A SINGLE ARBITRATION ACT FOR COMMERCIAL ARBITRATION: THE KEY RECOMMENDATION OF THE TORONTO COMMERCIAL ARBITRATION SOCIETY'S ARBITRATION ACT REFORM COMMITTEE

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I. INTRODUCTION

A—perhaps the—key recommendation of the Arbitration Act Reform Committee of the Toronto Commercial Arbitration Society ("AARC") for legislative reform in Ontario is that arbitration be regulated under a single piece of legislation to be known as the *Commercial Arbitration Act*. While some aspects of the AARC's recommendations are specific to Ontario, most of the observations will also be relevant to other provinces considering reform of their arbitration legislation.

The question of how many statutes should be enacted to regulate arbitration is fundamental: one, two, or possibly more. In Ontario, there are currently two statutes: the *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sched 5 ("*ICAA*")[1] which covers arbitrations that are both "commercial"

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[1] The *ICAA* is based on the *Uniform International Commercial Arbitration Act* adopted by the Uniform Law Conference of Canada in 2014. The *ICAA* adopts the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards ("New York Convention") and the Model Law on International Commercial Arbitration ("Model Law") promulgated by UNCITRAL in 1985, as amended in 2006.

and "international",[2] and the *Arbitration Act, 1991*, SO 1991, c 17 ("*Arbitration Act*") which covers all other kinds of arbitration. The application of the *Arbitration Act* is modified by various other enactments.[3]

Subsection 2(1)(b) of the *Arbitration Act* expressly states that it does not apply if the *ICAA* applies. However, section 3 of the *Arbitration Act* permits parties, by agreement, to exclude almost every provision of the legislation except for the provisions expressly set out in section 3.[4] Section 2(1)(b) is not listed in section 3. As such, there is an unresolved ambiguity as to whether parties to a dispute arising from an international agreement may choose to have the *Arbitration Act* apply to their dispute instead of the *ICAA*. An Ontario decision suggests they can.[5] However, two decisions from British Columbia suggest that parties cannot agree to have disputes that arise from international agreements arbitrated pursuant to British Columbia's *Arbitration Act*.[6] There is also a question as to whether non-international commercial parties can agree to have their dispute resolved by the *ICAA*.

In addition to non-international commercial arbitration, the *Arbitration Act* covers a host of other types of arbitration which do not have a great deal in common with commercial arbitration. For example, family law, consumer, residential, and

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[2] See *UNCITRAL Model Law on International Commercial Arbitration* UNCITRAL, Annex 1, UN Doc A/40/17 (1985), with amendments as adopted in 2006 (7 July 2006), art 1 [*Model Law*].

[3] See e.g., *Family Law Act*, RSO 1990, c F.3, s 59.1; *Consumer Protection Act, 2002*, SO 2002, c 30, Sched A, ss 7—8; *Labour Relations Act*, 1995, SO 1995, c 1, Sched A, ss 43(30), 48(20), 150.4(12), 163.3(38), 184(3).

[4] See *Jean Estate v Wires Jolley LLP*, 2010 ONSC 4835 at para 32.

[5] See *Noble China Inc v Lei* (1998), 42 OR (3d) 69 at para 60, 1998 CarswellOnt 4386 (WL Can) (ONCJ).

[6] See *Kang v Advanced Fresh Concepts Franchise Corp*, 2021 BCPC 262 at paras 26–29. See also *McHenry Software Inc v ARAS 360 Incorporated*, 2018 BCSC 586 at paras 27—28, 38—59.

employment arbitration are all governed by the *Arbitration Act*. The umbrella term "domestic arbitration" is commonly applied to all these subject matters, including non-international commercial arbitration.

One may observe that the term "domestic" has a double connotation. It may refer to disputes which have no international dimension and, on the other hand, disputes which relate to non-commercial, personal concerns. The non-commercial disputes covered by the *Arbitration Act* frequently involve issues of voluntariness and bargaining power not typically found in commercial disputes. These non-commercial disputes may also engage public policy issues such as the welfare of children, employees, and consumers, or the peaceable settlement of disputes between neighbours. As a result, ancillary legislation restricting rights available in commercial arbitration has been passed in some areas.[7]

Often, the nature of non-commercial disputes makes mixed processes, such as mediation combined with arbitration (med/arb) or online (or even algorithmic) arbitration, more effective. Such processes may relax concerns regarding the impartiality of the decision maker as the process unfolds, or accept limitations on due process in ways that are generally not acceptable in commercial arbitration, other than possibly in disputes which are not economical to process in any other way.[8]

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[7] See e.g., subsection 2.1(2) of the *Arbitration Act* states that in the event of a conflict between the *Arbitration Act* and the *Family Law Act*, the *Family Law Act* prevails. Subsection 7(2) of the *Consumer Protection Act*, *2002*, SO 2002, c 30, Sched A, states that "any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act". See also Shelley McGill, "Family Arbitration: One Step Forward, Two Steps Back" (2007) 21 J L & Social Pol'y 49.

[8] See e.g., Feldstein Family Law Group Professional Corporation, "Mediation/Arbitration (Med/Arb)" (23 May 2017), online (blog): Feldstein

On the other hand, due process concerns in truly "domestic" non-international arbitrations may activate the protective instincts of the judiciary to a greater degree than in arbitrations relating to commercial transactions.[9]

In addition, the *Arbitration Act* applies to statutory arbitrations in which arbitration is mandated for the settlement of certain types of disputes.[10] One example is statutorily mandated arbitration as to allocation of loss between two or more insurers which covered the same loss. Such arbitrations are in contrast to commercial arbitrations which arise from a transactional or business relationship that is voluntarily entered into by the parties. Parties to statutory arbitrations may be unwilling participants in an arbitration process that is imposed upon them. They may welcome court-like procedures and expanded court review of the merits, for example by electing to have recourse to appeals on both questions of law and questions of mixed fact and law.[11]

In contrast to these other types of domestic arbitration, commercial arbitration has developed in Ontario, and elsewhere in Canada, in ever closer alignment with international commercial arbitration. Two of the leading Canadian associations of commercial arbitrators and arbitration

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Family Law Group Professional Corporation <https://www.separation.ca/blog/2017/may/mediation-arbitration-med-arb-/>. See also ADR Institute of Canada, "Online Dispute Resolution", online: *ADR Institute of Canada* <https://adric.ca/online-dispute-resolution/>.

[9] The substantial differences both in substance and arbitral dynamics between family arbitration and commercial arbitration are well illustrated in *Kainz v Potter*, [2006] OJ No 2441 at paras 61—87, 149 ACWS (3d) 541 (SCJ).

[10] See e.g. *Condominium Act*, *1998*, SO 1998, c 19, s 132; and O Reg 283/95: *Disputes Between Insurers*, made under of the *Insurance Act*, RSO 1990, c 1.8, s 7.

[11] See *Intact Insurance Company v Allstate Insurance Company of Canada*, 2016 ONCA 609.

lawyers are affiliated with international bodies: ICC Canada and the Canadian Branch of the Chartered Institute of Arbitrators, both of which also play a large role in developing best standards and practices in the Canadian arbitration bar, through their educational programs. In addition, international arbitral institutions are active in Canada in relation to both international and purely Canadian commercial arbitrations.[12] This is a growing phenomenon globally.[13] Canadian commercial arbitrators regularly sit on tribunals with arbitrators from other countries, in both international and non-international arbitrations. There is significant interchange between Canadian and foreign arbitration practitioners at conferences in Canada and abroad and sharing of international techniques and standards. The FCIArb designation of the Chartered Institute of Arbitrators is generally acquired by leading Canadian arbitrators, including those doing primarily non-international arbitrations. Both international and non-international arbitration are taught interchangeably in the Gold Standard Course in Commercial Arbitration conducted by the Toronto Commercial Arbitration Society, which leads to the Q. Arb. designation offered by the ADR Institute of Canada ("ADRIC").

In Ontario, as in most of Canada, non-institutional ("ad hoc") arbitration is much more widespread than arbitrations administered by arbitration institutions. Nevertheless, the use

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[12] See ICDR Canada, "Canadian Dispute Resolution Procedures" (2015), online (pdf): *International Centre For Dispute Resolution* <https://www.icdr.org/sites/default/files/document_repository/ICDR-Canada-Rules-English.pdf>.

[13] See International Chamber of Commerce, "ICC Dispute Resolution 2020 Statistics" (2021) at 11, online (pdf): International Chamber of Commerce <https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf> ("Over the years, parties have increasingly selected ICC for their international disputes as well as for the resolution of their regional and domestic disputes. In 2020, disputes between parties of same nationality represented 31% of all cases registered (compared to 25% in 2019).").

of UNCITRAL Arbitration Rules, as well as international practices such as the use of the IBA Rules for the Taking of Evidence in Arbitration, Redfern Schedules, and Procedural Order No. 1 are increasingly widespread for ad hoc non-international arbitrations. Equally, the expertise of Canadian arbitrators with respect to conducting ad hoc arbitrations makes a pragmatic contribution to international arbitration procedures, whether the arbitrations are conducted in Canada or elsewhere. Canadian associations such as the Toronto Commercial Arbitration Society, the Vancouver International Arbitration Centre, and the Western Canadian Commercial Arbitration society address both international and non-international arbitration, as do the recently established Canadian Journal of Commercial Arbitration and the McGill Journal of Dispute Resolution.

None of the above activities involve or engage with the several non-commercial types of arbitration covered by the *Arbitration Act*. Commercial Arbitration has effectively become a separate, highly specialized, and increasingly unified form of arbitration, distinct and apart from other forms of domestic, non-commercial arbitration.

II. A BRIEF HISTORY OF COMMERCIAL ARBITRATION

To understand the choice between one act or two for commercial arbitration, a bit of historical perspective is helpful.

Prior to the current *Arbitration Act*, which was enacted in 1991, arbitration statutes in Ontario and most of common law Canada were based on the English arbitration legislation, which was consolidated in the English *Arbitration Act of 1950*. The English legislation dealt with the subject of arbitration in a unitary manner, encompassing all forms of arbitration and focusing primarily on the relationship between the courts and arbitrators and delineating the powers of the latter. The English

legislation provided for considerable intervention of the courts with respect to the arbitral process.[14]

Two crucial developments occurred after the last major consolidation of the English arbitration legislation in 1950. The first was the promulgation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) in 1958. The second was the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”) which was adopted in 1985.

1. The New York Convention

The main objective of the New York Convention was to obtain the commitment of adhering states to enforce arbitration agreements and foreign arbitration awards without the need for any court approval of the award in the jurisdiction where it was issued, or any more onerous conditions than for the enforcement of local arbitration awards. It emphasized the basic principles of: respecting party autonomy with reference to arbitration agreements; priority of arbitration over court proceedings; the direct enforcement of awards in jurisdictions other than where they were made; and strictly limited grounds for non-enforcement. Its application was not limited by the subject matter of the dispute. However, adopting states were given the option of limiting its application only to commercial cases and/or only to foreign awards. Canada adopted the Convention in 1985 with the commercial limitation[15] and all of the provinces followed suit.

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[14] See Gary B Born, *International Commercial Arbitration*, 3rd ed (Alphen aan den Rijn, The Netherlands: Wolters Kluwer Law International, 2021) at 153.

[15] See United Nations Foreign Arbitral Awards Convention Act, RSC 1985, c 16 (2nd Supp).

The Convention was based on the fundamental premise that the main obstacle to commercial arbitration fulfilling its proper role in international trade was intervention and interference by the courts. However, the Convention was never intended as a comprehensive arbitration statute and does not address matters relating to: the qualifications or powers of arbitrators; the role of the courts with respect to arbitrations in progress; or the content of local laws relating to such matters as the arbitrability of disputes and the standards for declaring an arbitration agreement "null and void, inoperative or incapable of being performed."[16]

2. The Model Law

In 1985, the United Nations Commission on Trade and Arbitration Law adopted the Model Law "to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration."[17] It was intended to provide a "pattern", or template, for "domestic legislation" that conformed generally with the New York Convention.[18]

Compliance with the New York Convention is an international obligation of all contracting states, currently numbering over 160. Compliance with the principles of the

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[16] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 38 at art 2(3) (entered into force 7 June 1959) [*New York Convention*].

[17] United Nations Commission on International Trade Law, "UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006", online: *United Nations Commission On International Trade Law* <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration>.

[18] See United Nations Commission on International Trade Law, "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006", online: *United Nations Commission On International Trade Law* <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

Model Law, while not mandatory, is highly desirable for any major trading jurisdiction seeking to establish a reputation for the modern and effective resolution of business disputes. Legislation based on the Model Law has been adopted by over 111 jurisdictions.

Two points about the Model Law are relevant to the present discussion:

- the Model Law is not a complete or definitive law for international commercial arbitration in any given jurisdiction; and
- the Model Law can be, and has been, adopted as the law governing non-international arbitrations, often in the context of unified arbitration acts.

On the first point, the Model Law restricts itself to matters pertinent to international arbitration and on which there is an international consensus. It does not, for example, contain any provisions with respect to interest or costs, as the practice internationally on both of these issues is varied and contentious. It does not address certain powers which would be useful for tribunals to have and which some jurisdictions confer upon them, such as: the ability to summon witnesses at the seat of the arbitration without using the courts; the power to administer oaths to witnesses; or the power to determine how to proceed in the event that an arbitrator must be replaced. It lacks some provisions that may be relevant based on prior case law or legislation in a particular jurisdiction, such as revocability of arbitral appointments or the immunity of arbitrators. In some instances, it leaves open questions on which clarity would be useful, such as whether preliminary jurisdictional rulings in the negative are subject to the same court review process as positive jurisdictional rulings.[19] It contains provisions which

[19] Born, *supra* note 14 at pp 1193—1196.

may not fit with local legal culture or practice, such as allowing a tribunal to delegate the power to make procedural decisions to the chair without the agreement of the parties. In yet other instances, the wording of the Model Law itself may have become qualified by subsequent court decisions. For example, on the issue of whether a party is entitled to a "full" opportunity to present its case, or merely a "reasonable" opportunity, the Model Law literally says the former but the consensus of international jurisprudence supports the latter.[20]

As a result of these considerations, most jurisdictions that have adopted the Model Law have modified it in some way to fill the gaps with provisions based on local arbitration practices. The Ontario *ICAA* does so in several ways.[21] Such modifications are in no way a criticism of the Model Law, nor do they diminish its prime importance. The Model Law assumes the existence of a compatible law of arbitration in the place where the arbitration is seated ("*lex arbitri*"). Such modifications have often been made in jurisdictions that have adopted the Model Law, either in the Act adopting the Model Law, or in separate legislation. In Ontario some such modifications have been made in *ICCA,* as has been done in other provinces which have adopted the *Uniform International Commercial Arbitration Act* put forward by the ULCC. In Ontario and other Canadian provinces much of the *lex arbitri* that could potentially be supportive of the international arbitration regime prescribed by the Model Law may be found in the *Arbitration Act* or equivalent statutes (e.g., with respect to interest and costs). However, as discussed above, the *Arbitration Act* does not apply if the *ICAA* applies.[22]

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[20] Born, *supra* note 14 at 2339.

[21] See e.g., *Model Law*, *supra* note 2 at ss 8, 10, 11.

[22] Many of these gaps (but not all) can be covered by institutional rules adopted by the parties. However, most arbitrations conducted in Ontario and in most of Canada (international and non-international) are *ad hoc* arbitrations, not administered by an institution.

On the second point, while the Model Law was written with international arbitration in mind, many of its main features have come to be identified with fundamental features of any modern commercial arbitration regime, principally rigorous respect for party autonomy and strictly limited court intervention. This is very much in contrast with the animating principles of the English arbitration legislation, which provided considerable opportunities for the courts to "supervise" arbitration and in some instances limit access to it. The Model Law affirms foundational principles relating to modern commercial arbitration in general—international and domestic alike—and provides a common language in which those principles are expressed and discussed. As discussed below, the Model Law has been widely adopted as the basis for both international and non-international commercial arbitration.

III. ARBITRATION LEGISLATION IN OTHER JURISDICTIONS

Of the 111 jurisdictions that have adopted the Model Law as of 2019, no less than 54 have adopted it in a single statute applicable to both international and non-international arbitration. These include: New Zealand, Germany, Belgium, Norway, Austria, China (Hong Kong), India, Japan, Spain, and the British Virgin Islands.[23]

In Australia, international commercial arbitration is the subject of federal legislation. The federal statute adopts the Model Law.[24] As State legislation only applies to non-international arbitration, unified Acts are not an option.

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[23] See Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*, 4th ed (Alphen aan den Rijn, The Netherlands: Wolters Kluwer, 2019) at 674—681.

[24] See *International Arbitration Act 1974* (Cth), 1974/136, s 16(1) [*IAA*]. The *IAA* governs international commercial arbitrations in Australia. Section 16(1) of the *IAA* provides that the UNCITRAL Model Law has force in Australia.

However, all six Australian States have adopted arbitration statutes based on the Model Law for non-international arbitration. The process which was followed in Australia to replace State legislation for "domestic" arbitration based on the English arbitration legislation with new statutes based on the Model Law is exemplary and inspiring.[25]

In Canada, both the federal government and Québec have legislation, based on the Model Law, which applies to both international and non-international arbitration. No distinction between the two forms of commercial arbitration are made in the federal *Commercial Arbitration Act*, RSC 1985, c 17, but only commercial arbitration is covered.[26] The arbitration provisions of Québec's *Code of Civil Procedure* apply to both international and non-international arbitration with the qualification that, for international arbitrations, the provisions are to be interpreted in light of international legal authorities and practices.[27] The arbitration provisions of the *Code of Civil Procedure* do not differentiate between commercial and non-commercial disputes.[28]

Two other unitary Acts require special mention: England's *Arbitration Act, 1996* (UK), 1996 (hereinafter "England's *Arbitration Act*"); and the *United States Arbitration Act*, 9 USC, c 1, more commonly referred to as the *Federal Arbitration Act* (hereinafter the "*FAA*"). Both acts apply to all arbitration, commercial or otherwise, and international or non-

[25] See Doug Jones, *Commercial Arbitration in Australia,* 2nd ed (Pyrmont, NSW: Thomson Reuters (Professional) Australia, 2013) at 1—20. See also Janet Walker, "Domestic Commercial Arbitration Reform In Canada: Lessons From Downunder" (2023) 3:2 Canadian Journal of Commercial Arbitration.

[26] It should be borne in mind that non-commercial arbitration at the federal level encompasses different subject matter than at the federal level. For example, family, residential and consumer disputes would not be covered.

[27] See arts 649—653 *CCP*.

[28] *Ibid* at arts 620—655.

international. Separate sections of each Act address and comply with specific requirements of the New York Convention.[29] However, neither Act is based upon the Model Law, although England's *Arbitration Act* has been described as "a compromise of some of the Model Law's provisions with other provisions adjusted to suit the English position."[30]

A major revision of English arbitration legislation took place when England enacted the current *Arbitration Act* in 1996. Like its predecessors, England's *Arbitration Act 1996* applies to all forms of arbitration (domestic and international) seated in England, Wales, or Northern Ireland. It is a comprehensive piece of legislation to which all persons conducting arbitration in those jurisdictions can have reference. England's *Arbitration Act* substantially reduced the control English courts could exercise over arbitration proceedings by eliminating the "stated case" procedure, which allowed for parties or the tribunals to call for the opinion of the court on points of law while the arbitration was in progress. However, there remains a default right to seek leave of the court to appeal an award on a point of law.[31]

In the United States, the *FAA* was enacted in 1925 and, except for the addition of a section incorporating the New York Convention, there have been no significant changes since then. Two features of the *FAA* are relevant.

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[29] Both the United Kingdom and the United States are signatories to the New York Convention.

[30] Hilary Heilbron, *A Practical Guide to International Arbitration in London*, 1st ed (London: Informa Law, 2008) at 4.

[31] See *Arbitration Act*, 1996 (UK), 1996, s 69. The right to seek leave to appeal on a point of law may be contracted out of, and selection of institutional rules that describe the award as "final and binding" are sufficient to contract out of s 69. Additionally, the test for obtaining leave to appeal is stringent and leave is rarely granted.

First, while states within the United States are not constitutionally permitted to pass legislation that is inconsistent with the *FAA*, they may, and have, passed arbitration statutes that supplement the *FAA*. Such statutes deal with issues not dealt with by the *FAA*, including: the qualifications of arbitrators vis-à-vis impartiality and independence, the powers of arbitrators, and interest and costs. Some of the states have adopted legislation based on the Model Law.[32]

Second, the stringent provisions of the *FAA* in terms of mandatory referral to arbitration are applied to all forms of arbitration, including consumer and employment disputes. This has created a situation in which states are unable to provide relief to vulnerable classes of disputants, such as consumers and employees, from onerous arbitration agreements designed to create obstacles to claims and coordinated actions against corporate defendants. Whatever the systemic difficulties might be in addressing the issue within the United States, the need to differentiate commercial arbitration from other forms of arbitration is well illustrated by this on-going controversy.[33]

From the foregoing brief comparative review, the following conclusions can be drawn:

the Model Law is the standard against which all legislation relating to commercial arbitration should now be judged;

the Model Law implements key provisions of the New York Convention that are essential to commercial arbitration, but which may not apply with equal force to other types of arbitration, including: party autonomy, strictly constrained

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[32] California, Connecticut, Florida, Georgia, Illinois and Louisiana. See Binder, *supra* note 23 at 674—681.

[33] For the history of this issue in the US and Canada, see William G Horton & David Campbell, "Arbitration as an Alternative to Dispute Resolution: Class Proceedings and the Mirage of Mandatory Arbitration" (2019) at 93, online (pdf): *William G Horton Commercial Arbitration* <https://www.wgharb.com //wp-content/uploads/The-Mirage-of-Mandatory-Arbitration.pdf>.

judicial involvement, and limited grounds for non-enforcement of arbitration agreements and awards; and

the Model Law may be applied to both international and non-international arbitration, including as a single legislative enactment.

The question then becomes whether Canadian provinces should adopt the Model Law as a single statute governing all commercial arbitrations.

IV. REASONS FOR A SINGLE COMMERCIAL ARBITRATION STATUTE

There are several reasons that a single commercial arbitration statute should be adopted in Ontario including, but not limited to:

1. the distinction between international and non-international arbitration is increasingly meaningless in the business context;
2. there are downsides to having two acts for commercial arbitration; and
3. international standards should be applied to all commercial arbitrations.

These will be discussed in turn.

1. The distinction between international and non-international arbitration is increasingly meaningless in the business context

Multinational companies and their subsidiaries now regularly do business in Ontario and Ontario companies regularly do business abroad. The past few decades have witnessed the rapid development of cross-border sales, franchising, licensing, intellectual property, and M&A activity, and the expansion of web-based channels for transacting business. Businesses often operate in a virtual environment in

which physical location is secondary and sometimes can be hard to determine. Domestic transactions may be fulfilled internationally, and vice versa. The choice of which business entities to involve in a particular transaction may be dictated by international tax or investment treaty considerations and may be determined after the core business deal is struck. In these circumstances, it may be a challenging (and a somewhat esoteric) exercise to determine which of two arbitration Acts will apply if, and when, there is ultimately a dispute.

Many arbitrations that are technically non-international are effectively international due to the fact that one or both parties are subsidiaries of international conglomerates with significant involvement of head-office executives and legal staff from outside Canada. Equally, a case which is technically international may be conducted wholly by Canadian counsel on both sides before an all-Canadian tribunal, with no involvement of any international organization or rules. The question of whether an arbitration that is taking place in Ontario is "international" may not arise until late in the arbitration, usually in relation to a specific issue such as the availability of an appeal.

In short, the business market is a national, cross-border, and international market. It makes little sense to serve that market with two separate and mutually exclusive pieces of arbitration legislation differentiated by a highly complex legal definition as to what constitutes an "international" and "commercial" arbitration.[34]

2. There are many downsides to having two Acts for commercial arbitration

All commercial arbitrations begin with an agreement to arbitrate. These agreements are frequently embedded in a commercial contract drafted by lawyers who are not specialists in commercial arbitration. It is not uncommon for arbitration

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[34] *Model Law*, *supra* note 4 at art 1(3).

clauses in international contracts to be drafted to refer to the *Arbitration Act* and (less commonly) for arbitration clauses in non-international contracts to refer to the *ICAA*. One may attribute this to lack of expertise on the part of the drafter, but that is not entirely fair. For reasons already mentioned, a high degree of expertise may in fact be required to determine which Act applies. Such expertise may not always be available to a transactional lawyer. It is not reasonable to have legislation which requires specialized legal advice in order to draft an arbitration clause.

In addition, whatever the expertise of the drafter, the choice of statute may require information that is not immediately available, is speculative or debatable, or has not yet been determined with respect to the structure of the transaction. For example:[35] Are the parties to the transaction fixed or does the agreement provide that they may be substituted or expanded to include others registered in different jurisdictions? Where do the parties have their places of business? Which place of business will have the closest connection to the arbitration agreement? What is the "habitual residence" of a party that has no fixed place of business? Will a substantial part of the obligations be performed outside of Ontario? Will any dispute that subsequently arises have its closest connection to a place other than Ontario?

There is little or no utility in having to undergo this type of analysis merely to provide for the arbitration of any disputes that may arise under a commercial contract. Nor is it realistic to expect this kind of analysis to be done by businesspeople or contract lawyers in the context of negotiating a commercial agreement.

At the opposite end of the scale, in some cases a deliberate choice may have been made by the drafter of a dispute

[35] All examples are based on definition of "international" in the Model Law.

resolution clause to refer to the *Arbitration Act* with the intention of allowing for the possibility of an appeal pursuant to section 45 of the *Act*.[36] However, as previously mentioned, the legal ability of parties to agree to apply the *Arbitration Act* to an international arbitration, while arguable, is not clear and may lead to disputes.

The problem of not applying one's mind to the question of "which Act" is not limited to corporate lawyers. Counsel arguing cases, and courts at all levels, may find themselves in the embarrassing position of not having considered the correct Act.

In *Novatrax International Inc. v Hägele Landtechnik GmbH* the parties' sales agreement provided that any disputes would be settled by binding arbitration under German law through the Chamber of Commerce in Frankfurt.[37] The court action commenced by the plaintiff included defendants who were not parties to the sales agreement. The defendants moved to stay the action. The motion judge granted a stay, and that stay was upheld at the Court of Appeal. The embarrassing fact was that neither counsel nor any of the judges who considered the matter realized that the issues in the case were governed by the *ICAA* and not by the *Arbitration Act*.

In *Haas v Gunasekaram*, the plaintiff, an overseas resident, had entered into a shareholders' agreement with the defendants with respect to a restaurant.[38] The restaurant failed. The plaintiff lost his investment and launched an action alleging that he was induced to enter into the shareholders' agreement by fraudulent misrepresentations. Again, on a motion to stay the

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[36] This was the case in one dispute arbitrated by the author and, anecdotally, that is not the only instance in which this has occurred. It is a sufficiently well-known phenomenon that, as mentioned above, in Singapore choosing the "wrong Act" is specifically allowed and the 2016 Uniform Arbitration Act would also specifically allow that choice.

[37] 2016 ONCA 771.

[38] 2016 ONCA 744.

action in favour of arbitration, no consideration was given to the fact that given the foreign residence of the plaintiff, the issue of whether or not to stay was likely governed by the *ICAA* and not the *Arbitration Act*.

If all commercial arbitration were governed by a single statute, all parties involved in drafting, invoking, implementing and adjudicating upon commercial arbitrations agreements would, at all stages, have their attention directed to a single Act and to any differentiations of treatment highlighted within the Act itself[39] (although hopefully such differences would be few).

It is important to note that the definitional issues surrounding the terms "commercial" would not be avoided in any single Act which applies only to commercial arbitration. Similarly, definitional issues are not avoided by a single Act that differentiates internally between international and non-international arbitrations. Such differentiation may involve issues such as the default rule as to the number of arbitrators or the ability to opt into a right of appeal. However, a single Act would bring the attention of all users to the points of differentiation and support reasoned decisions as to those choices. For a case involving the meaning of "commercial" see: Uber Technologies Inc v Heller, 2020 SCC 16.

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[39] A key point of possible differentiation is whether any appeals from awards would be allowed and, if so, on what basis would they be allowed, and would the same rights exist with respect to an international commercial arbitration. This issue is addressed in a separate article in this issue. See also William G Horton, "Reforming Arbitration Appeals: The New ULCC Uniform Arbitration Act" (2017) 75:1 Advocate 37. See also Joel Richler, "The Reform of Appeals Provisions in Canadian Commercial Arbitration Statutes" (2003) 3:2 Canadian Journal For Commercial Arbitration.

3. Courts should apply international standards to all commercial arbitrations

An important benefit of a single Act is that it would mandate the courts to apply international standards to all commercial arbitrations. This should result in more consistent application of the New York Convention principles of party autonomy and limited judicial intervention to all commercial arbitrations. It would also fulfill the goal of having legislation for all commercial arbitration that conforms to the Model Law, and which indicates a legislative intent to move decisively away from the legacy of the English arbitration legislation. This approach would be supported by the application of article 2A of the Model Law to all commercial arbitration, which requires the courts to consider the international origin of the Act. Hopefully, this will provide the courts with a basis to draw a line under prior Canadian jurisprudence that expressed a more paternalistic attitude towards arbitration and make a fresh start.

4. Additional benefits from a single commercial arbitration Act

Non-international arbitration in Ontario could benefit greatly from application of certain provisions of the *ICAA*. To name a few, the *ICAA* contains much more comprehensive provisions relating to interim measures,[40] clearer and less discretionary rules with respect to stays of court proceedings,[41] and a clearer prohibition on judicial interference.[42] A unified Act could also include provisions recommended for non-international commercial arbitration in the 2016 *Uniform Arbitration Act*.

[40] *Model Law*, *supra* note 2 at art 17.

[41] *Model Law*, *supra* note 2 at art 8.

[42] *Ibid* at art 5.

In addition, as mentioned above, a unified Act could provide much needed support for international arbitrations conducted in Ontario under the *ICAA*.

A further important benefit of this approach is that the uniform use of Model Law terminology for all commercial arbitrations would provide greater clarity and consistency both in the practice of commercial arbitration and in the jurisprudence relating to commercial arbitration. Familiarity with, and consistent use of, such terminology would also be of assistance to Ontario lawyers dealing with lawyers from other parts of the world when discussing commercial arbitration in Ontario.

More generally, a single Act would train the Ontario bar and bench to become familiar with international standards, legal instruments, and "soft laws", and with an international arbitration vocabulary, thereby making the expertise of Ontario lawyers more readily exportable to international markets.

V. CONCLUSIONS

The foregoing objectives of a single Act mirror the objectives of the highly successful efforts in Australia to enact modern Commercial Arbitration Acts based on the Model Law for non-international commercial arbitration in all Australian States. These aspirations are aptly summarized by Professor Doug Jones as follows:

> …By adopting a new paradigm for domestic arbitration, and by aligning it to the internal arbitration regime, the opportunity has been provided to users and lawyers alike to devise new and more effective ways to resolve domestic commercial disputes. This has occurred at a time when there is a momentum in encouraging international parties to choose

> Australian seats for international commercial arbitration. The restoration of domestic arbitration as the preferred form of binding non-curial dispute resolution within a legislative regime reflecting international best practice will provide the opportunity for Australian dispute practitioners, both counsel and arbitrators, to more effectively compete for international arbitration work locally and internationally.[43]

By adopting a unified commercial arbitration Act, Ontario would lead the way among common law provinces in Canada towards achieving these same goals.

Finally, there is evidence to suggest that the adoption of international standards would serve to bolster Ontario in general, as well as leading arbitration centres in Ontario such as Toronto, Ottawa, and Windsor, as pre-eminent jurisdictions to host international commercial arbitration, and would thereby bring more business to the local economy.[44]

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[43] Jones, *supra* note 25 at 1.

[44] A 2012 study found that arbitrations in Toronto brought $256 million into the city's economy, as compared with the impact of the 2010 Toronto International Film Festival which generated an economic impact of $170 million. See Arbitration Place, "Arbitration worth over a quarter-billion dollars a year to Toronto economy" (12 September 2012), online: *Cision* <https://www.newswire.ca/news-releases/arbitration-worth-over-a-quarter-billion-dollars-a-year-to-toronto-economy-510733681.html>.