APPENDIX E

DRAFT

Commercial Arbitration Act, 202*

S.O. 202*

This Act would replace the current International Commercial Arbitration Act, 2017, S.O. 2017. The Arbitration Act, 1991, S.O. 1991 would no longer apply to commercial arbitration. Subsection 2(1)(b) of the Arbitration Act, 1991 would be amended to replace the words "*International Commercial Arbitration Act*" with "*Commercial Arbitration Act*".

Sections highlighted in grey denote new content.

Bracketed references to Articles of the Model Law do not form part of the Act but are inserted to facilitate comparison to Articles of the Model Law that cover the same or similar subject matter.

PART I

THE NEW YORK CONVENTION AND THE MODEL LAW

THE NEW YORK CONVENTION

1 (1) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Conference on International Commercial Arbitration in New York on 10 June 1958, as ratified by Canada on May 12, 1986, has the force of law in Ontario in relation to arbitral awards or arbitration agreements in respect of differences arising out of commercial legal relationships, subject to this Act.

(2) Subsection (1) applies to arbitral awards and arbitration agreements whether made before or after the coming into force of this Act.

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. The Model Law is attached hereto as Schedule "A". Where applicable, cross-references to Articles of the Model Law are noted beside comparable section numbers below.

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.

4 Under this Act, the term "commercial" shall be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

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.

6 In this Act:

A. An arbitration is international if:

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

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

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

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

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

B. For the purposes of this section:

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

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

C. With respect to awards made in other provinces or territories of Canada:

(a) an arbitral award, made in a jurisdiction within Canada, that is considered to be international in that jurisdiction is considered international in Ontario;

(b) an arbitral award, made in a jurisdiction within Canada, that is not considered to be international in that jurisdiction is not considered to be an international award in Ontario.

Definitions and rules of interpretation

7 ***(cf. Article 1)***

For the purposes of this Act:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

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

(c) "Court" means the Superior Court of Justice;

(d) "place of arbitration" means the juridical seat of the arbitration designated

(i) by the parties to the arbitration agreement, or

(ii) by any arbitral or other institution or person vested by the parties with powers in that regard, or

(iii) by the arbitral tribunal if so authorised by the parties,

or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances.

(e) where a provision of this Act, except section 48, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an arbitral institution, to make that determination;

(f) where a provision of this Act refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(g) where a provision of this Act, other than section 42(a) and 54(2)(a), refers to a claim, it also applies to a counterclaim, and where it refers to a defence, it also applies to a defence to a counterclaim;

(h) references to a juridical person or persons include natural persons and vice versa, as the context requires.

International origin and general principles

8 ***(cf. Article 2)***

(1) In the interpretation of this Act, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Act which are not expressly settled in it are to be settled in conformity with the general principles on which the Model Law is based.

(3) In determining the general principles of the Model Law, recourse may be had to,

(a) the Reports of the United Nations Commission on International Trade Law on the work of its 18th (3 – 21 June 1985) and 39th (19 June – 7 July 2006) sessions (U.N. Docs. A/40/17 and A/61/17);

(b) the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (U.N. Doc A/CN.9/264); and

(c) the Commentary of the United Nations Commission on International Trade Law concerning the UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006 (U.N. Sales No. E.08.V.4).

Receipt of written communications

9 ***(cf. Article 3)***

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at the addressee's place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it; and

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this section do not apply to communications in court proceedings.

Waiver of right to object

10 ***(cf. Article 4)***

A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating its objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived its right to object.

Extent of court intervention

11 ***(cf. Article 5)***

In matters governed by this Act, no court shall intervene except where so provided in this Act.

Court or other authority for certain functions of arbitration assistance and supervision

12 ***(cf. Article 6)***

Any applications for assistance, supervision or relief, pursuant to provisions of this Act, shall be made to the Court.

ARBITRATION AGREEMENT

Definition and form of arbitration agreement

13 ***(cf. Article 7)***

(1) "Arbitration agreement" is an agreement to submit to arbitration all or certain disputes which have arisen or which may arise between the parties thereto in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) Subject to subsections (3), (4), (5) and (6), an arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

14 ***(cf. Article 8) Arbitration agreement and substantive claim before court***

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting its first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this section has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

(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.

Arbitration agreement and interim measures by court

15 ***(cf. Article 9)***

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

COMPOSITION OF ARBITRAL TRIBUNAL

Number of arbitrators

16 ***(cf. Article 10)***

(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.

Appointment of arbitrators

17 ***(cf. Article 11)***

(1) No person shall be precluded by reason of her or his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure for appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this section.

(3) Failing an agreement under paragraph (2) of this section,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the Court;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, the appointment shall be made, upon request of a party, by the Court.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an arbitral institution, fails to perform any function entrusted to it under such procedure, any party may request the Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this section to the Court shall not be subject to appeal. The Court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator 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.

(6) A party may not revoke the appointment of an arbitrator.

Grounds for challenge

18 ***(cf. Article 12)***

(1) When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to her or his impartiality or independence, or on the basis that he or she does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by it, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.

Challenge procedure

19 ***(cf. Article 13).***

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this section.

(2) Failing an agreement under paragraph (1) of this section, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in section 18(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from her or his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this section is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the Court to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Failure or impossibility to act

20 ***(cf. Article 14)***

(1) If an arbitrator becomes, *de jure* or *de facto*, unable to perform her or his functions or for other reasons fails to act without undue delay, her or his mandate terminates if he or she withdraws from his or her office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the Court or other authority specified in section 12 to decide on the termination of that arbitrator's mandate, which decision shall not be subject to any appeal.

(2) If, under this section or section 19(2), an arbitrator withdraws from her or his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this section or section 18(2).

Appointment of substitute arbitrator

21 ***(Article 15)***

(1) Where the mandate of an arbitrator terminates under sections 19 or 20 or because of her or his withdrawal from office for any other reason or because of the revocation of her or his mandate by agreement of the parties or in any other case of termination of her or his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(2) 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.

Immunity of Arbitrators

22 (New)

(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.

JURISDICTION OF ARBITRAL TRIBUNAL

Competence of arbitral tribunal to rule on its jurisdiction

23 ***(cf. Article 16)***

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this section either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may apply to the Court to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

(4) If an arbitral tribunal rules on a plea that it does not have jurisdiction, any party may apply to the Court to decide the matter.

(5) If the arbitral tribunal rules on the plea as a preliminary question and an application is brought under this section, the proceedings of the arbitral tribunal are not stayed with respect to any other matters to which the arbitration relates and are within its jurisdiction.

INTERIM MEASURES AND PRELIMINARY ORDERS

Interim measures

Power of arbitral tribunal to order interim measures

24 ***(cf. Article 17)***

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award, order or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Conditions for granting interim measures

25 ***(cf. Article 17 A)***

(1) The party requesting an interim measure under section 24(2)(a), (b) or (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under section 24(2)(d), the requirements in paragraphs (1)(a) and (b) of this section shall apply only to the extent the arbitral tribunal considers appropriate.

Preliminary orders

Applications for preliminary orders and conditions for granting preliminary orders

26 ***(cf. Article 17 B)***

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under section 25 apply to any preliminary order, provided that the harm to be assessed under section 25(1)(a), is the harm likely to result from the order being granted or not.

Specific regime for preliminary orders

27 ***(cf. Article 17 C)***

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a Court. Such a preliminary order does not constitute an award.

Provisions applicable to interim measures and preliminary orders

Modification, suspension, termination

28 ***(cf. Article 17 D)***

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Provision of security

29 ***(cf. Article 17 E)***

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Disclosure

30 ***(cf. Article 17 F)***

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this section shall apply.

Costs and damages

31 ***(cf. Article 17 G)***

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Recognition and enforcement of interim measures

Grounds for Recognition and enforcement

32 ***(cf. Article 17 H)***

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the Court, irrespective of the country in which it was issued, subject to the provisions of section 33.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the Court of any termination, suspension or modification of that interim measure.

(3) The Court may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Grounds for refusing recognition or enforcement

33 ***(cf. Article 17 I)***

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in section 58(1)(a)(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the Court finds that:

(i) The interim measure is incompatible with the powers conferred upon the Court unless the Court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in section 58(1)(b)(i) or (ii) apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the Court on any ground in paragraph (1) of this section shall be effective only for the purposes of the application to recognize and enforce the interim measure. The Court, where recognition or enforcement is sought, shall not, in making that determination, undertake a review of the substance of the interim measure.

Court-ordered interim measures

Power of the Court

34 ***(cf. Article 17 J)***

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures taking cognizance of the specific features and principles that apply to international arbitrations.

CHAPTER V.

CONDUCT OF ARBITRAL PROCEEDINGS

Equal treatment of parties

35 (cf. Article 18)

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

Determination of rules of procedure

36 ***(cf. Article 19)***

(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 the proceedings.

(2) Failing an agreement under paragraph (1) of this section, 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) Subject to any agreement by the parties, 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.

Place of arbitration

37 (cf. *Article 20)*

(1) The parties are free to agree on the place of the arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this section, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Commencement of arbitral proceedings

38 *(cf. Article 21)*

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.

Language

39 *(cf. Article 22)*

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Statements of claim and defence

40 ***(cf. Article 23)***

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting the claim, the points at issue and the relief or remedy sought, and the respondent shall state the defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they intend to submit.

(2) Unless otherwise agreed by the parties, any party may amend or supplement its claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Hearings and written proceedings

41 ***(cf. Article 24)***

(1) Subject to any agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed

that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by any party.

(2) An arbitral tribunal may decide all evidentiary matters, including the admissibility, relevance, materiality and weight of any evidence, and may draw such inferences as it considers appropriate under the circumstances.

(3) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(4) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other parties. Also, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to all parties.

Default of a party

42 ***(cf. Article 25)***

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate its statement of claim in accordance with section 40(1), the arbitral tribunal shall terminate the proceedings;

(b) a respondent fails to communicate its statement of defence in accordance with section 40(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Expert appointed by arbitral tribunal

43 ***(cf. Article 26)***

(1) Unless otherwise agreed by the parties, the arbitral tribunal,

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of a written or oral report, participate in a hearing where the parties have the opportunity to put questions to her or him and to present expert witnesses in order to testify on the points at issue.

COURT ASSISTANCE

Evidence

44 ***(cf. Article 27)***

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the Court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

Consolidation of Arbitrations

45

(1) If all parties to two or more arbitral proceedings have agreed to consolidate those proceedings, a party, with notice to the others, may apply to the Court for an order that the proceedings be consolidated as agreed to by the parties.

(2) On an application under subsection (2), if all parties to the arbitral proceedings have agreed to consolidate the proceedings but have not agreed, through the adoption of procedural rules or otherwise, to the following matters, the Court may make an order deciding either or both of those matters:

1. The designation of parties as claimants or respondents or a method for making those designations.

2. The method for determining the composition of the arbitral tribunal.

Extension of time for arbitral award

46

(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.

Enforcement of Orders and Directions

47

(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.

MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Rules applicable to substance of dispute

48 (cf. *Article 28)*

(1) The arbitral 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. Any designation of the law or legal system of a given State or juridical unit shall be construed, unless otherwise expressed, as directly referring to the substantive law of that Country or juridical unit and not to its conflict of laws rules.

(2) If the parties fail to make a designation, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances respecting the dispute.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

(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.

Costs

49

(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.

Interest

50

Subject to any agreement between the parties, the tribunal may award pre-judgment and post-judgment 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.

Decision-making by panel of arbitrators

51 ***(cf. Article 29)***

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Settlement

52 ***(cf. Article 30)***

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of section 53 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Form and contents of award

53 ***(cf. Article 31)***

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated in the award.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 52.

(3) The award shall state its date and the place of arbitration as determined in accordance with section 37(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this section shall be delivered to each party.

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

Termination of proceedings

54 ***(cf. Article 32)***

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this section.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws the claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on the respondent's part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of sections 52 and 55(4).

Correction and interpretation of award; additional award

55 (cf. *Article 33)*

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this section on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this section.

(5) The provisions of section 53 shall apply to a correction or interpretation of the award or to an additional award.

RECOURSE AGAINST AWARD

Appeals

56

(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.

Application for setting aside as exclusive recourse against arbitral award

57 ***(cf. Article 34)***

(1) Unless the parties agree to provide a right of appeal, as set out in section 56, recourse to a court against an arbitral award may be made only by an application for setting aside that award in accordance with paragraphs (2) and (3) of this section.

(2) An arbitral award may be set aside by the Court only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of Ontario; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case; or

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

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under section 53, from the date on which that request had been disposed of by the arbitral tribunal.

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

RECOGNITION AND ENFORCEMENT OF AWARDS

Recognition and enforcement

58 ***(cf. Article 35)***

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this section and of section 57.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

(3) No application under the Convention or this Act for recognition or enforcement (or both) of an arbitral award shall be made after the tenth anniversary of,

(a) the date on which the award was made; or

(b) if proceedings at the place of arbitration to set aside the award were commenced, the date on which the proceedings concluded.

(4) The court's decision under subsection (3) is not subject to appeal.

Grounds for refusing recognition or enforcement

59 ***(cf. Article 36)***

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in section 13 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this section, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Procedure for Enforcement of Awards

60

(1) A person who is entitled to enforcement of an award 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.

Transition

61

Section 56 shall only apply to arbitrations based on agreements entered into after the day this Act comes into force. In all other respects, this Act applies to arbitrations commenced after that day.

Binding on the Crown

62

(1) This Act binds the Crown.

(2) An award recognized pursuant to this Act is enforceable against the Crown in the same manner and to the same extent as a judgment is enforceable against the Crown.