Appendix B

Reasons to Consolidate Commercial Arbitration in a Single Act in Ontario

Perpetual confusion

Having two Acts for commercial arbitration has created perpetual confusion in Ontario. This confusion has been highlighted in the case law in recent years, including several prominent cases.

In *Novatrax International Inc. v. Hägele Landtechnik GmbH*, 2016 ONCA 771, the parties' sales agreement provided that any disputes would be settled by binding arbitration under German law through the Chamber of Commerce in Frankfurt. The action commenced by the plaintiff included defendants who were not parties to the sales agreement. The defendants moved to stay the action. The motion judge granted a stay, and that stay was upheld at the Court of Appeal. The embarrassing fact was that neither counsel nor any of the judges who considered the matter realized that the issues in the case were governed by the *International Commercial Arbitration Act* ("ICAA") and not by the *Arbitration Act*.

In *Haas v. Gunasekaram*, 2016 ONCA 744, the plaintiff, an overseas resident, had entered into a shareholders' agreement with the defendants with respect to a restaurant. The restaurant failed. The plaintiff lost his investment and launched an action alleging he was induced to enter into the shareholders' agreement by fraudulent misrepresentations. Again, no consideration was given to the fact that the issue of a stay of proceedings, given the foreign residence of the plaintiff, was likely governed by the ICAA and not by the *Arbitration Act*.

Distinction between international and non-international is complex

The distinction between what is international and what is non-international is complex. Section 2(1) of the *Arbitration Act* indicates that that Act applies to arbitrations conducted under an arbitration agreement unless (a) the application of the Act is excluded by law; or (b) the ICAA applies. Under the ICAA, which adopts the wording of Article 1 of the *UNCITRAL Model Law on International Commercial Arbitration, 2006* (the "Model Law"):

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

This framework often leads to confusion and could benefit from the adoption of a single Act applicable to commercial arbitrations in Ontario, which would make the foregoing analysis unnecessary.

In addition, the fact that an arbitration must be both international and commercial in order for the ICAA to apply can lead to results which some may find surprising. For example, in *Uber Technologies Inc. v. Heller*, 2020 SCC 16, an Uber driver in Ontario commenced a proposed class action for violations by Uber of employment standards legislation. The standard form agreement between drivers and Uber contained an arbitration clause. The dispute would be governed by the

laws of, and the place of arbitration would be, the Netherlands. Uber's stay of the proposed class action on the basis of the arbitration clause was initially granted, though it was reversed by the Court of Appeal. That decision was upheld by the Supreme Court of Canada. The parties disagreed on the arbitration statute applicable to their dispute. Uber argued that the Ontario ICAA applied and Heller argued that the *Arbitration Act* applied. The court held that whether the ICAA governs depends on whether the arbitration agreement is international *and* commercial. That the agreement in this case was international was not in dispute. However, the court held that labour or employment disputes are not the type that the ICAA is intended to govern, and the *Arbitration Act* therefore applied.

Distinction is becoming increasingly meaningless

The distinction between international and non-international arbitrations is becoming increasingly meaningless given the prevalence of global companies and their subsidiaries in Ontario. Many arbitrations that are technically non-international are effectively international due to the fact that one or both parties are subsidiaries of international conglomerates with significant involvement of head-office executive and legal staff.

Increasingly, parties are turning to international arbitration institutions such as ICDR and ICC to administer what are technically non-international arbitrations in Canada. In addition, international institutions such as the Chartered Institute of Arbitrators play a large role in developing best practices and standards and promoting educational programs. The FCIArb designation of the Chartered Institute of Arbitrators is generally acquired by leading arbitrators, including those doing primarily non-international arbitrations. International practices such as the use of the IBA Rules for the Taking of Evidence in Arbitration and the use of Redfern Schedules and Procedural Order #1 are increasingly widespread for non-international arbitrations.

Arbitration Act confuses commercial and non-commercial arbitration

The *Arbitration Act* confuses commercial arbitration with non-commercial arbitration (such as family, consumer, labour and statutory arbitration) and applies common standards to all forms of

arbitration. This is problematic because non-commercial arbitrations have many characteristics that are not shared with commercial arbitration. For example, family and employment arbitration may include certain human rights concerns that are not often found in commercial arbitration. The issue of power imbalance in these contexts causes greater concern with due process issues that are absent or less determinative in a commercial environment.

Statutory arbitration lacks the consensual foundation of commercial arbitration. This is problematic because parties that have arbitration imposed on them by statute often desire greater appeal rights and judicial review: see, for example, *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609 in which Allstate and Intact had agreed that either could "appeal the Arbitrator's decision on a point or points of law or mixed fact and law" to a judge of the Superior Court of Justice. Although this is permissible under the *Arbitration Act*, it is rarely seen in commercial arbitration clauses.

Because statutory arbitration lacks a consensual foundation, it may also attract a more intrusive form of judicial review which is often articulated with particular reference to decisions of "inferior tribunal". In this sense, statutory arbitrations confuse the basis and extent of judicial intervention.

From a statutory perspective, the to the extent that the *Arbitration Act* permits a greater degree of court discretion to intervene in an arbitration (see, for example, s. 6), such discretion is less appropriate, if at all, with respect to commercial arbitration. The Model Law and the ICAA provide a clearer standard that places tribunals in control of arbitration proceedings.

Confusion with respect to different types of "domestic" arbitration leads courts to provide lower standards for domestic commercial arbitration than for international arbitration, whereas the standards should be the same.

A single Act would encourage the courts to apply international standards to all commercial arbitrations. Moreover, a section that requires the courts to consider the international origin of the Act would apply to all commercial arbitrations, thereby fulfilling the original assumed goal of the *Arbitration Act* to conform more to the Model Law.

ULCC Uniform Domestic Arbitration Act only updated from perspective of commercial arbitration

The *ULCC Uniform Domestic Arbitration Act* (the "ULCC Uniform Act") was only updated from the perspective of commercial arbitration. The Task Force did not consider any other types of arbitration. If it were sought to be implemented, all users of the Act other than the commercial arbitration community would have to be consulted and would potentially have different views on a number of items. It is possible that an amended ULCC Uniform Act would itself have to differentiate further than it already does between provisions relating to commercial arbitration and provisions relating to other types of arbitration (for example, family or statutory arbitration in relation to rights of appeal).

International Commercial Arbitration Act lacks elements needed to support *ad hoc* arbitration

The ICAA lacks the elements needed to support *ad hoc* arbitration. *Ad hoc* arbitrations are very common in Ontario. Examples of elements lacking in the ICAA include the absence of provisions with respect to costs, interest, arbitrator immunity, a procedure for the enforcement of awards, and extension of time limits for completing an arbitration.

There is potential confusion in that some may view the *Arbitration Act* as providing a base for the arbitration law of Ontario which can be resorted to when the ICAA is silent. However, this is not the case as the *Arbitration Act* is not applicable to arbitrations to which the ICAA applies (see *Arbitration Act*, s. 2).

Some may also consider that some of these basic provisions of the *Arbitration Act* are not necessary in international arbitrations because they are covered by the institutional rules of organizations such as the ICC, ICDR, LCIA, etc. However, ad hoc arbitrations are in fact widespread and do not always specify international arbitrations rules such as those published by UNCITRAL. It would be valuable for some elements that are widely accepted in international arbitration (as evidenced by institutional rules and statutes in many leading arbitration jurisdictions) to also be included in an Ontario Act covering both international and non-international arbitration.

Arbitration Act could benefit from provisions of *International Commercial Arbitration Act*

Equally, non-international arbitration in Ontario could benefit greatly from certain provisions of the ICAA. To name a few such provisions, the ICAA contains much more comprehensive provisions relating to interim measures, less discretion with respect to stays of proceedings, and a clearer prohibition on judicial interference.

In addition, the uniform use of Model Law terminology that is used internationally for commercial arbitration would provide greater clarity and consistency both in the practice of commercial arbitration and in the jurisprudence relating to commercial arbitration. Familiarity with and consistent use of such terminology would also be of assistance to Ontario lawyers dealing with lawyers from other parts of the world when discussing commercial arbitration in Ontario.

Opt-in right of appeal

A significant distinction between the *Arbitration Act* and the ICAA has been the right to appeal. Under the *Arbitration Act*, parties may agree to opt out of all rights of appeal, including the default right to appeal with leave on a point of law. Parties may also agree to expand rights of appeal to include appeals on questions of fact or questions of mixed fact and law. Under the ICAA no rights of appeal are allowed, by agreement or otherwise.

The ULCC recommended that domestic arbitration acts should only allow for a right of appeal on a question of law, and only if the agreement of the parties so provides (see section 45 of the ULCC Uniform Act). There are many good reasons to adopt that recommendation for non-international commercial arbitration, as set out in the ULCC Report.

In a consolidated CAA, this right could be provided only for non-international arbitration. However, if the right is only available on an opt-in basis, there does not appear to be any good reason why it should not also be permitted in international arbitrations. A right to appeal to the court on a point of law may be considered valuable by parties seeking to hold tribunals to the mandatory provision of the Model Law that the "tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties".

Anecdotally, there is evidence that parties have chosen to make international arbitrations seated in Ontario subject to the *Arbitration Act*, seemingly in error but in actuality to obtain access to the ability to appeal on a point of law. Canadian jurisprudence is not consistent as to whether this is permissible.

Internationally, there are some examples of appeals on points of law being allowed on a default or opt-in basis, even in international arbitrations.

It should be noted that in the opt-in scenario, only points of Canadian/Ontario law would be points of law in Ontario. Foreign law is an issue of fact. If the parties seat their arbitration in Ontario and make their rights subject to Ontario or Canadian law, it may be argued that they should have the ability to agree that there is a right to appeal on a point of Canadian law to a Canadian court, rather than rely exclusively on a tribunal which might not include any Canadian lawyers, or any lawyers at all.

Comparators for Ontario legislation

Having a single Act for all commercial arbitration (albeit with some provisions applicable only to international or non-international arbitration) would align Ontario with other significant jurisdictional counterparts.

Canada's federal *Commercial Arbitration Act* and the *Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes* apply equally to international and non-international arbitrations, as does the *Federal Arbitration Act USA* (except with respect to New York Convention issues). The same is true of the English *Arbitration Act 1996*. Given the advanced state of Ontario's economy and the nature of the commercial disputes that are typically arbitrated in Ontario, these are the jurisdictions that should be Ontario's main comparators, rather than the other Canadian provinces.

Merging all commercial arbitration is relatively easy

Given the existing structure of the *Arbitration Act* and the ICAA, merging all commercial arbitrations under the existing ICAA could be achieved relatively easily. All that is required is to:

1. Amend the international arbitration exclusion in s. 2 of the *Arbitration Act* to make it a commercial arbitration exclusion (all other forms of arbitration would remain under the *Arbitration Act*);

2. Drop the word "International" from the title of the *International Commercial Arbitration Act*;

3. Add sections as required to the ICAA without changing the Schedules attaching the New York Convention and the Model Law, or produce an Act that integrates all the relevant provisions into one cohesive statute;

4. If desired, identify sections that are only applicable to international or non-international arbitration, though such distinctions should be eliminated or minimized as much as possible;

5. Provide for opt-in rights of appeal on points of law for commercial arbitrations seated in Ontario. Alternatively, all rights of appeal could be excluded for all commercial arbitrations, or opt-in rights of appeal could be restricted to non-international arbitrations.

Creating a Commercial Arbitration Act would leave the existing Act intact for other forms of arbitration

Creating a single Commercial Arbitration Act would leave the existing *Arbitration Act* intact for all other forms of arbitration. This would streamline the legislative amendment process. If we continued with two Acts, input would be required from all other arbitration stakeholders in Ontario.

Enhanced expertise of Ontario lawyers

A single Act would train the Ontario Bar and Bench to become highly familiar with international standards, legal instruments and "soft law" and an international arbitration vocabulary, thereby making the expertise of Ontario lawyers much more readily exportable in international markets. Ontario would lead the way among common law provinces towards the internationalization of the arbitration community in Ontario, similar to the movement towards International Financial Reporting Standards in the accounting world.

The adoption of international standards would also serve to bolster Ontario in general and Toronto in particular as a pre-eminent location for international commercial arbitration and would bring more business to the local economy.[1]

[1] A 2012 study found that arbitrations in Toronto brought $256 million into the city's economy, as compared with the impact of the 2010 Toronto International Film Festival which generated an economic impact of $170 million. See "Arbitration worth over a quarter-billion dollars a year to Toronto economy", available online at https://www.newswire.ca/news-releases/arbitration-worth-over-a-quarter-billion-dollars-a-year-to-toronto-economy-510733681.html.