ONE ACT TO RULE THEM ALL – MOVING TOWARDS A SINGLE COMMERCIAL ARBITRATION ACT

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As a foundational issue, any legislative reform initiative must consider the reach of the statute. Should the statute continue its existing scope or is there a more effective means to accomplish the objectives of the legislature? Given the increasing reliance on arbitration for the determination of commercial disputes, this paper explores the reasons why legislative reform of the Ontario *Arbitration Act*[1] (the "*Act*") should include a transition to a single commercial arbitration act in Ontario for international and non-international commercial arbitration. Reform legislation would advance the interests of parties, counsel, the larger arbitration community, and the courts. Such was the conclusion of the Arbitration Act Reform Committee of the Toronto Commercial Arbitration Society (the "AARC"), and serves as a foundation for its proposal for legislative reform.

Commercial arbitration is largely responsible for the acceptance of arbitration as a parallel and equivalent means of dispute resolution. In Justice Côté's dissenting opinion in *Uber Technologies Inc v Heller ("Uber")*,[2] she observed that only in the last four decades has Canada moved from what she characterizes as "hostility to arbitration"[3] to its current position

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[1] *Arbitration Act, 1991*, SO 1991, c 17.

[2] 2020 SCC 16 [*Uber*].

[3] *Ibid* at para 205.

as an international leader in arbitration jurisprudence.[4] Though she did not attribute this attitudinal shift to the unique features of commercial arbitration, it is noteworthy that she supported her observation with reference to two decisions, *Seidel*[5] and *Wellman*,[6] in which the Supreme Court of Canada recognized the legitimacy of arbitration while emphasizing the importance of parties' contractual agreement to an alternative dispute resolution process. This is particularly evident in the selected quote from *Seidel*, in which the Court stated that "[a]bsent legislative intervention, the courts will generally give effect to the terms of a *commercial contract* freely entered into, even a contract of adhesion, including an arbitration clause" (emphasis added).[7] Justice Côté notes that the Court then went on to recognize and embrace *commercial* arbitration.[8] In this historical context, it makes eminent sense that an analysis of areas for legislative reform would include consideration of a single act for commercial arbitration.

I. THE UNJUSTIFIABLE DIVISION OF INTERNATIONAL AND DOMESTIC COMMERCIAL DISPUTES[9]

In Ontario, separate arbitration acts govern domestic[10] and *some* international disputes. The Ontario *Act* governs domestic

[4] *Uber, supra* note 2 at para 208.

[5] *Seidel v TELUS Communications Inc*, 2011 SCC 15 [*Seidel*].

[6] *TELUS Communications Inc* v *Wellman*, 2019 SCC 19.

[7] *Uber*, *supra* note 2 at para 207, citing *Seidel* at para 2.

[8] *Ibid* at para 207.

[9] For a more complete review of this issue, please see the AARC Final Report dated February 12, 2021, Appendix B "Reasons to Consolidate Commercial Arbitration in a Single Act in Ontario". This section of the paper is a summary of that review and the work of the AARC.

[10] I use the word "domestic" to refer to any dispute that does not meet the definition of "international" in the *Model Law*. See United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, UN Doc A/40/17, Ann I, June 21, 1985 [*Model Law*].

arbitration matters whether commercial or not. The *International Commercial Arbitration Act*[11] (the "*ICAA*") only applies to international disputes *if* they are "commercial" in nature.[12] This bifurcated statutory scheme has resulted in the oddity of one statute applying to all disputes, except those with the dual characteristics of being both "international" and "commercial."[13] As discussed below, while there may be some question about the rationale for severing commercial disputes from non-commercial disputes in the existing *Act,* the real question is whether it is appropriate to divide commercial disputes into separate "domestic" and "international" regimes. There are a number of reasons why this division should end in Ontario.

First, other jurisdictions have already recognized that the distinction is properly drawn between commercial and non-commercial disputes rather than international and domestic disputes. In Canada, the federal *Commercial Arbitration Act*[14] applies equally to international and non-international arbitrations, as does the Quebec *Code of Civil Procedure, "Principles of Procedure Applicable to Private Dispute Prevention and Resolution Processes"*.[15] Likewise, the *Federal Arbitration Act, USA*[16] and the United Kingdom's *Arbitration Act 1996*[17] do not draw this distinction. The AARC's conclusion was that these statutes are the appropriate comparators to the *Act*, given the

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[11] *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sch 5 [*ICAA*].

[12] *Uber*, *supra* note 2 at para 14, citing *ICAA* and the domestic Act.

[13] See *Uber*, *supra* note 2 at para 23, citing n 2 to *Model Law*, art 1(1).

[14] *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp).

[15] *Code of Civil Procedure* (Book I, Title I – Principles of Procedure Applicable to Private Dispute Prevention and Resolution Processes), CQLR, c C-25.01, ss 1—7.

[16] *Federal Arbitration Act*, 9 USC 1. Note that one exception is for issues relating to the New York Convention.

[17] *Arbitration Act*, *1996* (UK), c 23.

nature and volume of commercial arbitrations in those jurisdictions.

Second, today's economy makes it more likely that a commercial dispute will have some international element, even if the dispute does not meet the specific definition of "international" set out in the *ICAA.* Under the *ICAA,* "international" is defined with reference to Article 1 of the *UNCITRAL Model Law of International Commercial Arbitration, 2006* (the "*Model Law*").[18] Canadian businesses have an increasingly global reach, and they should not be potentially subject to different arbitration frameworks for their commercial disputes.

This is particularly the case given that procedural elements of international arbitrations are increasingly being adopted by participants in domestic arbitrations. For example, the *IBA Rules for the Taking of Evidence*[19] are often applied in domestic arbitrations. Consolidating commercial arbitrations into one statute would create consistency in practice and enhance the commitment to *Model Law* principles. Increased experience and expertise with international standards in the context of growing globalization will only serve to advance that reputation of Canada as a world leader in arbitration of which Justice Côté wrote.

Finally, having all commercial arbitrations proceed under a single statute eliminates any confusion as to whether the domestic *Act* or the *ICAA* applies. There are currently substantive differences between the two statutes,[20] and, as *Uber*

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[18] *Uber*, *supra* note 2 at para 23, citing n 2 to *Model Law*, art 1(1).

[19] International Bar Association, "IBA Rules on the Taking of Evidence in International Arbitration" (2021), online (pdf): <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b>.

[20] For example, appeal rights differ. The *ICAA* does not permit appeals (following *Model Law* principles), while the Act does and currently provides a substantive right to appeal on a question of law, even if the parties do not expressly provide for one.

illustrates, the question of which applies may be a matter of considerable dispute among parties trying to obtain a legal advantage from one or the other statute. Since courts may not receive as much exposure to either statute except on appeal or review, they may struggle to (and may not always correctly)[21] identify which statute applies to a commercial dispute. This is not to fault courts or counsel. Rather, it reflects the existence of a somewhat arbitrary distinction between international and commercial arbitration, which gives rise to substantive consequences.

II. THE JUSTIFIABLE DISTINCTION BETWEEN COMMERCIAL AND NON-COMMERCIAL DISPUTES

Not only are there benefits to eliminating the distinction between international and domestic commercial arbitrations, it is also appropriate to introduce a distinction between commercial and non-commercial matters. The existing Ontario *Act* does not recognize the diverse nature of matters that come to arbitration, and that the origins and characteristics of the arbitrated disputes may be significantly different.

Central to commercial arbitration is the notion of party autonomy. As Horton and Campbell note in their article, "party autonomy was key to this concept of merchant-to-merchant arbitration"[22] and is consistent with the historic origins of commercial arbitration grounded in the Geneva Convention.[23] This long history of party autonomy as a foundation for commercial arbitration has had implications for the conduct of

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[21] See, for example, *Novatrax International Inc v Hagele Landtechnik GmbH*, 2016 ONCA 1771 in which the court and the parties applied the Act and did not appear, on the face of the decision, to have considered that the applicable statue was, in fact, the *ICAA*.

[22] William G. Horton and David Campbell, "Arbitration as an Alternative to Dispute Resolution: Class Proceedings and the Mirage of Mandatory Arbitration" (2019) Annual Review of Civil Litigation (WestLaw), at 1.

[23] *Ibid* at 5.

arbitration, including, for example, the need (or lack thereof) of ensuring access to the courts.

Party autonomy, including the ability to control a dispute resolution process, is supportive of business interests. In discussing the themes of freedom of contract and party autonomy in the context of choice of forum and choice of law in international commercial arbitration, Catherine Walsh notes that "deference to party autonomy in international commerce also advances the commercial values of certainty and predictability, relieving the contracting parties from having to deal with multiple overlapping state claims to exercise prescriptive and judicial authority over their affairs".[24] While the same concerns about state claims and interventionist judicial authorities do not arise in domestic disputes, the desire of commercial parties for certainty and predictability is not limited to international matters. Virtually all business entities want to be able to predict and minimize their exposure from disputes. The means of obtaining those objectives is the exercise of each party's autonomy in deciding the procedure for the determination of claims.

Party autonomy is not, however, the foundational principle of all disputes to which existing domestic arbitration legislation may apply. Statutory arbitrations, family law disputes, arbitrations involving contracts of adhesion (which may or may not be commercial in nature), religious arbitrations,[25] and labour and employment disputes may have limited or no grounding in the notion of arbitration as an exercise of the free will of the parties through contractual agreement. This point was made in the intervener's factum of the Consumers Counsel of Canada filed in the Supreme Court of Canada in *Uber*:

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[24] Catherine Walsh, "The Uses and Abuses of Party Autonomy in International Contract" (2009) 60 UNB LJ, at 12.

[25] For an interesting review of judicial interventionism in religious arbitrations, see Trevor Farrow, "Re-Framing the Sharia Debate" (2006) 15:2 Constitutional Forum, at 79—86.

> There can be no doubt that party autonomy and freedom of contract are fully engaged at one end of the spectrum where, for example, contracts result from negotiations between sophisticated commercial parties with equal bargaining power. As one moves farther down the spectrum, however, where parties' sophistication and relative bargaining power becomes polarized, the concepts of party autonomy and freedom of contract devolve into legal fictions.[26]

Reduced emphasis on party autonomy may promote increased judicial intervention. The Supreme Court of Canada has held that strictly holding parties to their "bargain" may not be appropriate in certain circumstances. In a non-arbitration case, *Facebook v Douez*,[27] the court recognized that the consumer context may provide a reason not to enforce a forum selection clause in a contract.[28] In *Uber*, the Court was concerned with whether the enforcement of an arbitration clause would be unconscionable.[29] While it is not impossible that these concerns may arise in the type of "merchant-to-merchant" disputes seen in commercial arbitration matters, the realization of these concerns is much more likely in the areas of consumer contracts, labour and employment, and family. The result is that the courts may be less hesitant to intervene in matters for which there is confidence that the contract before the court, including the arbitration clause, reflects the will of two (or more) commercial parties, and more so in these other forms of disputes.

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[26] Factum of the Intervener, Consumers Council of Canada, 2020 CCELMotionF 64181, SCC File No. 38534 (Uber), at paras 11—13.

[27] 2017 SCC 33 [*Douez*].

[28] *Ibid* at para 33.

[29] *Uber*, *supra* note 2 at paras 47—50.

Party autonomy is not the only hallmark of commercial arbitration that distinguishes it from the non-commercial matters. The Final Report of the Alberta Law Reform Institute Report noted that the hallmarks of international commercial arbitration also include consensual agreement whereby no party can be forced to arbitration (as compared to statutory arbitrations), the choice of impartial adjudicators, limited court interventions and the finality of the award.[30] Domestic commercial arbitrations have the same hallmarks, born predominantly out of business interests in the expedient and (often) private resolution of their disputes.

Those same considerations or "hallmarks" do not necessarily apply to non-commercial arbitrations, where the parties may have less concern with expediency and privacy and more concern with the management of potentially unequal bargaining power. The disparities in the theoretical underpinning of commercial and non-commercial arbitrations do not necessarily lend themselves to a common set of legislated procedural and substantive rights and powers. Yet that is what is offered by the *Act* and makes it particularly suitable for reform in this area.

One question arising from the single act proposal is whether sufficient meaning and definition of "commercial" can be given. Absent clear definitions, the confusion between international and non-international matters may simply devolve into confusion between commercial and non-commercial matters, with court intervention made necessary to resolve any dispute. *Uber* is identified as exemplifying the potential problem.

The AARC has not proposed a definition of "commercial", relying on the *Model Law* and the existing jurisprudence. There is no definition in the *Model Law*, however. Rather, in a footnote

[30] Alberta Law Reform Institute, Final Report on Uniform International Commercial Arbitration (March 2019) ALRI, at 9.

to Article 1(1), the *Model Law* gives examples of what may (or may not) be considered "commercial".[31]

The *Model Law* examples and related commentary[32] were key to the Supreme Court of Canada's determination in *Uber* as to whether the matter before it was an international commercial arbitration to which the *ICAA* applied or an international non-commercial arbitration to which the *Act* applied. There, the majority of the Court found that whether a matter is "commercial" is determined by the nature of the parties' dispute (as determined by their pleadings), not by an extensive review of the factual record.[33] Adopting an approach that, in effect, categorizes disputes, it noted that the examples of commercial matters in the *Model Law* did not include consumer claims and labour and employment disputes, even if related to business.[34] Having characterized the nature of the dispute as an employment matter, it was not "commercial" in nature.

Importantly, the division between the majority and dissent was not in respect of whether employment matters are "commercial" in nature or, more generally, on the interpretation of the word "commercial". While the Court agreed that the term "commercial" should be interpreted broadly and that employment matters were not commercial disputes, they disagreed as to the approach to be taken in making a determination as to whether the dispute before them was an employment matter at all.

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[31] *Model Law*, *supra* note 10 art 1(1), n 2.

[32] In *Uber*, *supra* note 2 at para 24, the Court references The Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General on whether labour or employment disputes fall into the definition of "commercial".

[33] *Uber*, *supra* note 2 at para 25.

[34] *Ibid* at paras 23—24.

Should the determination be based on the nature of the dispute (as the majority found)[35] or the nature of the relationship between the parties (per Justice Côté in dissent)?[36] The choice of analytic approach resulted in a different characterization of the dispute. Once the approach was decided upon by the majority, and the dispute characterized as an employment one, it was not controversial that the dispute concerned a non-commercial matter to which the *Act* (and not the *ICAA*) applied. The *Model Law* provided sufficient guidance.

The decision to rely on the *Model Law* in this respect was not new. Some 12 years earlier in *Patel v Kanbay International Inc*,[37] the Ontario Court of Appeal used a similar analysis, again relying on the *Model Law* and s. 13 of the *ICAA* to determine whether the dispute before it was commercial in nature.[38] While at least one earlier case referenced dictionary definitions and a consideration as to whether the transaction was conducted in "business-like way"[39] the majority of the jurisprudence focuses on the *Model Law* examples as a guide.

Legislative drafters cannot eliminate the potential for some conflict or debate, even if a clear definition of "commercial" were to be included in a new Act. When disputes do arise, reference to the examples in the *Model Law* has served well as a substitute for a clear definition. Further, as Redfern and Martin point out,

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[35] *Uber*, *supra* note 2 at para 25.

[36] *Ibid* at paras 211—212.

[37] 2008 ONCA 867 [*Patel*].

[38] *Ibid* at paras 11—13. See also, the 1992 decision in *Canada Packers Inc v Terra Nova Tankers*, 11 OR (3d) 382, 1992 CanLII 7463 (ONSC).

[39] See *Carter v McLaughlin*, 1996 27 O.R. (3d) 792, 61 ACWS (3d) 11 (Ontario General Division), at para 15 ["*Carter*"]. In *Carter*, the court considered whether the transaction was "commercial" for the purpose of the *Model Law* even though the parties themselves were not commercial businesses (at para 15—16).

"terms in common use tend to elude definition".[40] The term "commercial" is one that is part of the language of arbitration, and while there may be some controversy over its definition, in many respects, you know it when you see it.

By giving "commercial" a wide interpretation, the law will capture the transactions which are business-like in nature and ones for which the concept of party autonomy is most likely to be foundational. Labour and employment disputes and commercial consumer contracts properly fall outside the scope of the *Model Law* examples and these foundational principles. Future disputes can be decided with these same principles in mind.

Finally, and in any event, as *Uber* illustrates, the current legislative framework does not obviate the potential for a conflict over whether a dispute is "commercial". Movement to a single commercial arbitration act simply shifts that debate from being whether the *Act* or the *ICAA* applies, to whether the single commercial arbitration act would apply. Given the benefits of a single act, any ambiguity in defining the word "commercial" ought not to be an impediment to legislative reform.

III. CONCLUSION

Legislative reform is necessary to modernize the Ontario legislation, which will in turn assist in maintaining Canada's position as a world leader in arbitration. With increasing globalization of business conflicts, reforming the existing legislation to create a single commercial arbitration act would provide a valuable opportunity to merge the benefits from the *Act,* the *ICAA* and international standards into one statute. Such a development would best serve the interests of parties, counsel, the court, and the broader arbitration community.

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[40] Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration (2d), London: Sweet & Maxwell, 1991, at 14.