT**	**COMMENTS**
continued, and an award may be made, while the issue is pending before the court.	subsection (1) is before the court.		**View #1:** Agreed. **View #3:** Agreed.
	5. If the court stays the court proceeding in whole or in part without making a finding concerning the existence of a circumstances [sic] described in subsection (3) (a) through (d), an arbitral tribunal is not precluded from determining whether the circumstance exists.		**View #1:** Superfluous? **View #2:** Yes. **View #3:** Yes.
	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 pro-ceeding continues, (b) no person may commence an arbitral	(4) If the court refuses to stay the proceeding, (a) no arbitration of the dispute shall be commenced; and (b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.	**View #1:** Harmful. Inconsistent with the principle of competence-competence. **View #2:** The wording of the suggested Act is not the best, but it tries to convey the idea that items that are arbitrable go to arbitration even if other related matters need to be litigated.

MODEL LAW ARTICLE 8	PROPOSED UNIFORM ACT	PRESENT ONTARIO ACT	COMMENTS
	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.		**View #3:** Agree with View #1. Both versions are unsatisfactory.
	(7) A party may appeal a decision of a court under this section.	(6) There is no appeal from the court's decision.	**View #1:** Appeals are wasteful and vex the arbitral process. The issues can be revisited at a set aside/enforcement proceeding. **View #2:** I agree. One level of court involvement is enough in all cases. Justice is usually done regardless if its in court or arbitration. Neither system is the "be-all and end-all". **View #3:** Agree.
		48. (1) At any stage during or after an arbitration, on the application of a party who has not participated in the arbitration, the court may grant a	**View #2:** I have no problem with this. (I believe a party could always do this, even without legislation). However, it should be made clear that the

MODEL LAW ARTICLE 8	PROPOSED UNIFORM ACT	PRESENT ONTARIO ACT	COMMENTS
		declaration that the arbitration is invalid because, (a) a party entered into the arbitration agreement while under a legal incapacity; (b) the arbitration agreement is invalid or has ceased to exist; (c) the subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law; or (d) the arbitration agreement does not apply to the dispute.	same procedure and test set out in section 7 applies (i.e., if it is arguable, it goes to the arbitrator at first instance). **View #1:** I thought this was hashed out with the previous round of discussions, but if not, I disagree with View #2. It is contrary to competence-competence to encourage a court to pre-empt an arbitral tribunal's determination of these questions during the process. If someone wants clarity before or after the arbitration, yes, they should be able to get that from a court, but if they want to have an answer to this during the arbitration, they should ask the Tribunal. **View #3:** Hard to call.
		3. The parties to an arbitration agreement may agree, expressly or	

MODEL LAW ARTICLE 8	**PROPOSED UNIFORM ACT**	**PRESENT ONTARIO ACT**	**COMMENTS**
		by implication, to vary or exclude any provision of this Act except the following: v. section 48 (declaration of invalidity of arbitration),	

After considerable discussion within the Committee as a whole, Brian Casey (in consultation with his focus group) put forward the proposed wording for the new section on stays of court proceedings.

<u>Proposed Language re Stay of Court Proceedings</u>

> 7(1) If a party to an arbitration agreement commences a proceeding (Note 1) in respect of any matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of a party to the arbitration agreement (Note 2), stay the proceeding unless it finds that the agreement is null and void, inoperative or incapable of being performed. (Note 3)
>
> 7(2) Any motion to stay proceedings shall be brought no later than the time the moving party submits its first statement on the substance of the dispute in the proceeding. (Note 4)
>
> 7(3) The court may allow proceedings to continue with respect to those matters not dealt with by the agreement if it appears reasonable to separate those matters from the matters dealt with in the agreement. (Note 5)

7(4) An arbitration of the dispute may be commenced and continued while the motion is before the court. (Present s. 7(3))

7(5) If the court refuses to stay the proceeding under s. 7(1),

(a) no arbitration of the dispute shall be commenced; and

(b) an arbitration that has been commenced shall not be continued. (Note 6)

7(6) Deleted. (Note 7)

Brian Casey offered the following comments on his proposal:

Note 1: The Rules of Civil Procedure, Rule 1.03(1) defines "proceeding" as an action or an application. We are of the view that this language captures any application, including an application for a declaration as contemplated by present s. 48.

Note 2: The present Act says "another party". This captures the cases where the Plaintiff wishes to stay its own proceeding.

Note 3: For consistency we prefer the wording of the Model Law. We do not believe it is necessary to try and categorize the circumstances listed in the present Act. We have not tried to capture with legislative language the present caselaw, dealing with a "systematic referral to arbitration" where the issues are arguable. The wording becomes too complex.

Note 4: It was felt certainty was required to avoid lengthy debates about what forum the parties should be in. It was suggested that the Defendant must bring the application within 30 days of service of the originating process, however there may be any number of circumstances where the Plaintiff is not pursuing its claim with alacrity and the Defendant is not called upon to file a defence. It would be inappropriate to require the Defendant in all cases to make an election regarding pursuing arbitration,

or continuing with the court proceeding within thirty days after service of originating process.

Note 5: We are not convinced this section is needed at all, but as this is the area that has aroused the most debate it may be better to include something. This makes it clear that the arbitration continues with respect to those matters covered by the agreement and the court action is totally stayed unless the matters for the court can be reasonably separated. This is what happens now where the courts stay proceedings under s. 106 of the *Courts of Justice Act*, to await the outcome of the arbitration.

Note 6: The last words of present s. 7(4) state "and anything done in connection with the arbitration before the court made its decision is without effect." These words are problematic as there may be outstanding issues that need to be resolved (e.g. costs). Adding words that give the court the power to give directions is one answer, but this may also cause problems if it affects the members of the erstwhile tribunal, who are not before the court.

Note 7: After discussion, the view appears to be that appeals be allowed. While some would argue for appeals only where the stay is denied, such asymmetry cannot be justified. Rather than crafting language regarding appeals in the arbitration legislation, we have simply remained silent, whereby the usual court appellate rights are triggered.

The proposal was adopted unanimously by Committee members present, with a minor amendment to s. 7(2) already incorporated into the text set out above.

<u>Appeals</u>

The exchange of views with respect to appeals being available on an opt-in or opt-out basis was extensive.

In general, the consensus of the Committee was in favour of opt-in rights of appeal. However, there was a minority in favour of opt-out rights of appeal and a minority in favour of no rights of appeal.

In Phase 3, Cynthia Kuehl took on the assignment of drafting new proposed appeal provisions. Her draft addressed a number of issues, other than opt-in/opt-out, that had also been under discussion. The following was her proposed language:

Proposed Language re Appeals (Note 1)

1. (1) If an arbitration agreement provides that an appeal to a court may be brought on a question of law or on a question of mixed fact and law, an appeal arising out of an award may be brought to the Court of Appeal for Ontario on the question as provided for in the agreement, with leave of that court. (Note 2)

(2) A provision of an arbitration agreement purporting to permit an appeal on a question of law or a question of mixed fact and law to a court other than the Court of Appeal for Ontario is an agreement providing that an appeal may be brought to the Court of Appeal for Ontario. (Note 3)

(3) A provision of an arbitration agreement purporting to permit an appeal to a court on a question of fact has no effect. (Note 4)

(4) On an application for leave under subsection (1), the Court of Appeal for Ontario may grant leave if

(a) the question of law or mixed fact and law significantly affects the rights of any party,

(b) granting leave may prevent a miscarriage of justice,

(c) the question of law or mixed fact and law is of importance to a class or body of persons of which the applicant is a member, or

(d) the question of law or mixed fact and law is of general or public importance. (Note 5)

(5) The Court of Appeal for Ontario may attach conditions to an order granting leave.

(6) On an appeal, the Court of Appeal for Ontario may

(a) confirm, vary or set aside the award, or

(b) remit the award to the arbitral tribunal with directions relating to the question of law or question of mixed fact and law on which leave to appeal was granted. (Note 6)

Family arbitration award – exception

(7) Any appeal of a family arbitration award lies to,

(a) the Family Court, in the areas where it has jurisdiction under subsection 21.1 (4) of the *Courts of Justice Act*;

(b) the Superior Court of Justice, in the rest of Ontario. 2006, c. 1, s. 1 (6). (Note 7)

Cynthia Kuehl added the following notes to her proposal:

Note 1: The proposed language presumes that these revisions will apply to non-statutory arbitrations. It borrows heavily (almost entirely) from the language in the ULCC Uniform Arbitration Act ("UAA").

Note 2: This is substantially similar to the UAA and is an opt-in provision. Opt-in is seen as favourable for reasons expressed in the attached chart/summary of discussions. While some may favour no appeals (as in the international context), it is recognized that, in the domestic context, the elimination of appeals may not be viewed favourably and may inhibit

passage of legislation. Opt-in (as opposed to opt-out) is consistent with party autonomy, i.e., that the parties' contractual intentions are paramount in the arbitration context. An opt-in approach is also consistent with the premise that arbitration is intended to be an alternative to adjudication by the court; therefore, any court involvement in determining the merits should be the result of an express choice by the parties. In light of *Sattva*, the likelihood of arbitration appeals succeeding has been substantially reduced; therefore, the parties should make an express choice that the cost and delay is justified despite the very limited possibility of an appeal succeeding.

The UAA limits appeals to questions of law. This has been expanded to questions of law or questions of mixed fact and law. This is in recognition of party autonomy; i.e., if the parties wish to expand their right of appeal to mixed fact and law, they should be allowed to do so (see comments below re questions of fact). In light of *Sattva* and the likelihood of appeals being grounded in issues of contractual interpretation, it is anticipated that there would be concern if the appeal rights were limited to questions of law only.

The UAA suggests an appeal to the Court of Appeal of the province. This is seen as preferable to appeals to the Superior Court for two reasons. First, it puts arbitration decisions on par with first level trial decisions. Second, it reduces the number of appeals in a single proceeding, consistent with the arbitration goals of efficiency and finality.

The UAA further provides that the Court of Appeal for Ontario may decide whether an arbitration agreement provides that an appeal may be brought on a question of law or a question of mixed fact and law. This is likely not necessary. The issue of whether the arbitration agreement provides for an appeal would be one raised in the context of the argument of the appeal itself or, if on preliminary motion, would be addressed by the Court of

Appeal as the issue would have to be raised after the Notice of Appeal was filed. Accordingly, that provision was not adopted.

Note 3: This is similar to UAA s. 65(2) and ensures that there is no suggestion that the parties were attempting to grant jurisdiction for their appeal to a different court.

Note 4: There are no appeals on question of fact, even if the parties want it. First, this is a distinguishing feature of arbitration; having chosen arbitration, the parties have chosen to go a different route than litigation and the benefits of so doing must be respected. Second, these revisions contemplate that the Court of Appeal will now hear appeals directly and it is less likely that the Court would be willing to take on this role if the legislation allowed for a re-hearing of facts. Allowing appeals on questions of fact may create complications in relation to the adequacy of the arbitral record for that purpose.

Note 5: This is an expanded basis for leave from the current domestic Act, and is taken from the UAA. Unlike the domestic Act, it contemplates a grant of leave based on the public importance of the matter and not just the importance to the parties. The inclusion of "prevent a miscarriage of justice" is also aimed at ensuring that the rights and interests of the parties are protected. While the list is expanded, it is not so broad as to allow for every appeal.

Note 6: The most significant change from the domestic Act regarding powers of the court is to eliminate the provision that indicates the appellate court may ask that the tribunal explain any matter. The tribunal is put on equal standing as a trial court and that power does not exist with respect to litigation. It is not clear why it is necessary here.

Note 7: This provision is a hold-over from the current domestic Act and would be an exception in that, for family law appeals, the court hearing the

appeal would be, at first instance, the Superior Court of Justice. The retention of this provision (as well as s. 3.2.v. – contracting out) as the new provisions are not intended to apply to family law arbitrations.

The proposed language was adopted by the Committee, subject to the changes, already incorporated in the text above, changing the word “allow” to “permit”.

The following dissents were registered:

a) two dissents to proposed section (1). One objected to the opt-in feature. The other dissent preferred opt-in, but without requiring leave to appeal;

b) two dissents to section (3) would allow an appeal on a question of fact, on an opt-in basis;

c) one dissent to s. (4)(a) on the basis that “significantly affects the rights of the parties” is too low a threshold for granting leave;

d) one dissent to s. (6)(b) which would limit the appeal to a question of law or mixed fact and law on which leave to appeal was granted.

NEXT STEPS

The Committee has decided that it should continue its work with a view to the following:

1) discussing a number of less overarching, but important, topics within the existing Act;

2) continuing to have an open discussion as to whether commercial arbitration should be dealt with in the Act or in the ICAA and, if the latter, how that would be best accomplished;

3) beginning to address the issues of communicating with other stakeholders and developing a strategy for obtaining legislative implementation.

The additional topics identified for discussion are as follows:

List of Arbitration Act Sections to Review in 2018/2019

Section(s)	Points for Possible Discussion
s. 6 Court Intervention	Too broad? Too open to "real time" interference with arbitration?
s. 8 Consolidation	Is requirement for unanimous consent of the parties too limiting?
s. 11 Duties of Arbitrators	Update to Model Law wording?
s. 13 Arbitrator Challenges	Update to Model Law wording?
s. 21 Evidence	Re-word without reference to the SPPA?
s. 25 Default Procedural Rules	Necessary? Helpful?

Section(s)	Points for Possible Discussion
s. 27 Party in Default	Should a default award be made available?
s. 44 Corrections and Interpretations	Should a party have to exhaust remedies before the tribunal before seeking to appeal or set aside?
s. 34 Majority Decision	Should majority decisions be required, i.e. eliminate possibility of Chair deciding in the event that there is no majority?

s. 56 Fees and Expenses	Should the role of institutions and appointing authorities be explicitly referenced (as opposed to just relying on contractual override not excluded by s. 3)?
s. 45 and s. 46 Powers of the Court on Appeals and Set Aside Applications	Does the power of the court to remand require further clarification?

COMMITTEE MEMBERSHIP

Stephen Morrison has elected to step down from the Committee. We thank him for the enormous contributions he made to a full discussion of the issues.

Barbara Capes, Barry Leon and Paul Tichauer have joined the Committee as new members. We welcome them to the important work of the AARC.

We also wish to thank Doug Jones for the time he spent with the Committee to discuss his experience of leading arbitration reform in Australia. He has brought home to us the importance of modernizing and internationalizing commercial arbitration, even for non-international cases, and the professional and competitive advantages to be derived from those efforts.