Arbitration Act Reform Committee
Consolidation of Topics, Comparative Legislation, Conclusions and Proposed Wording
(26 Sept 20)

TOPIC #1

Should the definition of "arbitral tribunal" include a reference to umpires?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996 includes an umpire in subsections 21(1) to (6). Per subsection 21(1), an umpire may be used where the parties have agreed that there is to be one and they are free to agree to the functions of the umpire. The use of an umpire is a carry-over from the Arbitration Act 1950 and is still used in London, particularly for specific industry arbitral associations like the London Maritime Arbitrators Association. Umpires are also used in those Caribbean states which use the Arbitration Act 1950, such as St. Kitts and Nevis. In modern commercial cases, however, an umpire is often converted to a fully participating chair by agreement of the parties.

- The Australian International Arbitration Act 1974 does not include the concept of an umpire.

- The New Zealand Arbitration Act 1996 includes an emergency arbitrator in the definition of "arbitral tribunal" at s. 2(1) but does not include an "umpire".

- The Federal Arbitration Act USA and the Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) recognize an umpire as a concept, as evidenced by section 5, entitled "Appointment of arbitrators or umpire".

- The British Virgin Islands Arbitration Act, 2013, at section 2(2), includes an umpire in the definition of an "arbitral tribunal".

- The Singapore International Arbitration Act includes an emergency arbitrator in the definition of "arbitral tribunal" at s. 2(1) but does not include an "umpire".

- The Hong Kong Arbitration Ordinance Cap. 609 includes an umpire in its definition of "arbitral tribunal" at section 2(1).

- The German Arbitration Act does not include the concept of an umpire.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes does not include the concept of an umpire.

Domestic Legislation

- The *Uniform Arbitration Act* (2016) does not mention an "umpire"; however, section 2 does address appeal tribunals. In that legislation, "arbitral tribunal" means a sole arbitrator or a panel of arbitrators, and includes an arbitrator or panel appointed for the purposes of an agreed appeal or review process".

- The British Columbia Arbitration Act does not include an "umpire" in its definition of "arbitrator" in section 1.

- The Ontario Insurance Act, at s. 128, provides for the use of an umpire in appraisal disputes.

Conclusion: The definition of "arbitral tribunal" should include an "umpire", given that umpires are used in a number of international and non-international arbitration contexts.

The proposed definition of "arbitral tribunal" would be as follows:

"arbitral tribunal" means a sole arbitrator or a panel of arbitrators, and includes an umpire;

(See s. 7(b) of the Discussion Draft *Commercial Arbitration Act* ("Discussion Draft CAA")).

TOPIC #2

Should the definition section include a reference to both juridical and natural persons?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- None of the international or combined arbitration statutes reviewed includes a reference in the definition section to both juridical and natural persons.

Domestic Legislation

- None of the domestic arbitration statutes reviewed includes a reference in the definition section to both juridical and natural persons.

Conclusion: The issue of references to both juridical and natural persons should be left to the legislative draftspersons.

TOPIC #3

Should the CAA include a provision that allows the court to grant consequential relief when an action is, or is not, stayed based on an agreement to arbitrate?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996 provides for a stay of legal proceedings under section 9 but does not include a stay of arbitration proceedings.

- The Australian International Arbitration Act 1974 does not address this topic.

- The New Zealand Arbitration Act 1996 includes language from the UNCITRAL Model Law on International Commercial Arbitration, 2006 (the "Model Law") in Schedule 1, Article 8(1), which appears to be the operational equivalent of section 14(3) of the CAA. ("A court before which proceedings are brought in a matter which is the subject of an

arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.) There is, however, no equivalent of section 14(4) of the CAA contained in the New Zealand statute.

- The Federal Arbitration Act USA and the Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) do not address this topic.

- The British Virgin Islands Arbitration Act, 2013 has no equivalent provision. Section 18(4) of that statute provides that where the court refers the parties in an action to an arbitration, it shall make an order staying the legal proceedings. On a related note, section 13(1) and (2) address directions to be made by the court in circumstances involving interpleader proceedings.

- The Singapore International Arbitration Act provides additional specific jurisdiction to the court to provide relief, "upon such terms or conditions as it may think fit", when an action is stayed under section 6. Further, "the court may, for the purpose of preserving the rights of parties, make such interim or supplementary orders as it may think fit in relation to any property." This statute does not provide for a situation where an action is not stayed.

- The Hong Kong Arbitration Ordinance Cap. 609 also has no equivalent provision, though it does address relief by way of interpleader at section 15 and admiralty proceedings at s. 20(6).

- The German Arbitration Act takes a different approach than that taken in the CAA. Section 1032(3) provides that proceedings may be commenced or continued, and an arbitral award may be made, even if the court proceedings are not stayed.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes provides at CCP 622 that a court

seized of a dispute where the parties have an arbitration agreement is required, on a party's application, to refer the parties back to arbitration. Arbitration proceedings may be commenced or continued and an award made for so long as the court has not made its ruling.

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at section 7(6), provides that, depending on what the court has found on a stay application, it may order the court proceeding to continue, that arbitration cannot be commenced, or it may terminate an existing arbitral proceeding and render anything done in that proceeding of no effect.

- The British Columbia Arbitration Act does not address this topic.

Conclusion: 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.

The proposed wording would be as follows:

(3) Where a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

(4) If the arbitration is non-international and the proceedings of the court are not stayed;

a) no arbitration of the dispute shall be commenced;

b) an arbitration that has been commenced shall not be continued; and

c) the court may give directions as to whether anything done in connection with the arbitration before the court made its decision has any effect.

(See the Discussion Draft CAA at sections 14(3) and 14(4).)

TOPIC #4

Should the CAA include a default provision for one arbitrator?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996 provides at section 15 that the default is one arbitrator, unless otherwise specified. This legislation goes on to specify that where there are to be two arbitrators (or any other even number of arbitrators), the appointment of an additional arbitrator as chair of the tribunal will be required.

- The Australian International Arbitration Act 1974, at Sch. 2, Article 10, incorporates the Model Law, which provides that the default number of arbitrators shall be three.

- The New Zealand Arbitration Act 1996 provides at Sch. 1, Article 10 that, failing agreement of the parties, the default number of arbitrators shall be three for international arbitrators, and one for every other case.

- The Federal Arbitration Act USA defaults, at section 5, to one arbitrator.

- The British Virgin Islands Arbitration Act, 2013 specifies in section 21(4) that the number of arbitrators shall be either one or three as decided by the British Virgin Islands International Arbitration Centre in a particular case; however, where the parties opt in to section 89(a) and paragraph 1 of Schedule 2, any dispute is to be submitted to a sole arbitrator.

- The Singapore International Arbitration Act provides that one arbitrator is the default.

- The Hong Kong Arbitration Ordinance Cap. 609 at Part 4, Section 23(3), provides that the number of arbitrators is to be either one or three as decided by the Hong Kong International Arbitration Centre where the parties fail to agree on the number of arbitrators.

- The German Arbitration Act provides, at section 1034(1), that the default number of arbitrators is three, even for non-international arbitrations.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes provides a default of one arbitrator at CCP 624.

Domestic Legislation

- The *Uniform Arbitration Act* (2016) provides at section 18 that if the parties are not agreed on the number of arbitrators, an arbitral tribunal shall be composed of one arbitrator.

- The British Columbia Arbitration Act provides a default of one arbitrator at section 13.

Conclusion: The default number of arbitrators will be three in international and one in non-international arbitration.

The proposed wording regarding the default number of arbitrators would be as follows:

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three in an international commercial arbitration, and one in a non-international commercial arbitration.

(See section 16 of the Discussion Draft CAA.)

TOPIC #5

Should the CAA make it explicit that the procedure for appointing an arbitrator or arbitrators agreed to by the parties may include the use of a third party or arbitral institution?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996 does not specifically provide for the use of a third party or arbitral institution.

- The Australian International Arbitration Act 1974 follows the Model Law and refers at Article 11(4)(c) of Sch. 2 to the scenario where a third party, including an institution, fails to perform any function entrusted to it under an appointment procedure.

- The New Zealand Arbitration Act 1996 also follows the Model Law and refers at Article 11(4)(c) of Sch. 1 to where a third party, including an institution, fails to perform any function entrusted to it under an appointment procedure.

- The Federal Arbitration Act USA also does not specifically provide for the use of a third party or arbitral institution.

- The British Virgin Islands Arbitration Act, 2013, at section 21(3), provides that "… the freedom of the parties to determine the number of arbitrators includes the right of the parties to authorise a third party, including an institution, to make that determination."

- The Singapore International Arbitration Act does not specifically provide for the use of a third party or arbitral institution.

- The Hong Kong Arbitration Ordinance Cap. 609 at Part 4, section 23(2) provides, in accordance with Article 2(d) of the Model Law, that the parties have the right to authorize a third party, including an institution, to determine the number of arbitrators.

- The German Arbitration Act, at section 1035(1), provides that the parties are free to agree on a procedure of appointing the arbitrator(s). Given this wording, the addition of "including the use of a third party or arbitral institution" would be superfluous, but the use of an institution is nonetheless an option available under the legislation.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes references at CCP 624 the parties' ability to ask a third person to make an appointment.

Domestic Legislation

- The *Uniform Arbitration Act* (2016) does not specifically provide for the use of a third party or arbitral institution.

- The British Columbia Arbitration Act, at section 14, addresses the appointment of the arbitral tribunal by a designated appointing authority or, in default, the Supreme Court.

Conclusion: There is no need to make specific reference to the role of third parties or arbitral institutions in the appointment of arbitrators.

TOPIC #6

Should the provisions relating to the consideration of the nationality of an arbitrator be continued or deleted?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996, at section 19, does not contain any reference to nationality as a qualification for a prospective arbitrator.

- The Australian International Arbitration Act 1974 follows the Model Law and provides, at Sch. 2, Article 11(1): "No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties." At Article 11(5), the Australian International Arbitration Act 1974 adopts the wording from the Model Law and provides that a court, in appointing an arbitrator, "…shall have due regard to any qualifications required of the arbitrator by the agreement of the parties…and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties."

- The New Zealand Arbitration Act 1996, at Sch. 1, Article 11(5), retains the reference to taking into account the nationality of the arbitrator "in the case of an international arbitration".

- The Federal Arbitration Act USA and the Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) do not address the nationality of the arbitrator.

- The British Virgin Islands Arbitration Act, 2013 provides at section 22(1), in accordance with Article 11(1) of the Model Law, that "[n]o person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties."

- The Singapore International Arbitration Act does not contain any reference to nationality as a qualification for a prospective arbitrator.

- The Hong Kong Arbitration Ordinance Cap. 609 at Sch. 1, Articles 11(1) and (5), adopts the provisions of the Model Law.

- The German Arbitration Act provides, at section 1035(5), that in the case of a sole or third arbitrator, the court shall take into account the advisability of appointing an arbitrator of a nationality other than those of the parties. It can be said the German Act takes great steps to promote neutrality.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes also does not contain any reference to nationality as a qualification for a prospective arbitrator.

Domestic Legislation

- The *Uniform Arbitration Act* (2016) does not specifically mention nationality when addressing the procedure for appointment of arbitrators in section 19(3). That legislation simply indicates that the court shall consider: "(a) the nature of the dispute, (b) any qualifications required by the agreement of the parties, and (c) what will most likely result in the appointment of an independent and impartial arbitral tribunal."

- The British Columbia Arbitration Act does not contain any reference to nationality as a qualification for a prospective arbitrator.

Conclusion: 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.

TOPIC #7

Should the CAA be written in gender-neutral language?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The Australian International Arbitration Act 1974 refers to both men and women.
- The balance of the combined international/domestic arbitration statutes reviewed refer only to the masculine gender.

Domestic Legislation

- The *Uniform Arbitration Act* (2016) refers to men and women.
- The British Columbia Arbitration Act uses gender neutral language.

Conclusion: 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.

TOPIC #8

Should 30 day time limits for challenging an arbitrator be changed to 15 days?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996, at section 24, contains a much more detailed challenge procedure than in the Model Law.

- The Australian International Arbitration Act 1974 contains the same rules as in the Model Law, with the timeframe for asking the court to decide on the challenge remaining at 30 days.

- The New Zealand Arbitration Act 1996, at Sch. 1, Article 13(3) contains the same rules as in the Model Law and retains 30 days as the timeframe for both domestic and international arbitrations.

- The Federal Arbitration Act USA and the Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) do not provide an equivalent provision with respect to challenging an arbitrator.

- The British Virgin Islands Arbitration Act, 2013, at section 24(1), mirrors the language and the timeframe contained in the Model Law.

- The Singapore International Arbitration Act does not provide an equivalent provision with respect to the challenge of an arbitrator.

- The Hong Kong Arbitration Ordinance Cap. 609, at Sch. 1, Article 13, adopts the provisions of the Model Law.

- The German Arbitration Act provides two weeks to file a challenge per section 1037.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes provides, at CCP 627, that "…a party may, within 30 days after being advised of it, ask the court to rule on the recusation." In such a scenario, the arbitral tribunal may continue the arbitration proceedings and make an award for so long as the court has not made its ruling, as is provided in the Model Law.

Domestic Legislation

- The *Uniform Arbitration Act* (2016) provides 15 days for a challenge at section 23(4).

- The British Columbia Arbitration Act, at section 18, provides the challenging party with 30 days to apply to the Supreme Court to decide on the challenge.

Conclusion: The rules for challenging arbitrators should be as in the Model Law.

TOPIC #9

Should Latin terms such as "de jure" or "de facto" and "ex aequo et bono" be changed to English?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996 does not appear to contain any Latin expressions.

- The Australian International Arbitration Act 1974 does not anglicize Latin expressions. For example, Sch. 2 incorporates the Model Law. Therein, *ipso jure* appears in Article 16(1) and *ex aequo et bono* and *amiable compositeur* appear in Article 28(3).

- The New Zealand Arbitration Act 1996, at Sch. 1, also incorporates the Model Law, which, as indicated, does not anglicize Latin expressions.

- The Federal Arbitration Act USA does not appear to contain any Latin expressions.

- The British Virgin Islands Arbitration Act, 2013 incorporates portions of the Model Law and therefore contains Latin expressions which are not anglicized.

- The Singapore International Arbitration Act incorporates the Model Law and therefore contains Latin expressions which are not anglicized.

- The Hong Kong Arbitration Ordinance Cap. 609 adopts the Model Law at Sch. 1 and therefore contains Latin expressions which are not anglicized.

- The German Arbitration Act does not anglicize Latin expressions. For example, *de jure* and *de facto* appear in section 1038(1) and *ex aequo et bono* and *amiable compositeur* appear in section 1051(3).

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes does not anglicize or convert to French Latin expressions. For example, *amiable compositeur* appears in CCP 620.

Domestic Legislation

- The *Uniform Arbitration Act* (2016) does not anglicize Latin terms. For example, *ex aequo et bono* and *amiable compositeur* appear in section 33.

- The British Columbia Arbitration Act contains Latin expressions which are not anglicized (for example, *amiable compositeur* appears in section 27); interestingly, however, this new legislation amends section 14(1)(a) of the International Commercial Arbitration Act by striking out "*de jure* or *de facto*" and substituting "in law or in fact" and amends section 16(1)(b) of the International Commercial Arbitration Act by striking out "*ipso jure*" and substituting "as a matter of law" (see the British Columbia Arbitration Act at sections 78 and 80, which make these amendments).

Conclusion: There is no need to Anglicize Latin expressions.

TOPIC #10

Should the Tribunal be given express jurisdiction to decide whether or not previous proceedings will be repeated when a substitute arbitrator is appointed, even if one of the parties does not agree?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996, at section 27, specifically gives the reconstituted tribunal the power to determine the extent to which the prior proceedings "should stand", to the extent that the parties are unable to agree.

- The Australian International Arbitration Act 1974 does not address the ability of the tribunal to decide on this topic.

- The New Zealand Arbitration Act 1996, at Sch. 1, Article 15(2), provides that where the parties have not agreed otherwise, where the sole or presiding arbitrator is replaced, any hearings previously held shall be repeated. Where an arbitrator other than a sole or a presiding arbitrator is replaced, the legislation gives the tribunal discretion to repeat any hearings previously held. Giving the tribunal discretion in this Article is meant to counter resignations (presumably of party-appointed arbitrators) that are designed to obstruct arbitral proceedings (Sir David A.R. Williams et al., *Williams & Kawharu on Arbitration* (LexisNexis, 2017) ("Williams") at p. 163).

- The Federal Arbitration Act USA and the Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) do not address this topic.

- The British Virgin Islands Arbitration Act, 2013, at section 26, incorporates Article 15 of the Model Law, which simply provides that where the mandate of an arbitrator terminates, "a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced." The issue of whether previous proceedings should stand is not addressed.

- The Singapore International Arbitration Act also incorporates the Model Law at the First Schedule, Article 15, and therefore does not address the issue of whether previous proceedings should stand.

- The Hong Kong Arbitration Ordinance Cap. 609 similarly adopts the Model Law at Sch. 1, Article 15, and therefore also does not address this topic.

- The German Arbitration Act provides at section 1039(2) that the parties are free to agree on another procedure. This provision is all encompassing and offers more flexibility.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes does not address this topic.

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at section 25(2), provides that the reconstituted arbitral tribunal may determine if steps taken before the reconstitution of the arbitral tribunal should be repeated.

- The British Columbia Arbitration Act distinguishes between sole and presiding arbitrators and other arbitrators. At section 20(3), this legislation provides that, unless otherwise agreed by the parties: if the sole or presiding arbitrator is replaced, any hearing must be repeated, and if an arbitrator other than the sole or presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.

Conclusion: The Tribunal should be given express jurisdiction to decide whether or not previous proceedings should stand when a substitute arbitrator is appointed, even if one of the parties does not agree.

The proposed wording regarding the Tribunal's ability to decide whether previous proceedings should be repeated when a substitute arbitrator is appointed would be as follows:

If a substitute arbitrator is appointed by the court, unless the parties otherwise agree, the arbitral tribunal as constituted with the substitute arbitrator shall determine, after hearing submissions from all parties, whether all or part of the case shall be repeated.

(See section 21(2) of the Discussion Draft CAA, which is taken from the new British Columbia Arbitration Act.)

TOPIC #11

APPENDIX D

Should the CAA include a provision regarding arbitrator immunity?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996 contains two arbitrator immunity provisions. Section 29 relates to immunity of the arbitrator and also employees or agents of the arbitrator. Immunity does not apply to acts or omissions in bad faith, and does not apply with respect to potential liability on resignation. Section 74 relates to the immunity of the arbitral institution and others who appoint arbitrators, including employees or agents. Again, immunity does not apply to acts or omissions in bad faith. Arbitral institutions are not liable for anything done or omitted by an arbitrator in the discharge or purported discharge of his or her functions.

- The Australian International Arbitration Act 1974, at section 28, adds, with respect to the appointment, immunity for institutions who appoint an arbitrator.

- The New Zealand Arbitration Act 1996, at section 13, provides that an arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator. As Williams states at p. 183, "…absolute protection from suit is patently not intended. Thus, … s. 13 does not protect an arbitrator from liability for breach of contract… Nor does s. 13 immunise an arbitrator who commits fraud or otherwise acts in bad faith."

- The Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft), at section 3.10, provides that international arbitrators are immune from civil liability from acts or omissions within the scope of their duties, to the same extent as judges. Arbitral institutions and appointing authorities are also immune from civil liability for acts or omissions within the scope of their duties. US case law provides for arbitrator immunity.

- The British Virgin Islands Arbitration Act, 2013, provides for immunity of arbitral the tribunal or mediator at section 101 and for immunity of administrators and appointers at

section 102. Both sections include employees or agents, and apply unless the arbitral tribunal/mediator/administrator/appointer/employee/agent has acted in bad faith.

- The Singapore International Arbitration Act includes an immunity provision for arbitrators at section 25. There shall be no liability for negligence, or any mistake in law, fact or procedure. This legislation also includes an immunity provision for appointing authorities and arbitral institutions at section 25A. There shall be no liability unless an act or omission was done in bad faith; there shall be no liability for anything done or omitted by the arbitrator, his employees or agents; and employees and agents of an appointing authority or arbitral institution shall also have immunity.

- The Hong Kong Arbitration Ordinance Cap. 609 provides at section 104 that an arbitral tribunal or mediator is liable in law for an act done or omitted to be done by them or their agent only if it is proved that the act was done or omitted to be done dishonestly. An employee or agent of an arbitral tribunal will be liable in law for an act done or omitted to be done by them only if it is proved that the act was done or omitted to be done dishonestly. At section 105, the legislation provides that appointers and administrators will be liable in law for the consequences of doing or omitting to do an act only if it is proved that the act was done or omitted to be done dishonestly. An employee or agent will be liable in law only if it is proved that the employee or agent was a party to the dishonesty. Neither the appointer nor its employees/agents are liable in law for the consequences of acts or omissions made by the arbitral tribunal or mediator or an employee/agent of the arbitral tribunal or mediator.

- The German Arbitration Act contains no provision for arbitrator immunity.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes provides, at CCP 621: “Arbitrators cannot be prosecuted for an act performed in the course of their arbitration mission, unless they acted in bad faith or committed an intentional or gross fault.

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at section 21, provides that no action may be brought against an arbitrator for anything done or omitted, unless it is an act or omission in bad faith or the arbitrator has engaged in intentional wrongdoing.

- The British Columbia Arbitration Act, at section 62, contains a provision that is identical to the proposed wording in section 22 of the Discussion Draft CAA.

Conclusion: The CAA should include a provision regarding arbitrator immunity, both in terms of liability and compellability. There is no need to provide an express exception for bad faith and that exception is implicit in the words "performance or intended performance of any duty".

The proposed wording of an arbitrator immunity provision would be as follows:

(1) Subject to subsection (2), no legal proceeding for damages lies or may be commenced or maintained against an arbitrator because of anything done or omitted

(a) in the performance or intended performance of any duty under an enactment governing an arbitration or under an arbitration agreement, or

(b) in the exercise or intended exercise of any power under an enactment governing an arbitration or under an arbitration agreement.

(2) An arbitrator or member of an arbitral tribunal may not be compelled to give evidence in any court proceedings related to the arbitration or to any award, decision or direction given by the arbitrator or the tribunal in the proceedings.

(See section 22 of the Discussion Draft CAA.)

TOPIC #12

Should each party be given a "reasonable opportunity" of presenting its case, as opposed to a "full opportunity"?

APPENDIX D

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996, at s. 33(1), provides in part that the tribunal has a general duty to "(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent". Under subsection (b), the tribunal has a general duty to "… provide a fair means for the resolution of the matters falling to be determined."

- The Australian International Arbitration Act 1974, at section 18C, provides that "…a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case."

- The New Zealand Arbitration Act 1996, at Sch. 1, Article 18, changes the language in the Model Law from "his" to "that party's", providing that, "The parties shall be treated with equality and each party shall be given a full opportunity of presenting that party's case."

- The Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft), at section 4.11, does not use "full" or "reasonable". It refers simply to "the opportunity" of a party to present its case or to rebut the case of its opponent. The commentary provides that each party should "be afforded a reasonable amount of time in which to prepare and present evidence and argument to the tribunal."

- The British Virgin Islands Arbitration Act, 2013, provides at section 44(2) that the parties shall be treated with equality. Section 44(3)(b) states that the tribunal is required "to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents".

- The Singapore International Arbitration Act, in the First Schedule, Article 18, includes the Model Law language, with each party being given "a full opportunity" to present their case.

- The Hong Kong Arbitration Ordinance Cap. 609 provides, at section 46, a modified version of the Model Law language, that the parties must be treated with equality (subsection 2)

and that the arbitral tribunal is required "to act fairly and impartiality as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents" (subsection 3(b)).

- The German Arbitration Act provides, at section 1042(1), that the parties shall be treated with equality and each shall be given a full opportunity of presenting his case. Again, the German legislation is more liberal and eliminates any restriction on a party's ability to make its case.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes oddly has no equivalent, other than by reference to the "adversarial principle" in CCP 632: "Arbitrators conduct the arbitration according to the procedure they determine; they are required, however, to see that the adversarial principle and the principle of proportionality are observed."

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at section 28, provides that an arbitral tribunal shall give each party a reasonable opportunity to present its case and to answer any case presented against it. There was a deliberate decision by the ULCC not to use the Model Law language of equality.

- The British Columbia Arbitration Act, at section 21, refers to a "reasonable opportunity".

Conclusion: The word "full" in Article 18 of the Model Law should be changed to "reasonable".

The proposed wording with respect to equal treatment of parties would be as follows:

The parties shall be treated with equality and each party shall be given a reasonable opportunity to present its claims and defences.

(See section 35 of the Discussion Draft CAA.)

TOPICS #13, 14

Should a Tribunal be given express discretion as to the manner in which the evidence may be heard?

Should the Tribunal be given explicit discretion regarding all evidentiary matters?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996, at section 33(2), provides that the tribunal shall comply with its general duty of fairness in its decisions on matters of procedure and evidence. Section 34 provides a detailed description of the "manner in which the evidence may be heard". Section 34(2)(f) provides discretion to the tribunal as to whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material sought to be tendered.

- The Australian International Arbitration Act 1974, in Sch. 2, Article 19, contains the wording of the Model Law, namely that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, and the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

- The New Zealand Arbitration Act 1996, at Sch. 1, Article 18, retains the language of Article 19(2) of the Model Law.

- The Federal Arbitration Act USA and the Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) do not address the admissibility of evidence or the manner by which evidence may be heard.

- The British Virgin Islands Arbitration Act, 2013 has replaced Article 19(2) and (3) of the Model Law with the following: "If or to the extent that there is no agreement between the parties pursuant to article 19 (1) of the UNCITRAL Model Law, as provided in subsection (1), the arbitral tribunal may, subject to the provisions of this Act, conduct the arbitration in the manner that it considers appropriate."

- The Singapore International Arbitration Act, does not contain a directly comparable provision; however, at section 12, there is a detailed list setting out the powers of the arbitral tribunal.

- The Hong Kong Arbitration Ordinance Cap. 609 provides, at section 47(1), that Article 19 of the Model Law has effect. Section 47(3) provides that an arbitral tribunal is not bound by the rules of evidence and may receive any evidence that it considers relevant, but it must give appropriate weight to the evidence adduced.

- The German Arbitration Act, at section 1042(2), contains succinct language, providing that the "…tribunal is empowered to determine the admissibility of taking evidence, take evidence and assess freely such evidence."

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes only provides, at CCP 632, that arbitrators are to conduct the arbitration according to the procedure they determine but in observation of the adversarial principle and the principle of proportionality.

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at section 35(1), indicates that the tribunal need not apply legal rules of evidence, other than rules concerning privilege. At section 36, the Act includes lengthy provisions intended to give the tribunal wide powers and flexibility to determine a fair and efficient procedure.

- The British Columbia Arbitration Act, at section 28(3), defaults to written direct evidence, unless otherwise agreed by the parties or directed by the tribunal. At section 28(2), the British Columbia Act provides that unless otherwise agreed by the parties, the tribunal is not required to apply the law of evidence other than the law of privilege.

Conclusion: There should be a general statement, as in sections 33 and 34 of the English Arbitration Act 1996, as to the discretion of the Tribunal with respect to matters of procedure and evidence, without adopting a long "laundry list" and without imposing any specific obligations on the Tribunal.

The proposed wording regarding the discretion of the Tribunal as to the manner by which evidence may be heard and the discretion of the Tribunal regarding evidentiary matters would be as follows:

(1) Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting all proceedings in the arbitration.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Act, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence and the manner by which evidence may be heard.

(3) Rules of evidence applicable in court proceedings are not applicable in arbitrations in which the place of arbitration is Ontario. The tribunal shall take such steps as it considers necessary or appropriate, based upon applicable laws and international practice, to protect rights of privilege pertaining to legal communications, advice and representation.

(4) Parties to arbitral proceedings shall do all things necessary for the just, speedy, cost effective and proportional determination of the proceedings, in accordance with the agreement of the parties and any orders and directions of the arbitral tribunal.

(See section 36 of the Discussion Draft CAA. The wording "and the manner by which evidence may be heard" is a new addition.)

TOPIC #15

Should the CAA contain provisions regarding the Tribunal's authority with respect to witnesses, such as those contained in the Evidence Act?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996 contains comparable provisions at sections 34 (procedural and evidential matters), 38(5) (administering oaths or taking affirmations), and 43 (securing attendance of witnesses).

- The Australian International Arbitration Act 1974 includes provisions regarding compelling evidence and documents at sections 23 (parties may obtain subpoenas), 23A (failure to assist arbitral tribunal), 23B (default by party to an arbitration agreement) and 23J (evidence), though opt-out is permitted. This legislation does not contain a provision with respect to administering an oath.

- The New Zealand Arbitration Act 1996, at Sch. 1, Article 27(1), provides that the arbitral tribunal or a party with the approval of the arbitral tribunal may request from the court assistance in taking evidence. As per Article 27(2), such assistance may include ordering subpoenas and compelling witnesses. As per Williams, at p. 317, the New Zealand Evidence Act 2006 does not apply to arbitrations seated in New Zealand.

- The Federal Arbitration Act USA, at section 7, provides tribunals with the power to summon witnesses. The summons procedure is set out in detail.

- The British Virgin Islands Arbitration Act, 2013, at section 54(8), covers oaths and directing the attendance of witnesses to give evidence or produce documents or other evidence. These powers are available to the tribunal unless otherwise agreed by the parties.

- The Singapore International Arbitration Act, at section 12(2), provides that, unless the parties have agreed otherwise, the tribunal shall have power to administer oaths to or take affirmations of the parties and witnesses. At section 13, this legislation contains provisions with respect to witnesses that are found in the Ontario Evidence Act.

- The Hong Kong Arbitration Ordinance Cap. 609, at section 56(8), provides that an arbitral tribunal may, unless otherwise agreed by the parties, administer oaths to or take the affirmations of witnesses and parties, or direct the attendance before the arbitral tribunal of witnesses to give evidence or to produce documents.

- The German Arbitration Act offers greater latitude and does not specify a particular Act. Under section 1042(3), the parties are free to determine the procedure themselves or by reference to a set of arbitration rules. Under section 1042(4), failing an agreement by the parties, the tribunal shall conduct the arbitration in such manner as it considers appropriate.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes contains no equivalent to the Evidence Act reference.

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at section 38, provides for the ability of the tribunal to issue subpoenas, seek the assistance of other courts, etc.

- The British Columbia Arbitration Act, at section 28(2), provides that the arbitral tribunal is not required to apply the law of evidence other than the law of privilege, unless otherwise agreed by the parties to the arbitral proceedings.

- The Ontario Evidence Act makes provision for all these matters. Section 1 of the Ontario Evidence Act contains the following definitions:

1. In this Act,

"action" includes an issue, matter, **arbitration**, reference, investigation, inquiry, a prosecution for an offence committed against a statute of Ontario or against a by-law or regulation made under any such statute and any other proceeding **authorized or permitted to be tried, heard, had or taken by or before a court under the law of Ontario**; ("action")

"court" includes a judge, **arbitrator**, umpire, commissioner, justice of the peace or other officer or person having by law or by consent of parties authority to hear, receive and examine evidence; ("tribunal")

Conclusion: There is no need for a separate provision in the CAA providing for such matters as the summonsing of witnesses or the administering of oaths. The Evidence Act, by its terms, applies

to all non-international arbitrations conducted in Ontario and to all international arbitrations in which Ontario law is applicable as the *lex arbitri* or the curial law of the arbitration.

TOPIC #16

Should the CAA contain an express duty on parties to cooperate in the arbitration?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996, at section 40, contains a general duty of the parties to "do all things necessary for the proper and expeditious conduct" of the proceedings. Section 40(2)(a) contains the express requirement of compliance with tribunal orders and section 40(2)(b) requires the parties to obtain a decision of the court where appropriate and without delay.

- The Australian International Arbitration Act 1974 contains section 23A, which the parties may opt out of, providing that a court order may be obtained for failure to co-operate with evidence or documents or "any other thing that may assist the Tribunal".

- The New Zealand Arbitration Act 1996 does not provide for a duty of the parties to co-operate.

- The Federal Arbitration Act USA and the Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) also do not address a duty to co-operate.

- The British Virgin Islands Arbitration Act, 2013 does not address a duty to co-operate; however, section 108(1) permits the British Virgin Islands International Arbitration Centre to issue guidelines (which are not law but best practices) on conduct expected of persons connected with the operation of the Act.

- The Singapore International Arbitration Act does not address a duty to co-operate.

- The Hong Kong Arbitration Ordinance Cap. 609 does not address a duty to co-operate.

- The German Arbitration Act does not address a duty to co-operate in section 1042 on general rules of procedure, or elsewhere.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes, at CCP 2, provides that parties are required to participate in good faith and "…to co-operate actively in searching for a solution".

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at section 29, provides that a party shall participate "…efficiently and in good faith, in accordance with the agreement of the parties and the orders and directions of the arbitral tribunal."

- The British Columbia Arbitration Act, at section 22(1), provides that parties "…must do all things necessary for the just, speedy and economical determination of the proceedings, in accordance with the agreement of the parties and the orders and directions of the arbitral tribunal." Section 22(2) provides that "[a] party must not wilfully do or cause to be done any act to delay or prevent an arbitral award being made."

Conclusion: The CAA should include a general direction to the parties to adopt efficient, cost-effective and proportional procedures and to comply with orders and directions of the tribunal.

The proposed wording with respect to the parties' duty to co-operate would be as follows:

Parties to arbitral proceedings shall do all things necessary for the just, speedy and economical determination of the proceedings, in accordance with the agreement of the parties and any orders and directions of the arbitral tribunal.

(See section 36(5) of the Discussion Draft CAA. This wording is taken from the new British Columbia Arbitration Act.)

TOPIC #17

Should the CAA clarify whether or not an arbitration commences when the request for arbitration is received by any respondent, or by all respondents?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996 does not address this matter as it does not incorporate Article 21 of the Model Law.

- The Australian International Arbitration Act 1974 also does not address this matter as it does not incorporate Article 21 of the Model Law.

- The New Zealand Arbitration Act 1996, Sch. 1, Article 21, contains the unchanged Article 21 from the Model Law.

- The Federal Arbitration Act USA and the Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) do not address this matter.

- The British Virgin Islands Arbitration Act, 2013, at section 47, gives effect to the unchanged version of Article 21 of the Model Law.

- The Singapore International Arbitration Act, in the First Schedule, incorporates the unchanged wording of Article 21 of the Model Law.

- The Hong Kong Arbitration Ordinance Cap. 609, at section 49(1), reproduces the unchanged wording of Article 21 of the Model Law.

- The German Arbitration Act, at section 1044, includes "by the respondent", and goes on to specify that the request shall state the names of the parties, the subject matter of the dispute, and contain a reference to the arbitration agreement.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes, at CCP 631, states in relevant part, "[a]rbitration proceedings commence on the date of notification of one party to the other of a notice stating that it is submitting a dispute to arbitration and specifying the subject matter of the dispute."

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at section 15(2), contains provisions with respect to commencement when there is no agreement by the parties.

- The British Columbia Arbitration Act does not address this matter as it does not incorporate Article 21 of the Model Law.

Conclusion: In Article 21 of the Model Law the phrase "received by the respondent" should be changed to "by a respondent" or "by any respondent".

The proposed wording with respect to the commencement of arbitral proceedings would be as follows:

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by any respondent.

(See section 38 of the Discussion Draft CAA, which changes the language of Article 21 of the Model Law from "the respondent" to "a respondent".)

TOPIC #18

Should the CAA contain default provisions regarding the privacy or confidentiality of the proceedings?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996 does not include a provision with respect to either the privacy or confidentiality of the proceedings.

- The Australian International Arbitration Act 1974, while silent on privacy, contains complicated provisions regarding "confidential information in relation to the arbitral proceedings" at sections 23C, 23D, 23E, 23F, and 23G.

- The New Zealand Arbitration Act 1996, at section 14A, provides that an arbitral tribunal must conduct the arbitral proceedings in private. Section 14B(1) provides that the parties and the arbitral tribunal must not disclose confidential information. The balance of section 14B through 14I contains limitations and exceptions with respect to privacy and confidentiality.

- The Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) does not include a presumption of confidentiality. Section 3.11 provides that the extent to which an international arbitration proceeding is confidential is determined by the parties' agreement.

- The British Virgin Islands Arbitration Act, 2013, at section 16(1), contains a prohibition against the disclosure of information relating to arbitral proceedings and awards. In addition, per sections 14 and 15, court proceedings relating to arbitrations are largely closed.

- The Singapore International Arbitration Act implies confidentiality at section 22 in providing that "[p]roceedings under this Act in any court shall, on the application of any party to the proceedings, be heard otherwise than in open court."

- The Hong Kong Arbitration Ordinance Cap. 609, at section 18, provides that disclosure of information relating to arbitral proceedings and awards is prohibited.

- The German Arbitration Act, at section 1047 on oral hearings and written proceedings, is silent with respect to privacy and confidentiality.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes, at CCP 4, provides that parties who opt for a private dispute resolution process, and their representatives, undertake to preserve the confidentiality of anything said, written or done during the process. CCP 644 provides that the arbitrator is required to preserve the confidentiality of the arbitration process and protect deliberative secrecy.

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at section 36(2)(j), gives the tribunal the ability to make orders with respect to confidentiality in the absence of an agreement by the parties.

- The British Columbia Arbitration Act, at section 63(1), provides that, unless otherwise agreed by the parties, all hearings and meetings in arbitral proceedings must be held in private. Section 63(2) provides that the parties and the arbitral tribunal must not disclose proceedings, evidence, documents and information that are not otherwise in the public domain, or an arbitral award.

Conclusion: There was consensus that there should be no binding provision regarding privacy and confidentiality. There was strong support for a brief educational provision regarding the tribunal's powers to make orders on these topics.

TOPIC #19

Should the consolidation provision in the existing International Commercial Arbitration Act be streamlined?

APPENDIX D

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996, at section 35, provides that consolidation depends only on the agreement of the parties, without the need for a court order.

- The Australian International Arbitration Act 1974, at section 24, provides that a party may ask the Tribunal to consolidate other arbitrations, or to have them heard together. If there is more than one Tribunal, all must confer and decide. If there is no agreement, then there will be no consolidation. There is no provision for court involvement.

- The New Zealand Arbitration Act 1996, at Schedule 2, section 2, contains consolidation provisions which apply to domestic arbitrations unless the parties expressly agree otherwise, and to international arbitrations if the parties expressly agree.

- The Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft), at section 3.6, provides that questions about consolidation of multiple proceedings into a single proceeding should be referred to the tribunal or arbitral institution.

- The British Virgin Islands Arbitration Act, 2013, at Schedule 2 ("Provisions that may be expressly opted for or automatically apply"), section 2, provides that the Court may, on the application of any party to the arbitral proceedings, consolidate two or more arbitral proceedings in certain circumstances.

- The Singapore International Arbitration Act does not address the consolidation of proceedings.

- The Hong Kong Arbitration Ordinance Cap. 609, at Schedule 2, section 2, authorizes the Court, on the application of any party to the arbitral proceedings, to order two or more arbitral proceedings to be consolidated or to be heard at the same time or one immediately after another, and to give consequential directions.

- The German Arbitration Act does not address the consolidation of proceedings.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes does not address the consolidation of arbitral proceedings.

Domestic Legislation

- The *Uniform Arbitration Act* (2016) does not address the consolidation of proceedings.

- The British Columbia Arbitration Act, at section 9, contains a lengthy and precise provision with respect to the consolidation of proceedings. While the Supreme Court may make an order that the proceedings be consolidated as agreed by all parties to two or more arbitral proceedings, this does not limit the parties' ability to consolidate arbitral proceedings without a court order.

Conclusion: The combination of the existing consolidation provisions in the two acts is a wording issue that may be left to the legislative drafters.

TOPIC #20

Should the CAA contain a provision allowing the court to extend the time for rendering an award?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996, at section 50, contains a provision allowing for the extension of the time for making an award by the court, unless otherwise agreed by the parties. Unlike the proposed wording of the Discussion Draft CAA, the English Act permits an appeal with leave.

- The Australian International Arbitration Act 1974 does not provide for the court to extend the time for rendering an award.

- The New Zealand Arbitration Act 1996 also does not provide for the court to extend the time for rendering an award.

- The Federal Arbitration Act USA and the Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) do not address this matter.

- The British Virgin Islands Arbitration Act, 2013, at section 70(2), provides that the time for making an award may be extended by order of the Court on the application of any party, whether that time has expired or not. Per section 70(3), such an order is not subject to appeal.

- The Singapore International Arbitration Act does not address this matter.

- The Hong Kong Arbitration Ordinance Cap. 609, at section 72(2), provides that "[t]he time, if any, limited for making an award,… may from time to time be extended by order of the Court on the application of any party, whether that time has expired or not." Per section 72(3), such an order is not subject to appeal.

- The German Arbitration Act does not address this matter.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes, at CCP 642, provides that the award "…must be made within three months after the matter is taken under advisement, but the parties may, more than once, agree to extend the time limit or, if it is expired, set a new one." The court may make such a decision, on a party's or the arbitrator's request, and such decision cannot be appealed.

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at section 56(1), provides that an arbitral tribunal or a party may apply for a court order extending the time within which the tribunal is required to make an award. The court shall make the order if satisfied that a substantial injustice would otherwise be done (section 56(2)). Such an order may not be appealed (section

56(3)) and may be made before or after the expiry of the time within which the tribunal is required to make the award (section 56(4)).

- The British Columbia Arbitration Act, at section 53, provides that an arbitral tribunal or a party may apply for an order extending the time for the arbitral tribunal to make an award. This provision is comparable to that contained in the *Uniform Arbitration Act* (2016).

Conclusion: The CAA should include a provision allowing the court to extend the time for rendering an award in limited circumstances where a substantial injustice would otherwise be done.

The proposed wording with respect to the ability of the court to extend the time for rendering an award would be as follows:

(1) Unless the agreement to arbitrate provides otherwise, an arbitral tribunal or a party may apply to the Court for an order extending the time within which the arbitral tribunal is required to make an arbitral award.

(2) The Court may make the order referred to in subsection (1) if satisfied that a substantial injustice would otherwise be done.

(3) An order under subsection (2) may be made before or after the expiry of the time within which the arbitral tribunal is required to make the arbitral award.

(4) An order under this section may not be appealed.

(See section 46 of the Discussion Draft CAA. This language is taken from the British Columbia Arbitration Act, with alterations ("must" changed to "may" and added "unless the agreement to arbitrate provides otherwise").)

TOPIC #21

Should the CAA contain a provision regarding the scope of arbitral jurisdiction, substantive and remedial?

APPENDIX D

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996, at section 46, provides rules applicable to the substance of the dispute. Section 46(1)(b) of the English Act requires the agreement of the parties for the arbitral tribunal to decide the dispute in accordance with other considerations, whereas the proposed wording of the Discussion Draft CAA is broader and requires only that the parties "could have agreed", but did not necessarily do so. Query whether the intended purpose is to potentially re-write the agreement of the parties.

- The Australian International Arbitration Act 1974 does not address this matter.

- The New Zealand Arbitration Act 1996 provides, at section 10(1), that any dispute which the parties have agreed to submit to arbitration may be determined by arbitration unless the agreement is contrary to public policy or such a dispute is not capable of determination by arbitration. Section 10(2) states that the fact that an enactment confers jurisdiction regarding a matter on the Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.

- The Federal Arbitration Act USA and the Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) do not address this matter.

- The British Virgin Islands Arbitration Act, 2013, in its definitions at section 2(2), provides that "dispute" includes a difference between parties. Section 68(1) provides that "…an arbitral tribunal may, in deciding a dispute, award any remedy or relief that could have been ordered by the Court if the dispute had been the subject of civil proceedings in the Court." Section 68(2) provides that, "[u]nless otherwise agreed by the parties, an arbitral tribunal has the same power as the Court to order specific performance of any contract, other than a contract relating to land or any interests in land."

- The Singapore International Arbitration Act, at section 11, provides a broad statement of arbitral jurisdiction and incorporates the principle for which we, in Canada, cite *Seidel v. TELUS Communications Inc.*, 2011 SCC 15.

- The Hong Kong Arbitration Ordinance Cap. 609, at section 64, incorporates Article 28 of the Model Law and provides that the tribunal "…shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute." At section 70(1), the Ordinance provides that a tribunal may award any remedy or relief that could have been ordered by the Court if the dispute had been the subject of civil proceedings in the Court. Section 70(2) provides that, unless otherwise agreed by the parties, the tribunal has the same power as the Court to order specific performance of any contract.

- The German Arbitration Act, at section 1051(1), also uses the Model Law wording and provides that the tribunal "…shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute." The German Act does not address the remedial scope of arbitral jurisdiction.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes, at CCP 651, provides that "[t]he arbitrator decides the dispute in accordance with the rules of law chosen by the parties or, failing any such designation, in accordance with the rules of law the arbitrator considers appropriate." Notably, this appears in Chapter VIII and is thus only applicable to arbitrations where international trade interests are involved.

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at section 31(4), provides that an arbitral tribunal may grant the same relief or remedies as a court of competent jurisdiction under the applicable law, including orders of specific performance, injunctions, declarations or other equitable remedies. This provision is intended to give the tribunal the same remedial powers as a court of law.

- The British Columbia Arbitration Act does not address this matter.

Conclusion: The CAA should include a robust statement regarding the scope of arbitral jurisdiction, substantive and remedial.

The proposed wording regarding the substantive and remedial scope of arbitral jurisdiction would be as follows:

(5) The parties may submit to arbitration any dispute which they are legally capable of settling by agreement as between themselves, and any remedy upon which the parties are legally capable of agreeing upon as between themselves, under applicable rules of law as determined by the tribunal, may be ordered by the tribunal.

(See section 48(5) of the Discussion Draft CAA.)

TOPIC #22

Should the CAA provide for jurisdiction as to costs?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996, at sections 59-65, provides a comprehensive cost regime with certain limitations on any agreement of the parties on costs. Note that section 60 renders invalid an agreement requiring a party to pay the whole or part of the arbitration costs, unless made after the dispute.

- The Australian International Arbitration Act 1974, at section 27, gives jurisdiction to award costs. This provision includes the following: costs other than arbitrators' fees are taxable by the court; and if the award doesn't deal with costs, a party may ask for costs within 14 days. This provision does not contain anything about offers.

- The New Zealand Arbitration Act 1996, at section 12(1), provides that an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that an arbitral

tribunal may award any remedy or relief that could have been offered by the High Court if the dispute had been the subject of civil proceedings in that court. Williams, at p. 457, indicates that "Since an award of costs is a 'remedy' that can be ordered by the High Court it necessarily follows that it is an order which can be made by an arbitral tribunal." Schedule 2, section 6, contains additional detailed provisions with respect to costs. It applies to domestic arbitrations unless the parties expressly agree otherwise, and to international arbitrations if the parties expressly agree.

- The Federal Arbitration Act USA and the Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) do not provide for jurisdiction as to costs.

- The British Virgin Islands Arbitration Act, 2013, at section 72(2), provides that the tribunal may, having regard to all relevant circumstances, direct in the award to whom and by whom and in what matter the costs are to be paid.

- The Singapore International Arbitration Act does not provide for jurisdiction as to costs.

- The Hong Kong Arbitration Ordinance Cap. 609, at section 74, contains detailed provisions as to costs. The tribunal may direct in the award to whom and by whom and in what manner costs are to be paid (section 74(2)). Such costs include the fees and expenses of the tribunal (section 74(1)).

- The German Arbitration Act, at section 1057, is succinct and less prescriptive than the proposed wording in the Discussion Draft CAA. The German Act, however, is mindful of the need to "… take into consideration the circumstances of the case, in particular the outcome of the proceedings."

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes, at CCP 637, provides that the parties are equally liable for the arbitrator's professional fee and expenses, subject to their agreement or unless the arbitrator decides otherwise.

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at section 60, provides lengthy provisions on costs that provide for fees and disbursements to be paid, including expert witness fees, and the consideration of settlement offers.

- The British Columbia Arbitration Act, at section 50, provides that a costs award may be made at any time during arbitral proceedings. It does not consider whether an award made by the tribunal in favour of a party is "no more favourable" than an offer received by that party. The proposed wording of the Discussion Draft CAA is more limited to costs at the end of the hearing, and the provision on offers in the BC Act is wider.

Conclusion: The CAA should contain a provision regarding the jurisdiction of the tribunal to award costs subject to the agreement of the parties and applicable law.

The proposed wording with respect to jurisdiction as to costs would be as follows:

(1) Subject to any agreement between the parties, an arbitral tribunal may award the costs of an arbitration as provided in this section.

(2) The costs of an arbitration consist of the parties' reasonable legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.

(3) If the arbitral tribunal does not deal with costs in an award, a party may, within thirty days of receiving the award, request that it make a further award dealing with costs.

(4) In the absence of an award dealing with costs, each party is responsible for the party's own legal expenses and for an equal share of the fees and expenses of the arbitral tribunal and of any other expenses related to the arbitration.

(See section 49 of the Discussion Draft CAA, which needs further discussion.)

TOPIC #23

Should the CAA provide for jurisdiction as to interest?

APPENDIX D

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996, at section 49, provides a very detailed regime for ordering interest, in addition to any other power in the parties' agreement. This is in contrast to the very broad power proposed in the Discussion Draft CAA.

- The Australian International Arbitration Act 1974 contains, at section 26, a provision that is in essence the same as the proposed provision in the Discussion Draft CAA.

- The New Zealand Arbitration Act 1996, at section 12(1), provides that an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that an arbitral tribunal may award interest on the whole or any part of any sum which is awarded to any party or is in issue in the proceedings but is paid before the date of the award. As well, Sch. 1, Article 31(5) provides that unless the arbitration agreement provides otherwise, or the award otherwise directs, a sum directed to be paid by an award shall carry interest as from the date of the award and at the same rate as a judgment debt. Article 31(5) is an addition to what is otherwise Article 31 of the Model Law.

- The Federal Arbitration Act USA and the Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) do not provide for jurisdiction as to interest.

- The British Virgin Islands Arbitration Act, 2013, at section 77, provides that a tribunal may award simple or compound interest on money awarded by the tribunal, claimed in the proceedings but paid before the award is made, or on costs awarded by the tribunal. Section 78 provides that interest is payable on money awarded by the tribunal from the date of the award, unless the award provides otherwise.

- The Singapore International Arbitration Act provides specific jurisdiction with respect to interest. Section 20 provides that the tribunal may award simple or compound interest and

that where an award directs a sum to be paid, that sum shall carry interest as from the date of the award and at the same rate as a judgment debt.

- The Hong Kong Arbitration Ordinance Cap. 609 addresses interest at sections 79 and 80. Section 79 provides that the tribunal may award simple or compound interest on money or costs awarded. Section 80 provides that interest is payable on costs awarded or ordered at the judgment rate, except when the award or order on costs provides otherwise.

- The German Arbitration Act is silent as to interest; however, it does not preclude the awarding of interest.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes does not appear to deal with jurisdiction as to interest.

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at section 63, provides that a tribunal shall order pre-award interest in the same manner as a court orders pre-judgment interest under [Court Order Interest Statute]; post-award interest is calculated in the same manner as post-judgment interest under [Court Order Interest Statute].

- The British Columbia Arbitration Act, at section 51, provides for simple or compound interest before or after an award (as opposed to pre-judgment or post-judgment interest as in the Discussion Draft CAA).

Conclusion: The CAA should contain a provision regarding the jurisdiction of the tribunal to award interest subject to the agreement of the parties and applicable law.

The proposed wording with respect to jurisdiction as to interest would be as follows:

Subject to any agreement between the parties, the tribunal may award pre-award and post-award interest on any award it renders based upon such laws or international practice as it finds to be applicable with respect to the awarding of interest.

(See section 50 of the Discussion Draft CAA.)

TOPIC #24

Should the CAA exclude the possibility that the Tribunal can delegate procedural decisions to the presiding arbitrator, even if none of the parties agree?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996 does not specifically provide for the presiding arbitrator to make decisions on questions of procedure. Section 20(1) provides that where the parties have agreed that there is to be a chairman, they are free to agree what functions of the chairman are to be in relation to the making of decisions, orders and awards. Section 20(3) provides that, where there is no agreement, decisions, orders and awards shall be made by all or a majority of the arbitrators.

- The Australian International Arbitration Act 1974 contains the Model Law. At Sch. 2, Article 29, it states that "…questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the tribunal."

- The New Zealand Arbitration Act 1996, at Sch. 1, Article 29, is also unchanged from Article 29 of the Model Law.

- The Federal Arbitration Act USA and the Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) do not address the delegation of procedural decisions to the presiding arbitrator.

- The British Virgin Islands Arbitration Act, 2013, at section 65, incorporates Article 29 of the Model Law.

- The Singapore International Arbitration Act, at the First Schedule, Article 29, contains the Model Law wording.

- The Hong Kong Arbitration Ordinance Cap. 609, at section 65, incorporates the wording of Article 29 of the Model Law.

- The German Arbitration Act, at section 1052(3), provides that individual questions of procedure may be decided by a presiding arbitrator alone if so authorized by the parties or all members of the arbitral tribunal.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes, at CCP 636, provides that an arbitrator may rule alone on a question of procedure if so authorized by the parties or by all the other arbitrators.

Domestic Legislation

- The *Uniform Arbitration Act* (2016) does not contain any specific provision with respect to procedural questions versus awards. Subsection 20(2) of the previous uniform Act, which allowed a multi-person tribunal to delegate procedural questions to the chair without party consent, was not carried forward.

- The British Columbia Arbitration Act, at section 46(2), provides that if authorized by the parties or all members of the tribunal, questions of procedure may be decided by a presiding arbitrator.

Conclusion: The CAA should maintain the current Model Law provision that the tribunal may delegate procedural decisions to the presiding arbitrator even if none of the parties agree, and that in all other circumstances decisions of the tribunal require the agreement of the majority.

TOPIC #25

Should the CAA contain a reference to partial awards?

APPENDIX D

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996, at section 47, has a comparable effect to the wording proposed in the Discussion Draft CAA. Section 47(2)(b) provides that the tribunal may make an award relating to a part only of the claims or cross-claims submitted to it for decision.

- The Australian International Arbitration Act 1974 contains the Model Law, which does not specifically address partial awards.

- The New Zealand Arbitration Act 1996, in the definitions in section 2, provides that award "means a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award". At Sch. 2, section 3(1)(k) provides that, for the purposes of Article 19 of Schedule 1, unless the parties agree otherwise, the tribunal shall have the powers to make an interim, interlocutory or partial award. Article 19 in the New Zealand Act is unchanged from Article 19 of the Model Law.

- The Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft), at section 1.1(jj), explicitly defines a partial award as "an arbitral award that disposes of some, but not all, of the claims, defenses, or issues before the arbitral tribunal. A partial award does not include an order addressing scheduling, procedural, or evidentiary matters."

- The British Virgin Islands Arbitration Act, 2013, at section 69, provides that unless otherwise agreed by the parties, a tribunal may make more than one award at different times on different aspects of the matters to be determined. Unless otherwise agreed by the parties, a tribunal has the power to make an award at any time (section 70(1)).

- The Singapore International Arbitration Act, at section 19A, specifically references the possibility of multiple awards dealing with discrete issues.

- The Hong Kong Arbitration Ordinance Cap. 609, at section 47, simply adopts Article 19 of the Model Law, which does not specifically address partial awards. Article 19(1) simply provides that the parties are free to agree on the procedure to be followed by the tribunal in conducting the proceedings.

- The German Arbitration Act does not address partial awards.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes does not address partial awards.

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at section 58, provides that the tribunal may make an award finally deciding a matter in dispute, while retaining jurisdiction to decide another matter in dispute.

- The British Columbia Arbitration Act, at section 49, also provides that the tribunal may make an award finally deciding a matter in dispute while retaining jurisdiction to decide another matter in dispute.

Conclusion: The CAA should contain a reference to partial awards.

The proposed wording with respect to partial awards would be as follows:

The tribunal may finally dispose of one or more issues by delivering one or more partial awards prior to delivery of its final award.

(See section 53(5) of the Discussion Draft CAA. Consideration must be given to whether appeals should be allowed from partial awards before a final award is rendered.)

TOPIC #26

Should the CAA contain an opt-in right of appeal on a question of law to the Court of Appeal?

APPENDIX D

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996, at section 69, provides a detailed regime for appeal on a point of law, unless excluded by agreement. This is an opt-out regime, rather than an opt-in regime. Section 70 contains additional provisions such as the posting of security for costs and payment of the award amount into court pending appeal.

- The Australian International Arbitration Act 1974 contains the Model Law and does not include an opt-in right of appeal on a question of law.

- The New Zealand Arbitration Act 1996, at Sch. 2, section 5, provides for appeals to the High Court on a question of law with leave. With the leave of the High Court, any party may appeal to the Court of Appeal from any refusal of the High Court to grant leave from the determination of the High Court on a question of law. Recall that Sch. 2 applies to domestic arbitrations unless the parties expressly agree otherwise, and to international arbitrations if the parties expressly agree.

- The Federal Arbitration Act USA and the Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) do not include an opt-in right of appeal on a question of law.

- The British Virgin Islands Arbitration Act, 2013 does not include an opt-in right of appeal on a question of law.

- The Singapore International Arbitration Act does not include an opt-in right of appeal on a question of law; however, a legislative proposal is currently pending to provide for such a right.

- The Hong Kong Arbitration Ordinance Cap. 609, at Sch. 2, section 5, provides for an appeal to the Court on a question of law "arising out of an award made in the arbitral proceedings". Section 6 provides that such an appeal may only be brought on agreement of the parties, or

with leave of the Court. A decision granting or refusing leave to appeal may be appealed to the Court of Appeal, with leave.

- The German Arbitration Act does not include an opt-in right of appeal on a question of law.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes does not include any appeal rights on a question of law arising out of an arbitral award.

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at sections 65(1), contains identical language to that proposed in the Discussion Draft CAA, except it includes "with leave of the court". Sections 65(5) and (6) of the Act were left out in the proposed wording of the Discussion Draft CAA as they relate to leave.

- The British Columbia Arbitration Act, at section 59(2), provides that a party may appeal to the Court of Appeal on a question of law arising out of an arbitral award if all the parties to the arbitration consent or a justice grants leave to appeal. Section 59(3) provides that a party may seek leave unless the arbitration agreement expressly states that the parties may not appeal any question of law arising out of an arbitral award.

Conclusion: There was a consensus that 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. Therefore, the consensus is that an appeal should be allowed on a question of law only if the arbitration agreement so provides, without leave, 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.

The proposed wording with respect to an opt-in right of appeal on a question of law would be as follows:

(1) If an arbitration agreement provides that an appeal to a court may be brought on a question of law, an appeal may be brought to the Ontario Court of Appeal on a question of law arising out of an award.

(2) A provision of an arbitration agreement purporting to allow

(a) an appeal on a question of law to a court other than the Ontario Court of Appeal, or

(b) an appeal to a court on a question of mixed fact and law,

is an agreement providing that an appeal may be brought to the Ontario Court of Appeal on a question of law.

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

(4) In this section, "question of law" means a question as to the law of Canada or any of its provinces and territories.

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

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

(b) remit the award to the arbitral tribunal with directions.

(See section 56 of the Discussion Draft CAA, which was taken mostly from the ULCC, without the leave requirement. The issue of whether leave is required will eventually require input from the Court of Appeal during the legislative drafting process. We will try to arrange a consultation with the Court of Appeal once we have Committee consensus on the overall draft.)

TOPIC #27

Should the CAA contain a procedure for the enforcement of awards?

APPENDIX D

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

International and Combined International/Domestic Legislation

- The English Arbitration Act 1996, at sections 101-104, contains a comprehensive regime for the enforcement of awards based largely, but not exclusively, on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (the "New York Convention") for foreign awards. Section 104 preserves the enforcement of awards at common law and section 66 is aimed largely at domestic awards.

- The Australian International Arbitration Act 1974, at section 20, provides that foreign awards are enforced under the New York Convention, and not the Model Law. Detailed procedures are set out in Part II of the Act. This codifies the common law: if both a treaty and domestic legislation are in force in a State, and cover the same matter, the treaty takes precedence over the local law where there is a conflict.

- The New Zealand Arbitration Act 1996 is silent on this matter. However, the issue is governed by the provisions of the New Zealand High Court Rules 2016 (Williams, pp. 918-920).

- The Federal Arbitration Act USA, at section 9, contains a skeletal procedural provision on the confirmation of awards. The United States Code, 2011 Edition at Title 9, Ch. 1, section 12, provides that a judge on a motion to vacate, modify or correct an award may make an order staying the proceedings of the adverse party to enforce the award.

- The British Virgin Islands Arbitration Act, 2013, at sections 80-88, addresses the procedure for enforcement of awards. Section 81 provides that awards are "…enforceable in the same manner as a judgment or order of the Court that has the same effect."

- The Singapore International Arbitration Act, at section 19, provides the procedure for enforcement of awards. Section 19(C) adds a specific provision for authentication of an award. Sections 29 and 30 address recognition and enforcement of foreign awards.

- The Hong Kong Arbitration Ordinance Cap. 609, at sections 82 to 98D, contains separate provisions for the enforcement of domestic awards, foreign awards, awards from the Mainland, and awards from Macao. The Hong Kong Ordinance does not give effect to all of the provisions on recognition and enforcement under the Model Law.

- The German Arbitration Act contains separate provisions for the recognition and enforcement of domestic versus foreign awards. Section 1060 applies to domestic awards; section 1061 applies to foreign awards.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes, at CCP 645 to 647 and 653 to 655, contains detailed provisions with respect to the homologation and enforcement of arbitration awards. The rules provide that, in interpreting the rules in this matter, consideration may be given to the New York Convention.

Domestic Legislation

- The *Uniform Arbitration Act* (2016), at section 69, contains detailed provisions for enforcement of arbitral awards.

- The British Columbia Arbitration Act, at section 61, provides for the enforcement of awards with a place of arbitration in Canada.

Conclusion: There was a consensus that 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 proposed wording with respect to the procedure for enforcement of awards would be as follows:

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

(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 certified copy.

(3) 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.

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

(5) If the award gives a remedy that the court does not have jurisdiction to grant or would not grant in a proceeding based on similar circumstances, the court may,

(a) grant a different remedy requested by the applicant; or

(b) in the case of an award made in Ontario, remit it to the arbitral tribunal with the court's opinion, in which case the arbitral tribunal may award a different remedy.

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

(7) If the court sets aside an award, terminates an arbitration or declares an arbitration to be invalid, it may order that the period from the commencement of the arbitration to the date of the order shall be excluded from the computation of the time within which an action may be brought in Ontario on a cause of action that was a claim in the arbitration.

(See section 60 of the Discussion Draft CAA.)

TOPIC #28

APPENDIX D

Should the CAA contain a provision for the enforcement by the Court in Ontario of orders and directions of arbitral tribunals, whether made in arbitrations seated in Ontario or elsewhere?

From a review of various arbitration statutes, the following points are relevant to the analysis of this topic:

Combined International/Domestic Legislation

- The English Arbitration Act 1996, at sections 41 and 42, provides for certain limited enforcement powers on the part of a tribunal, including the making of "peremptory orders", which may be enforced in court. Unlike the proposed language of the Draft CAA, the English legislation provides for an appeal with leave.

- The New Zealand Arbitration Act 1996, at Schedule 2, Clause 3, provides that certain enumerated powers of the tribunal can be made the subject of a court order. These provisions apply to domestic arbitrations unless the parties expressly agree otherwise, and to international arbitrations if the parties expressly agree.

- Neither the Federal Arbitration Act USA nor the Restatement of the Law, The US Law of International Commercial and Investor State Arbitration (Final Draft) contain a provision regarding the enforcement of orders and directions of a tribunal.

- The British Virgin Islands Arbitration Act, 2013, at section 59, includes a provision regarding the enforcement of the orders and directions of a tribunal, and that provision forms the basis of the language of section 47 in the Draft CAA.

- The Singapore International Arbitration Act, at section 12(6), provides for Court enforcement of orders and directions of a tribunal, where leave is given.

- The Hong Kong Arbitration Ordinance Cap. 609, at section 61, also provides for Court enforcement of orders and directions of an arbitral tribunal. This provision is nearly identical to the provision in the British Virgin Islands Arbitration Act, 2013.

- The German Arbitration Act does not include a provision regarding the enforcement of orders and directions of a tribunal.

- The Quebec Code of Civil Procedure on Principles of Procedure Applicable to Private Dispute Prevention and Dispute Resolution Processes does not address the enforcement of orders and directions of a tribunal.

Domestic Legislation

- The *Uniform Arbitration Act* (2016) does not contain a provision regarding the enforcement of orders and directions of a tribunal.
- The British Columbia Arbitration Act, at section 43, addresses the enforcement of interim measures. More specifically, interim measures issued by an arbitral tribunal must be recognized as binding and, unless otherwise provided by the tribunal, enforced on application to the Supreme Court.

Conclusion: The CAA should contain a provision with respect to the enforcement of orders and directions of a tribunal.

The proposed wording with respect to the enforcement of orders and directions would be as follows:

(1) An order or direction made by an arbitral tribunal in relation to arbitral proceedings, whether in or outside Ontario, is enforceable in the same manner as an order or direction of the Court with the leave the Court.

(2) Leave to enforce an order or direction made outside Ontario is not to be granted, unless the party seeking to enforce the order or direction can demonstrate that it belongs to a type or description of order or direction that may be made by an arbitral tribunal in Ontario.

(3) If leave is granted under subsection (1), the Court may enter a judgment or order in terms of the order or direction.

(4) A decision made by the Court to grant or refuse to grant leave under subsection (1) is not subject to appeal.

(5) An order or direction referred to in this section includes an interim measure.

(See section 47 of the Draft CAA, which is taken from section 59 of the British Virgin Islands Arbitration Act, 2013.)

Additional Provisions

Additional provisions contained in the Discussion Draft CAA to give effect to the overall objective of creating a single commercial arbitration act based on international standards are as follows:

THE MODEL LAW

2 (1) The purpose of this Act is to apply, to all commercial arbitration in Ontario, the general principles set out in the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the United Nations Commission on International Trade Law on 7 July 2006 (the "Model Law"), and to make only such provisions for the conduct of commercial arbitrations in which the place of arbitration is in Ontario as are compatible with those principles.

APPLICATION OF THIS ACT

3 This Act applies to:

a) all commercial arbitrations in which the place of arbitration is Ontario, and

b) all awards, orders or other determinations in commercial arbitrations, wherever made, which are sought to be enforced in Ontario.

…

5 (1) Except where expressly stated in this Act, this Act applies to both international and non-international (domestic) commercial arbitration.

(2) This Act is subject to any agreement that is in force in Ontario between Canada and any other country or countries, and to any agreement that is in force between Ontario and any other province or territory, or the federal government, of Canada.

(3) This Act shall not affect any other statute in force in Ontario by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration according to provisions other than those of this Act.

Additional provisions are also included in the Discussion Draft CAA based on conclusions reached in Phase 2 of the Project, including:

a) all arbitration agreements shall be in writing (See Discussion Draft CAA, s.13);

b) a party may not revoke the appointment of an arbitrator (See Discussion Draft CAA, s. 17(6));

c) the limitation period provision applicable to the enforcement of awards should be updated in light of the passage of December 31, 2018; and

d) the transition period should provide that the new section on appeals only applies after the new CAA is in force.

Limitation Period Regarding Commencement of an Arbitration

It should be noted that the Committee did not consider or reach any conclusion regarding the limitation period applicable to arbitration under Ontario law.

Under the laws of Canada and its provinces, limitation periods in a statute are substantive, not procedural: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022. The statutory limitation period for commencing an action in court in Ontario is set out in the *Limitations Act, 2002*, and is generally two years for most commercial disputes (s. 4). The *Limitations Act, 2002* is made applicable to arbitrations by s. 52(1) of the *Arbitration Act, 1991*. However, the *Arbitration Act, 1991* does not apply to arbitrations to which the *International Commercial Arbitration Act, 2017* applies (s. 2(1)(b)). The *International Commercial Arbitration Act, 2017* does not contain any limitation period regarding the commencement of an arbitration. Therefore, where Ontario law is found to be applicable to the limitation period for the commencement of an international arbitration, there is a gap in Ontario law on that issue. The limitation period applicable to arbitrations where Ontario

is the applicable law should be addressed either by an amendment to the *Limitations Act, 2002* or by the inclusion of a provision in the new CAA.