THE IMPORTANCE OF APPLYING INTERNATIONAL STANDARDS TO COMMERCIAL ARBITRATION STATUTES: MATTERS OF SUBSTANCE AND FORM[AT]

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I. INTRODUCTION

This article deals with two related topics concerning a reformed Ontario arbitration law. First, it sets out the case for applying international standards for all commercial arbitrations in Ontario in one commercial arbitration statute covering both international and non-international (domestic) arbitrations. Second, it considers whether an UNCITRAL Model Law-based[1] arbitration statute should indicate where it differs from the Model Law, and if so, which provisions differ and how they differ.

II. THE CASE FOR APPLYING INTERNATIONAL STANDARDS FOR ALL COMMERCIAL ARBITRATIONS IN ONTARIO

One of the major recommendations in The Final Report of the Arbitration Act Reform Committee dated February 12, 2021 (AARC Report)[2] is that the proposed Commercial Arbitration Act (CAA) for Ontario be enacted, and that, in doing so, Ontario make international standards relating to the conduct of arbitrations and the role of the courts, as set out in the

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[1] 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) [*Model Law*].

[2] See "AARC Final Report 12 Feb 21" (12 February 2021), online: *Toronto Commercial Arbitration Society* <torontocommercialarbitrationsociety.com/arbitration-act-reform-committee/> [*AARC Report*].

UNCITRAL Model Law on International Commercial Arbitration ("Model Law") and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), applicable to all commercial arbitrations conducted in Ontario.

The overarching premise of the AARC Report is adherence to the Model Law and the New York Convention.[3]

What degree of conformity with the Model Law is desirable?

For a smaller jurisdiction in the arbitration world (which Ontario is), it is better to adhere to the Model Law to the extent possible. Doing so makes it much easier for people elsewhere to instantly know what they would be getting by choosing the jurisdiction as their seat of arbitration.

One of the reasons articulated for a single Act for all commercial arbitrations in Ontario, domestic and international, is that all commercial arbitrations in Ontario would be better served by closer adherence to the Model Law.[4]

It is widely accepted globally that commercial arbitration should be conducted in ways that are more efficient, expeditious, and cost-effective than domestic court proceedings in many jurisdictions, and than non-international (domestic) commercial arbitration proceedings in many jurisdictions. Also, it is widely accepted globally that commercial arbitration should be conducted in line with the needs of commercial parties. While these important principles are not expressly stated in the AARC Report, they are fundamental to its recommendations.

The AARC Report concludes that a single Act with unified terminology and concepts based on international standards

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[3] AARC Report, *supra* note 2 at 6.

[4] *Ibid* at 7, Reason (e).

would raise the practices and skills of Ontario lawyers and arbitrators to international standards.[5] In particular, it would help bring some of the practices that have been proven effective and efficient in international disputes to Canadian domestic arbitration procedures, which can otherwise amount to "litigation sitting down". As a result, a single Act based on international standards would enshrine the concepts of efficiency, expeditiousness, and cost-effectiveness in arbitration procedure, in line with the needs of commercial parties.

Accordingly, the AARC Report recommends that the CAA should make it clear that commercial arbitrations in Ontario are to be conducted to the standards of the Model Law.[6]

Appendix B to the AARC Report, "Reasons to Consolidate Commercial Arbitration in a Single Act in Ontario", explains the rationale as follows:

> A single Act would encourage the courts to apply international standards to all commercial arbitrations. Moreover, a section that requires the courts to consider the international origin of the Act would apply to all commercial arbitrations, thereby fulfilling the original assumed goal of the Arbitration Act to conform more to the Model Law.[7]

One significant point on which the AARC Report deviates from the Model Law, favouring increased party autonomy, is its recommendation that a right of appeal on a question of law, on an opt-in basis, be permitted for both non-international and international arbitrations.[8] The Report reasons as follows:

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[5] AARC Report, *supra* note 2 at 8, Reason (i).

[6] *Ibid* at 9, under "Topics to be Addressed in the CAA".

[7] *Ibid* at Appendix B, p 4.

[8] *Ibid* at Appendix B, p 6.

> A right to appeal to the court on a point of law may be considered valuable by parties seeking to hold tribunals to the mandatory provision of the Model Law that the "tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties".[9]

While the AARC Report intentionally does not recommend a specific language for the CCA, it does include (as its Appendix E) a draft CAA in integrated format with cross-references to the Model Law "for the purpose of presenting the conclusions of the work of the Committee as a whole in a comprehensive way that can be viewed in a single continuous format."[10]

Consistent with the intent of the Report's overarching premise of adherence to the Model Law and the New York Convention, and of implementing international standards relating to the conduct of arbitrations and the role of the courts, it should be expected that the provisions in Part I and in section 6(3) of Part II of the Ontario *International Commercial Arbitration Act*[11] ("ICAA") will be included in the CCA.

Those provisions read:

> **Part I The Convention**
>
> **Application of Convention**
>
> **2** (1) Subject to this Act, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Conference on International Commercial

[9] *AARC Report, supra* note 2

[10] *Ibid* at 14.

[11] 2017, SO 2017, c 2, sched 5.

Arbitration in New York on 10 June 1958 and set out in Schedule 1, has force of law in Ontario in relation to arbitral awards or arbitration agreements in respect of differences arising out of commercial legal relationships.

Part II The Model Law

…

Use of extrinsic material

6 (3) In applying 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).[12]

[12] These materials collectively form the *travaux préparatoires* of the Model Law. They are available online, <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/travaux>.

Importantly, the ability to have regard to the materials described in section 6(3) of the ICCA in applying the Model Law means that the drafting history of the Model Law will be available to interpret provisions of the CCA taken from the Model Law, as will jurisprudence from all jurisdictions that have Model Law arbitration statutes. Currently, arbitration legislation based on the Model Law has been adopted by 85 states and a total of 118 jurisdictions.[13]

Indeed, the illustrative CCA in Appendix E to the Report provides as follows:[14]

> **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

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

[14] AARC Report, *supra* note 2, at Appendix E.

> 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);
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> (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
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> (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).

UNCITRAL explains what the AARC Report terms "international standards" as follows:

> The Model Law is designed 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. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.[15]

[15] See "UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006", online: *United Nations*

Ontario and its arbitration practitioners will benefit from conducting commercial arbitrations in accordance with this "worldwide consensus on key aspects of international arbitration practice".

It will mean that commercial parties and their legal advisors outside Ontario will have a clear understanding of Ontario's commercial arbitration law without having to ask themselves anything more than how it differs from the Model Law. As a result, they will be able to comfortably choose Ontario as their seat of arbitration.

Having a commercial arbitration law that is so close to the Model Law is, of course, not the only factor that parties will consider in choosing a seat. However, it will also help them "tick some of the other boxes", including the presence of a judiciary that is conversant with and supportive of arbitration.

An illustration of this can be seen by looking at the Chartered Institute of Arbitrators' *London Centenary Principles 2015*, which define the necessary characteristics of "an effective, efficient and 'safe' seat for the conduct of International Arbitration". The first of the 10 Principles is the jurisdiction's international arbitration law, the second is its judiciary having (among other things) "expertise in International Commercial Arbitration", and the third is an "independent competent legal profession with expertise in International Arbitration and International Dispute Resolution providing significant choice for parties who seek representation in the Courts of the Seat or in the International Arbitration proceedings conducted at the Seat".[16]

Commission On International Trade Law <uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration>.

[16] See "CIArb London Centenary Principles" (2015), online: *CiArb* <www.ciarb.org/media/4357/london-centenary-principles.pdf>.

Looking outward, Ontario arbitration practitioners—counsel and arbitrators alike—likewise will be able to participate more readily in arbitrations in the 85 states and 118 jurisdictions that have as their arbitration law the Model Law, as well as those important states (such as England and Wales, and France) that have not adopted the Model Law but have arbitration laws and practices that are consistent with the international standards and practices reflected in the Model Law. This will be so not just because of the similarity of their arbitration laws to the commercial arbitration law of Ontario but because Ontario arbitration practitioners will become increasingly conversant and comfortable with how things are done internationally in commercial arbitration.

In turn, commercial parties arbitrating their disputes in Ontario—both international and non-international—will have greater access to, and will be able to make greater use of, arbitration practices that, if applied as they should be, will lead to more efficient, timely, and effective resolution of commercial disputes.

III. FORMAT/FORM OF THE PROPOSED COMMERCIAL ARBITRATION ACT

An important consideration for any statute based on the Model Law is whether it will indicate expressly (a) where it differs from the Model Law, and (b) if so, which provisions differ and how they differ.

Showing where the particular statute differs from the Model Law will make the statute more user-friendly, so that anyone looking at it, particularly from outside the jurisdiction, will be able to home in on the ways it is distinct from the Model Law that they know.

There is a compelling logic to making any statute user-friendly, and particularly a statute that will have an audience outside the jurisdiction.

Apart from that, it makes sense for it to be easy to identify the points of difference from the Model Law. As stated earlier, one of the reasons for a jurisdiction having a Model Law arbitration statute is to make it easy for those choosing a seat to know the arbitration law to which they would be agreeing.

Some jurisdictions which have not adopted the Model Law verbatim do not indicate the differences in any way, creating traps for the unwary. For example, a jurisdiction could implement the Model Law almost exactly as written, but add a wide domestic public policy ground for the setting-aside of arbitral awards and the non-enforcement of foreign awards.

There are a number of ways in which a Model Law statute could indicate how it differs from the Model Law.

One approach is that used in Ontario's existing ICCA, which is to have a short statute setting out provisions that have been changed from provisions of the Model Law, followed by an appendix comprising the entire text of the Model Law. A drawback to this approach is that the reader must keep checking back and forth in some manner to see what has been changed.

A second approach is to include a table of concordance between the statute and the Model Law, which while helpful, still requires the reader to check back and forth between the jurisdiction's statute and the Model Law.

A third approach is to set out, beside each provision of the statute, the article or sub-article number of the Model Law that it reflects, so that a reader knows which provision of the statute corresponds to, or deals in a different way with, each provision of the Model Law. Of course, this still leaves the reader having to compare the provisions of the statute and the Model Law to see how they differ.

A fourth approach is that taken by the British Virgin Islands in the *Arbitration Act, 2013*[17] ("BVI Act"), which is to set out in the body of the statute the provisions of the Model Law that are part of the BVI Act, either with no change or with one or more specified changes. To accomplish this, the BVI Act states that the particular article of the Model Law "has effect", or "has effect subject to", and then reproduces it in the body of the statute.

For example, in section 40:

> 40. Article 17G of the UNCITRAL Model Law, the text of which is reproduced below, has effect:
>
> "Article 17G. Costs and damages
>
> 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 …"

And in section 22:

> 22. (1) Article 11 of the UNCITRAL Model Law, the text of which is reproduced below, has effect subject to subsection 11 (2) and (3):

Where the BVI Act differs from corresponding provisions of the Model Law, the BVI Act so states. For example, in section 11:

> 11. (1) Subsections (2) to (5) have effect in substitution for article 6 of the UNCITRAL Model Law.

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[17] *Arbitration Act, 2013*, No 13 of 2013, as amended (British Virgin Islands); British Virgin Islands International Arbitration Centre > Arbitration > BVI Arbitration Act (bviiac.org).

And in section 44(1):

> 44. (1) Article 18 of the UNCITRAL Model Law is substituted by this section …

While this approach provides all the information needed to see differences from the Model Law in the body of the statute, it may appear to be awkward, and is inconsistent with ordinary statute drafting practices.

A fifth approach would be a combination of other approaches where they can be implemented in a consistent manner. In particular, having a table of concordance (the second approach) would be consistent with the third and fourth approaches. Also, enacting the Model Law as an appendix to the statute can be utilized not only with the first approach but with all the others as well.

The AARC Report does not recommend a particular approach but does recommend that whichever format is used, it should be made easy for readers of the CAA to identify the points of similarity and departure from the Model Law. This is an important recommendation.

> [F]or the purpose of presenting the conclusions of the work of the Committee as a whole in a comprehensive way that can be viewed in a single continuous format, we have attached to this Report as Appendix E a draft CAA in integrated format with cross-references to the Model Law.[18]

Without question, for the reasons set out above, every Model Law statute—and of course including the proposed CAA—should be drafted in a manner that involves the easiest possible,

[18] AARC Report, *supra* note 2 at 14.

most user-friendly way for readers to readily identify the points where the statute is identical to, similar to, or departs from the Model Law.

In my view, for the CAA, this would be achieved best, and in a manner that is consistent with common ordinary legislative drafting in Ontario and in many other jurisdictions, by adopting the approach taken in Appendix E to the Report.

The CAA should be a self-contained, integrated statute with all provisions flowing sequentially, and with cross-references to the Model Law beside each provision. In addition, the CAA should include as appendices, first, a copy of the Model Law, and second, a table of concordance between the CAA and the Model Law for further assistance to a reader.