INSTITUTE OF LAW RESEARCH AND REFORM

EDMONTON, ALBERTA

TOWARDS A NEW ARBITRATION ACT FOR ALBERTA

ISSUES PAPER No. 1

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INSTITUTE OF LAW RESEARCH AND REFORM

The Institute of Law Research and Reform was established January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

The Institute's office is at 402 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5. Its telephone number is (403) 432-5291.

The members of the Institute's Board of Directors are J.W. Beames, Q.C. (Chairman); Professor R.G. Hammond (Director); Myra B. Bielby; C.W. Dalton; J.L. Foster; W.H. Hurlburt, Q.C.; H.J.L. Irwin; Professor J.C. Levy; Professor D.P. Jones; The Honourable Mr. Justice D. Blair Mason; Dr. J.P. Meekison; Bonnie Rawlins; A.C.L. Sims; and C.G. Watkins.

The Institute's legal staff consists of Professor R.G. Hammond, Director; Richard Bowes; Professor C. Davies; Brian Burrows; and Margaret A. Shone. W.H. Hurlburt, Q.C. is a consultant to the Institute.

LIBRARY NOTE

For library purposes this Issues Paper should be treated as the first of a series of issues papers, although its use by the Institute is experimental. It differs from the Institute's Reports for Discussion in that, although it raises issues and provides information relevant to them, it does not give even tentative views of the Institute. It will be superseded by a final report.

PREFACE

and

INVITATION TO COMMENT

Voluntary or consensual arbitration, that is, arbitration under an agreement to arbitrate, is a subject which is important to a wide range of persons in Alberta today. Arbitration is not a new process. It has long been an alternative to court actions for resolving disputes under commercial and construction contracts. It is becoming used more and more to resolve consumer and other disputes.

The parties to a dispute can decide how an arbitration of that dispute is to be carried on. The Arbitration Act, however, performs a number of important functions. It provides a "fall-back" position when the parties have not agreed on something or when their agreement leaves a gap in the procedure. It provides for court supervision of arbitrations. It provides for the enforcement of arbitrators' awards.

The Arbitration Act is therefore an important statute. It is also a very old statute, much of it being taken from the English Arbitration Act of 1889, which was based upon 19th century commercial arbitrations in England. Given its present importance, it is timely to consider whether its underlying philosophy and its working features are well suited to the resolution of disputes under Alberta conditions as those conditions exist today and as they may be expected to exist for the foreseeable future.

Representations made to the Institute of Law Research and Reform over the years have suggested that changes in the Arbitration Act are needed, and the Alberta Arbitration and Mediation Society has taken initiatives toward the preparation of a new arbitration statute. Because of these suggestions and initiatives, but also because we believe the subject to be timely and important, we have undertaken a study of the Arbitration Act and the associated common law. The preliminary indications are that changes are needed and that our project will result in recommendations for a revised and modernized arbitration statute which we hope will commend itself to the Legislature.

We are putting forward this issues paper as a preliminary step in that exercise. The issues paper has two purposes. One is to obtain information about the working of the present law. The second is to obtain informed advice about the policies upon which an arbitration statute should be based in Alberta today and for the foreseeable future.

The paper, which has been prepared by W.H. Hurlburt, Q.C. -- a former Director of the Institute and a consultant to it on this

project -- is designed to provide background information fo the guidance of people and organizations who wish to make submissions to us, and to stimulate discussion. It suggests the sorts of issues which a review of the present law ought to encompass. It is not intended to suggest even tentative solutions to the issues.

The Institute invites comment on the matters raised in the paper and on any other matters touching on or concerning the private arbitral process in the province. It is emphasized that the issues and questions raised in the paper are not intended to restrict the range of submissions which might be made. Commentators should feel completely free to raise other matters for discussion.

There are a great many issues raised in the paper. There is no need for a commentator to address them all.

It is also emphasized that the Institute's Board, which is its governing body, has not formed any final, or indeed, tentative, views, on any of the issues raised in the paper. The Board has directed that the solicitation of the views of a wide range of persons and organizations with an interest in and knowledge of the subject be undertaken before the Institute begins its own deliberations. Institute staff will also engage in consultative processes based upon this issues paper.

The Institute is working to a timetable on this project. We hope to conclude the consultative process by October 31, 1987, and it would be appreciated if any written submissions about the issues could be in our hands no later than September 30, 1987, to give us an opportunity to come back to commentators for further discussion. Any person or organization who would prefer to make oral submissions should feel free to do so. If more time is needed, the Institute will be grateful if the commentator will so advise the Institute so that it will know when the comments may be expected.

Written submissions should be sent to the Institute to the attention of W.H. Hurlburt at the following address:

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Anyone who wants to obtain further information or to make oral comments should telephone W.H. Hurlburt at (403) 432-5291, or, failing him, the Director of the Institute, Professor R.G. Hammond at the same telephone number.

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TABLE OF TERMS USED IN THIS PAPER

Arbitration: We use the term "arbitration" to mean a process by which a tribunal other than a court decides a dispute between parties under a prior agreement by which the parties have agreed to honour the decision of the tribunal (the arbitrator), but we exclude from the term for the purposes of this paper arbitrations governed by statutes other than the Arbitration Act, such as international commercial arbitrations and labour arbitrations.

Sometimes parties will agree to refer a dispute to "non-binding arbitration", that is, to refer the dispute to an "arbitrator" whose decision will not be binding. While this may upon occasion be a useful procedure, we do not think that this use of the term "arbitration" is correct. In any event, we will use the term to denote, and to denote only, a process which will result in an award which is binding upon the parties to a dispute.

Nor does the term "arbitration" include the process or processes called "mediation", "conciliation" or "negotiation" which are intended to help the parties to a dispute to reach their own resolution of the dispute. It includes only an independent adjudication in which the independent adjudicator decides what are the respective rights of the parties to a dispute.

Arbitration agreement: The Arbitration Act talks of a "submission", which it defines as "a written agreement to submit present or future differences to arbitration whether an arbitrator is named in it or not". Except for the word "written", which we will later recommend be dropped, this definition is satisfactory, but we propose to use the term "arbitration agreement" to denote such an agreement.

Arbitrator: We will use this term to denote a tribunal which conducts an arbitration, whether it is composed of one arbitrator or more than one, and whether or not it includes an umpire whose function it is to decide when arbitrators named by the parties have failed to agree. "Arbitral tribunal" would be more precise but more cumbersome, and we do not wish to say "arbitrator or arbitrators" every time.

Award: This is the decision of an arbitrator which decides the dispute and the rights of the parties with respect to it.

Domestic arbitration: We will use this term in contrast to "international arbitration". It signifies an arbitration the connotations of which are local to Alberta rather than international. Needless to say, while it could include an intra-family arbitration, that is not its primary meaning.

International arbitration: This term includes an arbitration which has an international character. The characteristics of an

international arbitration are described in Section D.

Natural justice: The rules of natural justice have to do with procedure. A precise definition is not practical, but, under the rules of natural justice, an adjudicator must act fairly, in good faith and without bias. He must give each party an opportunity of adequately stating his own case and meeting the case of the other.

Submission: This is a technical term which is used to describe an agreement that a dispute or disputes will be referred to arbitration. We think that the usage is archaic and confusing. We will use it as little as possible in this paper, and we hope that it can be removed from the law.

TABLE OF ABBREVIATED REFERENCES

Statute or convention	Abbreviated reference
UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985 (See Schedule B)	UNCITRAL Model Law, or Model Law
Arbitration Act, RSA 1980 c. A-43, as amended by SA 1983 c. 18 (See Schedule A)	Arbitration Act, or Arbitration Act (Alberta)
International Commercial Arbitration Act, SA 1986 c. I-6.6 (See Schedule B)	ICAA
Commercial Arbitration Act, Statutes of British Columbia 1986, c. 3	BC Act

Note: The UNCITRAL Model Law is adopted as a schedule by the ICAA, with a few minor modifications. An article in the UNCITRAL Model Law as it appears in the ICAA schedule is cited as ICAA/Model Law Article *.

Book or report	Abbreviated reference
Mustill, Sir Michael J., & Boyd, Stewart C., Commercial Arbitration, Butterworths 1982	Mustill
Russell on the Law of Arbitration, 20th edition, Anthony Walton, Stevens & Sons 1982	Russell
Report on Arbitration, Law Reform Commission of British Columbia, LRC 55, 1982	BC Report

LIST OF ISSUES

(1) Should the parties to an arbitration agreement be able to exclude any or all of the jurisdictions which the Court has or should have under the arbitration statute?

(2) If an exclusion agreement is to be permitted, should the parties be able to enter into it at any time or only after an arbitration has been commenced?

CHAPTER 1

INTRODUCTION

A. Purpose of Paper

As we have stated in the Preface, the purposes of this paper are to obtain information about the working of the present law relating to private arbitration and to obtain informed advice about the policies upon which an arbitration should be based in Alberta and for the foreseeable future.

B. What is Arbitration?

"Arbitration", for our purposes, means a process by which a tribunal other than a court decides a dispute between two or more parties under authority granted by the parties under an arbitration agreement. The tribunal (which we shall call an arbitrator) may be appointed in the arbitration agreement, or under a process set out in the agreement, or, sometimes (if an arbitration does not make adequate provision for the appointment of the tribunal), by a court.

We have excluded from our project arbitrations to which parties are compelled by law to resort, of which labour arbitrations are an important example. We have also excluded arbitrations governed by special statutes, of which arbitrations governed by the International Commercial Arbitrations Act are an important example (though we will refer extensively to that Act as a possible model for a new arbitration statute).

Our project, then, covers only arbitrations which are private in the sense that they are not mandated by a special law (though a public body, such as the government, may be a party to a private arbitration). It covers only arbitrations which are consensual or voluntary in the sense that the parties to the dispute have agreed to refer the dispute to arbitration (whether the agreement is in their original contract or is made specially after a dispute has arisen).

The reader should therefore note that when we speak of arbitrations in this paper, we are, in the absence of context showing the contrary, referring only to private consensual arbitrations, and, where we are raising issues and making proposals, we are referring only to private consensual arbitrations which are not governed by another statute. Since international commercial arbitrations are governed by another statute, we will occasionally refer to "domestic" Alberta arbitrations, meaning arbitrations which are not international in character.

C. What is Involved in an Arbitration?

The steps in an arbitration are as follows:

1. Agreement to arbitrate (now technically called a "submission"). Usually this is contained in a larger contract between the parties and provides that some or all disputes which may arise under the contract will be referred to arbitration. Less frequently, parties will agree to refer to arbitration a dispute which has already arisen. An agreement to arbitrate is commonly in writing, though an

oral arbitration agreement is not impossible, and the Alberta Arbitration Act deals only with written agreements.

2. Appointment of an arbitrator or arbitrators. The agreement to arbitrate may name a specific arbitrator, or, more commonly, it may lay down a procedure by which the arbitrator is to be named. The parties can get together and agree upon the arbitrator. If the procedure is not adequately covered by an arbitration agreement, the Court of Queen's Bench may be able to appoint the arbitrator.

3. Reference to arbitration. One party may give the other party notice that there is a dispute and demand arbitration, or the parties may get together and agree to refer the specific dispute to arbitration.

4. Arbitration proceedings. These can be very informal: the parties can agree to submit prescribed material to the arbitrator which he will read and upon which he will decide. More commonly, the arbitrator will hold a hearing, which may be conducted more or less like a trial in court, though the tendency is towards less formality than is involved in a trial in court. Generally speaking, the arbitrator must see that every party has proper notice of the proceedings and is given a fair chance to put forward his case and to dispute the case of the other party.

5. Award. Having received the evidence and arguments of the parties, the arbitrator makes an "award" or decision which decides the dispute.

6. Enforcement of the award. The parties will probably do what

the award tells them. If one does not, the other must turn to the court system to enforce the award through usual court processes.

D. The Law About Arbitrations

(1) The place of voluntary arbitrations in the legal system[1]

A voluntary arbitration is created by a contract between the parties to a dispute. The contract determines what disputes can be arbitrated, and it can, if the parties wish, determine who the arbitrator shall be and what ground rules shall apply.

Parties may choose to arbitrate rather than to litigate for one or more of a number of different reasons. They may think that arbitration is cheaper than litigation. They may think that it is faster. They may think it less formal. They may think that a specialist arbitrator will give a better decision than will a generalist judge. They may want privacy. They may think that a less adversarial procedure will allow a dispute to be resolved with less chance of injury to a long-standing business relationship. It is not the function of this project to analyse the reasons why parties choose arbitration or to assess the validity of those reasons. It is enough for this purpose that many parties do choose arbitration.

There is a choice of approaches which the law can take to arbitrations. Broadly speaking, the first approach is to treat arbitrations as part of the system for the administration of justice. This approach leads to greater supervision and control

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[1] The treatment of this subject in Mustill & Boyd is very clear and succinct. See pages 5-9.

by the courts, which supervise the administration of justice. The second approach is to treat arbitrations as something which is really between the parties and is not an aspect of the public legal system. This approach leads to lesser supervision and control by the courts.

It would not be practicable for the legal system to ignore arbitrations entirely. If it did, there would be no way of enforcing an agreement to arbitrate or an arbitrator's award. An arbitration agreement, like any other contract, requires enforcement by the legal system in order to be effective.

The general approach which the law has taken in Alberta and in other common law jurisdictions is to recognize arbitration as a valid form of dispute resolution. It has made provision for assistance in the process and for enforcement of awards. It has imposed some supervision of the process by providing for removal of arbitrators and setting aside awards, and it may allow an arbitration to be pre-empted by a lawsuit, though the courts lean against pre-emption. But, in general, it has tended to treat arbitration as something which the parties have chosen for themselves and to which they should be left in the absence of strong reason to the contrary.

(2) International commercial arbitrations

We will first mention the International Commercial Arbitration Act (ICAA), which is included in the attached material. We do so because it is a new piece of law which applies to commercial arbitrations which take place in Alberta but which have certain international connotations.

The ICAA governs "international commercial arbitration". This term is defined to include a number of different classes of commercial arbitrations: (a) a commercial arbitration between parties whose respective places of business are in different countries; (b) a commercial arbitration in which the place of arbitration, the place where a substantial part of the commercial obligation is to be performed or the place with which the subject-matter of the dispute is most closely connected, is outside the country in which the parties have their places of business; and (c) an arbitration where the parties have expressly agreed that the subject-matter relates to more than one country.

Provincial legislation similar to the ICAA has been enacted by most of the provinces and by Parliament. It is the result of remarkable experiment in federal-provincial cooperation, sparked by the government of British Columbia, which was anxious to establish Vancouver as a centre of international arbitrations, and by the federal government. It is based upon a Uniform Act prepared by the Uniform Law Conference, and it adopts two international conventions, the New York Convention[2] and the UNCITRAL Model Law.

Because the ICAA is a recent expression of the will of the Legislature, and because it is part of an exercise in providing a hospitable atmosphere for international commercial arbitrations throughout Canada (though more particularly in the provinces which have extensive commercial contact with other countries), a reconsideration of it is outside our project.

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[2] This is the name commonly given to 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 June 10, 1958.

(3) Arbitrations under federal law

As we have mentioned above, Parliament, like many of the Canadian provinces, has adopted an international commercial arbitration statute based upon the UNCITRAL Model Law. Parliament, however, has gone one step farther: the Commercial Arbitration Act, S.C. 1986 c. 22, applies not only to international commercial arbitrations, but also to domestic arbitration which fall under federal law, including domestic arbitrations to which at least one party is a federal government department or a federal crown corporation, and also including domestic arbitrations relating to maritime or admiralty matters.

(4) UNCITRAL Model Law as a possible model

Although our project does not include international commercial arbitrations, it should be noted that the UNCITRAL Model Law could be used as a model for a domestic Alberta arbitration statute, just as it has been used as a model for a domestic federal arbitration statute. We have accordingly referred to the Model Law, in the form in which it has been adopted by the ICAA, throughout this paper.

(5) Arbitrations in general

(a) Purpose of the discussion

We will now make a brief general statement of some of the legal principles and rules which govern arbitrations. This statement is not a treatise. The principles and rules stated are only those which we think will help the reader to address the broad issues raised by this paper. Some of them will be

amplified when we come to discuss specific issues.

Please note specifically that in this part of the paper we are trying to describe the law as it is, not the law as it should be. The description is for the reader's information only.

(b) Sources of law

Much of the law relating to arbitrations is found in the common law, that is, the law made by court decisions. The rest is found in the Arbitration Act. As we noted in the Preface, that Act is largely copied from the English Arbitration Act of 1889, which was the model for several provincial arbitration statutes. Some additions have been made to the Alberta statute over the years, including a specialized provision dealing with arbitrations involving the price of gas, but it is still substantially faithful to its model.

(c) Rights of the parties

The law recognizes the right of contracting parties to agree that a tribunal other than a court is to decide their disputes. It provides a structure within which the disputes are to be decided, but it allows the contracting parties to make substantial variations in that structure and leaves some parts of it to be filled in by the parties or by the arbitrator. The law does reserve to the courts, however, significant powers to police the arbitration process and to change its outcome.

(d) What may be arbitrated?

The agreement to arbitrate defines the disputes which can be referred to arbitration. It may cover a dispute which has

already arisen. More commonly, it is included in a larger contract and includes any dispute which may later arise under the contract.

The parties can agree to allow the arbitrator to decide questions of fact and questions of law. They can agree to allow the arbitrator to interpret the contract in which an arbitration clause appears, and even to rectify that contract on grounds of mistake. They can agree to allow the arbitrator to decide whether a contract has been broken and whether it has been brought to an end. Whether they have agreed to do so depends upon the wording of the agreement to arbitrate. An agreement to refer to arbitration all disputes which may arise under the agreement is probably broad enough to cover issues of these kinds.

It is generally thought, however, that the parties to an agreement to arbitrate cannot agree to allow the arbitrator to decide whether a contract came into existence in the first place. The feeling is based upon the fact that the arbitrator has no power to decide that there was a contract in the first place, because he derives all his power from the contract. To allow him to decide about the initial existence of the contract would allow him to decide that he had no power to decide because there was no contract.

(e) Appointment of arbitrator

The arbitration agreement may specify the number of arbitrators. If it does not, section 1 of the Schedule to the Arbitration Act provides that there must be a single arbitrator.

The agreement may name an arbitrator or establish a procedure for his appointment. In some cases in which either the agreement does not provide any such procedure or does not provide for an appointment under the specific circumstances which have arisen, section 5 of the Arbitration Act gives the Court of Queen's Bench power to make an appointment. The arbitrator need not have any special qualifications, unless the arbitration agreement says that he must, but he must be and must appear to be impartial.

(f) Arbitrator's duty to apply law

An arbitrator must apply law, much as a court does. He cannot decide upon his own view of justice and equity, and it is generally said that the parties cannot authorize him to do so (though this is not beyond doubt).[3]

(g) Procedure to be followed

An arbitrator must follow any procedure which the parties to the arbitration have agreed upon. Where the agreement does not provide a procedure he may adopt his own procedure. Generally speaking, he should follow an adversarial procedure which gives all parties an opportunity to present evidence and arguments and which follows the rules of natural justice. The parties may, however, agree to dispense with such a procedure: they may, for example, agree that an arbitrator can determine by his own examination whether goods are of a certain description or that an arbitrator can determine a question by reviewing documents or correspondence.

(h) The arbitrator's award

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[3] See Mustill 50 and following.

The arbitrator must decide every question which is referred to him. There are a number of things which he can do in relation to subjects referred to him, unless the arbitration agreement precludes him from doing so. He may declare what the rights of the parties are as against each other. He may require one party to pay money to another.

It is at best doubtful that an arbitrator has the power under the law to compel one party to do something other than to pay money to the other. The courts themselves do so only in limited situations in which putting a party in prison is seen as a reasonable way of compelling him to do what is ordered. In the cases in which a court does order a party to do something it is usually under the rubric of an order for "specific performance", which is a technical remedy usually associated with the superior courts and which is usually given in a case in which the turning over of property is involved. A "mandatory injunction" can also require a party to do something, but such an order is uncommon.

An arbitrator does not have the power to commit a party to prison for contempt of the arbitrator's order to do something. If he makes an award requiring a party to do something, the most that can be done with the order is to apply to the Court of Queen's Bench for the leave of the Court to enforce it as an order of the Court. The Court has a discretion to refuse the leave, and if it does grant the leave, it still has a discretion to refuse to exercise the power to commit for contempt for a breach of the order. The Court is not likely to try to enforce an order which it could not have made itself.

It is not so difficult to get an order from the Court forbidding a party to do something (an injunction). An award which made an order in the nature of an injunction would also be dependent upon the Court to grant leave to enforce the order and to commit a party to prison for contempt for refusal to obey it.

No doubt, there are agreements to arbitrate which provide for arbitrators making orders directing parties to fix up whatever is complained of, and no doubt arbitrators make common sense orders to resolve disputes. Nevertheless, the legal foundation for such orders and their legal effectiveness, if challenged, appears, as we have said, to be at best doubtful.

An arbitrator can award interest and costs. He cannot bind persons who are not parties to the arbitration agreement.

(i) Enforcement of an arbitrator's award

The parties to a private consensual arbitration agreement are taken to have bound themselves by contract to comply with the arbitrator's award, which is therefore enforceable against them by whatever means are available. Unlike a court, however, an arbitrator cannot make the machinery of the state available to enforce the award, so that something more -- court intervention -- is needed before a complainant can gather in the fruits of the award if the respondent is recalcitrant.

There are two procedures by which a party can obtain court intervention in Alberta. The first is to sue on the award in the Court of Queen's Bench: because one party has a contractual right to have the award honoured, the Court can give judgment requiring the other party to honour it. The second is to bring

an application for leave of the Court of Queen's Bench to enforce the award as if the award itself were a judgment or order of the Court. When the leave is granted, the Court machinery becomes available for the enforcement of an award.

(j) Intervention by the Court of Queen's Bench

(i) During the arbitration

The first form of intervention is supportive of an arbitration. The existence of an arbitration agreement, or even the commencement of an arbitration, does not of itself stop a party from bringing an action in court to adjudicate on a dispute of the kind which is to be arbitrated. The court in which such an action is brought can, however, intervene and grant a "stay" of the action, that is, it can order that no further proceedings be taken in the court action. The granting of a stay effectively stops the court action and permits the arbitration to proceed unhindered. The refusal of a stay allows the court action to proceed. Although the statute does not say so, there is judicial authority which says that if a stay is refused, the court action takes precedence and the arbitration cannot proceed.[4]

Under the present law, the court must, in most circumstances, grant a stay if the arbitration agreement says that the completion of the arbitration is a condition precedent to the bringing of an action in court. If the arbitration agreement tries to exclude the jurisdiction of the courts by any other form of words, however, a court has a discretion to grant or refuse the stay.

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[4] *Doleman & Sons* v. *Ossett Corporation* [1912] 3 KB 257, 269 (Court of Appeal); Mustill 461-62.

The next form of court intervention may result in an arbitration being stopped. Section 2 of the Arbitration Act reads in part as follows: "A submission, unless a contrary intention is expressed in it, . . . is irrevocable except by leave of the Court. . .". As a matter of language, this provision does two things. First, it says that a party cannot unilaterally revoke an agreement to submit to arbitration. Second, it says, in a back-handed way, that the Court of Queen's Bench can allow a party revoke such an agreement. One Alberta case[5] suggests that granting a party leave to revoke a submission involves much the same considerations as refusing to stay a court action involving the subject-matter of the arbitration, which makes sense if each will have much the same result, i.e., stopping the arbitration and allowing the court action to proceed.

There is, however, English authority which interprets revocation of a submission to arbitration to mean something else, that is, revocation of the authority of an arbitrator.[6] The BC Report accepted this authority and the BC Act has a provision which talks about revoking the authority of an arbitrator. Apparently the reason for this is that the Arbitration Act provision is historically based upon the power which a party to an arbitration agreement had at common law to revoke the authority of an arbitrator appointed by him.

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5 *Mobil Oil Canada Ltd.* v. *Pan West Engineering & Construction Ltd.* [1973] 1 WWR 412 (Alta. S.C.).

6 Re Smith & Service and Nelson and Sons (1890) 25 QBD 545 (CA).

Since revoking a submission, that is, an agreement to arbitrate, seems to us to be one thing, while revoking the authority of a particular arbitrator seems to us to be a different thing, we find the law which we have described in the two immediately preceding paragraphs to be quite confusing. To clear up the confusion, however, would take a good deal of legal research and a good deal of legal exposition in this paper, and we do not think that either is justified. We think that it is possible to consider what the law about court intervention in arbitrations should be in the future without resolving this arcane mystery of the past, and we do so in Chapter 7.

The next form of court intervention does not usually stop the arbitration. Under section 11(1) of the Arbitration Act, the Court of Queen's Bench can also remove an arbitrator who has "misconducted himself". These words obviously include corruption and unfairness, which most people would consider to be "misconduct". It also seems clear that the Court can remove an arbitrator on grounds of bias or reasonable apprehension of bias, whether under this provision or not. The words "misconducted himself", have, however, been interpreted much more broadly, as "going beyond any sense of moral culpability and including an error of law on the face of the award. That which would be mere regrettable error, if done by a judge, earns for the arbitrator the opprobrium of 'misconduct' with whatever double standard that may involve."[7] "Misconduct" includes making a technical but serious error in conducting the proceedings -- hearing evidence in the absence of the other side, for example. It also includes

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[7] *Mijon Holdings Ltd. and Mesza Holdings Ltd.* v. *City of Edmonton* (1980) 12 Alta. L.R. (2d) 88, 94, per Laycraft J.A., speaking for the Court of Appeal.

fixing excessive costs for the arbitrator. It may be broadly said to include any failure to conduct proceedings in the way required by law.[8]

Section 14 of the Arbitration Act provides for another form of court intervention. Under section 14, the arbitrator may "state in the form of a special case any question of law arising in the course of the reference". This allows the Court of Queen's Bench to give a consultative judgment saying what the law is. The arbitrator may himself decide to state a case or he may state a case on the application of a party. However, a party to the arbitration may apply to the Court to direct the arbitrator to state a case, in which case it is compulsory that he do so. The Court's answer to the question raised by the stated case is not itself binding, but it is not likely that an arbitrator would disregard it. Section 7(b) of the Act allows the arbitrator to state his award in the form of a special case, so that the result will go one way or other according to the Court's decision on the question of law raised by the award.

There is one additional way in which the Court could intervene. That would be by making a declaration that an arbitrator has no jurisdiction or power to act in the way proposed, either with or without an injunction ordering the arbitrator not to proceed in that way.[9]

(ii) <u>After the conclusion of the arbitration</u>

Generally speaking, an arbitrator's award is final and the

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8 Mustill 494-95.

9 Mustill 514.

courts should not interfere with it. There are, however, exceptional cases in which the Court of Queen's Bench can set aside an award under section 11 of the Arbitration Act or send the award back to the arbitrator for further consideration under section 10.[10]

The more important of the exceptional cases in which the Court may set aside an award or send it back to the arbitrator for reconsideration are as follows:

1. where the arbitrator has not conducted the proceedings according to the arbitration agreement, has acted in a way which is contrary to public policy, has dealt with an issue which is outside his jurisdiction, has not dealt with an issue which was referred to him, or has given an award which is not clear.

2. where the arbitrator is corrupt or biased.

3. where the arbitrator has not complied with the rules of natural justice.

4. where the award has been "improperly procured". Apart from cases in which the arbitrator has been corrupted, which will fall under "misconduct" as well as improper procurement, there may be a case in which a party has

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10 There can be an argument whether the Court, in addition to its powers under these sections, has inherent powers under the common law to set aside awards. However, Laycraft J.A., speaking for the Court of Appeal, said in *Mijon Holdings Ltd. and Mesza Holdings Ltd.* v. *City of Edmonton* (1980) 12 Alta L.R. (2d) 88, 93, that the power is entirely statutory. Since his definition of "misconduct" was broad enough to cover any form of error for which the Court is likely to want to set aside an award, the question whether the Court has an additional source of power is too academic for this paper.

deceived the arbitrator or concealed evidence.

5. where the arbitrator has made a mistake and asked to have the award remitted to him for reconsideration, or where fresh evidence of some weight has been discovered and the evidence could not by due diligence have been obtained for the arbitration proceedings. Both of these are generally perceived grounds only for remission back to the arbitrator, not for setting aside the award.

6. where there is error on the face of the award. Though the error is sometimes said to include error of fact, the usual examples involve an error of law which is material to the decision. There is an exception to this exception, namely, that if the specific question of law was referred to the arbitrator, the Court will not, in most circumstances, set aside the award because the arbitrator has given a wrong answer to the question.[11] Admitting evidence which should not be admitted, or making a finding of fact without evidence, or interpreting a contract or statute on wrong principles, can be an error of law.

It should be noted that one difficulty in the way of a party who wants to take advantage of Court's power to set aside an award for error -- the fact that the error must appear in the award itself -- can be got

[11] Some recent decisions have made it difficult to expound this part of the law in a way which is both precise and intelligible and have cast some doubt upon some aspects of these propositions. We think, however, that the statements which we have made are appropriate for this paper.

around by an application to the Court to require the arbitrator to state a question of law in the final award.

These cases are not exhaustive. The "misconduct" for which a Court can intervene is a malleable and flexible concept, and courts have been known to intervene because particular facts suggest strongly that an award is unreasonable or that grave injustice is taking place. However, we think that this account will acquaint the reader with the most important bases for setting aside or remitting awards.

There are in theory two other ways in which a party might try to escape from an arbitrator's award. One is to sue for a declaration of the Court that the award is a nullity, probably on grounds of lack of jurisdiction. This is rarely, if ever, done after the award, as participation by the party in the arbitration proceedings is likely to be grounds for refusing a declaration that the proceedings are a nullity, and it would be a bold party who would allow the proceedings to proceed in his absence with the intention of attacking them later.[12] The second would be to ask the Court not to give leave to enforce the award (or to oppose any other proceedings in which the other party might seek to enforce the award). This would rarely be a safe course of action.

(k) Effect of award

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[12] This is not unheard of. It is substantially what happened in *Gauthier* v. *The King* (1918) 56 SCR 176, where the federal Crown successfully resisted an action on an arbitration award on the grounds that it had revoked the authority of the arbitrators before the hearing was conducted.

Unless an award is set aside or declared to be a nullity, it is final and binding. The parties' original rights and obligations are, to the extent that they were the subject of the arbitration, at an end. Instead they have the rights and obligations which the award gives and imposes. Neither party can, as against the other, dispute the facts which the arbitrator has found. Persons who were not parties to the arbitration are not affected.

(6) Gas purchase price arbitration

Section 17 of the Arbitration Act is a special provision inserted in the Arbitration Act to deal with the determination or redetermination by arbitration of the price of gas sold under gas purchase price contracts. It makes two substantive provisons: (a) it prescribes a number of factors which an arbitrator must take into consideration; and (b) it requires that a single arbitrator or half of two or more arbitrators be ordinarily resident in Alberta. The parties to a gas purchase contract may contract out of the provision.

E. Our Approach

(1) Scope of project

Our project, as we have said earlier, is not concerned with international commercial arbitrations, labour arbitrations, or arbitrations conducted under other statutes which provide codes for arbitrations conducted under them. It is concerned with domestic -- that is, intra-Alberta -- arbitrations of all kinds which are not governed by other statutes. It is concerned also

with arbitrations which have an inter-provincial or international aspect (but are not international commercial arbitrations to which the ICAA applies) and in which the applicable law is the law of Alberta.

(2) Conduct of project

Australian law reform commissions have investigated and reported upon the subject of arbitration. So has the Law Reform Commission of British Columbia. The Alberta Arbitration and Mediation Society and the Arbitrators' Institute of Canada have done much work in the area. Reliable textbooks have been written about the subject.

We are satisfied that all these efforts have identified the principles underlying arbitration, the problems which should be addressed, and the range of solutions which is available. We are satisfied that they have turned up all the relevant law (with the possible exception of Alberta judicial decisions, which we have examined for ourselves).

We therefore do not propose to launch a massive research project to plough the same ground. Instead we propose to rely to a great extent upon what has been done, and in particular upon the BC Report, which embodies a recent and thorough examination of the law in a province the legal system of which is similar to that of Alberta.

(3) Approach to proposals

Our first proposition is that the law relating to arbitrations should be designed to satisfy the interests of those

who enter into arbitration agreements, or who would do so under a properly designed system, considered as a class. The difficulty is in determining what is in the interests of that class.

Of course, the arbitration system cannot at one and the same time satisfy the interest of a claimant in establishing his claim and the interest of the respondent in rebutting it. That is, it cannot provide every party with a victory over every other party. But there are certain interests which the parties to arbitrations, considered as a class, do have, though not all of these interests are present in different arbitrations in the same degrees, or at all. These include interests in cheapness, expedition, the ability to design a procedure suitable to the parties, justice, expertise of the adjudicator, informality, privacy, and a non-adversarial procedure which will enable the parties to an arbitration to have their dispute resolved by a procedure which will enable them to have continued business relations.

The law cannot itself ensure that all these interests are satisfied. It ought, however, to satisfy them to the extent that it can, and it ought to leave as much freedom as possible to the parties to an arbitration agreement to devise a system which will satisfy their particular interests.

Our second proposition is that the law should not try to drive litigants either towards the litigation system or towards the arbitration system. There should be a free choice. But the law should either provide arbitration machinery which is efficient or allow the parties to do so. Efficiency is measured here in terms of the satisfaction of the interests of the parties

to arbitrations.

Public interests are nevertheless involved. One is the public interest in a legal system which deals justly and efficiently with the members of Alberta society. A second is the public interest in keeping down public costs, which the arbitration system helps to satisfy because a much greater part of the cost of arbitrations is born by the parties than is the case in the judicial system. However, while the public interest in keeping public costs down is an argument for making an efficient alternative available, we do not think that it justifies compelling litigants to arbitrate if they want to litigate.

The various interests of parties to arbitrations may, of course, come into conflict. In particular, their interest in cheapness and expedition may come into conflict with their interest in getting justice. These interests must be balanced against each other when the time comes to consider what rules, if any, the new statute should lay down for the appointment and removal of arbitrators and the conduct of arbitration proceedings. The greatest difficulties in balancing these interests come, however, when the supervisory role of the courts is considered. These difficulties will be discussed later in this paper.

In the meantime, it should be noted that there are two conflicting philosophical arguments which enter into much of the discussion. One is that the law should not intervene in arbitrations, or at least should not intervene very much, because the parties have agreed upon their tribunal, and one party should

not be allowed to escape into the very judicial system which, for one reason or another, the parties have agreed to avoid.

This argument is somewhat weakened by the fact that arbitration clauses are often contained in standard form contracts under which one party must accept terms dictated by the other, and the further fact that many other arbitration clauses are inserted in contracts with no real weighing of alternatives: a party who has signed a contract put before him on a "take it or leave it basis" or a party who has signed a contract with an arbitration clause without understanding it merely because he was told that it was a good thing to do, has not really applied his mind to the respective merits of litigation and arbitration and it may be that although he has participated in making his bed he should not be compelled to lie in it.

The opposing philosophical argument is based upon the proposition that the courts are there to see that justice is done and should be willing to intervene in arbitrations to ensure that it is.

F. Is Our Approach Adequate?

ISSUE 1.1

Should a bolder and more radical approach be taken to a new arbitration statute than the one proposed in Chapter 1? If so, what should it be?

The approach which we have outlined is cautious. Being based upon what has gone before, it is not likely to (though it could) result in proposals for radical change in the arbitration system. Its tendency is rather to accept the existing system as

a functioning one and to look to see what improvements might make it function better.

Is this too narrow and blinkered an approach to the subject? Does the existing Arbitration Act encourage (though it does not compel) the adoption of a complex and legalistic form of arbitration conceived in the image of a complex and legalistic judicial system from which people want to flee? Should the process be freed from its shackles to the judicial system so that arbitrators would turn away from law and legalisms and towards the adjustment of interests on the basis of policy and non-legal considerations?

A reply to such suggestions could be that a new statute based upon the answers to the issues raised in this paper would be likely to leave the parties free to design whatever kind of arbitration they want, within limits which would not prevent the adoption of any model which is likely to be wanted: parties who want radical change can provide it for themselves. A rejoinder to that reply could be that freedom to devise another model is really no freedom at all, bearing in mind the cost in time and money of devising a different model for every different set of circumstances, and bearing in mind that parties do not usually turn their minds to the subject.

The reader might turn his or her mind to this issue before proceeding to look at the kind of legislative structure which would be likely to flow from the issues raised through the rest of this paper. We do not ourselves have any suggestions to make along these lines.

G. Plan of Paper

We will in Chapter 2 raise another threshold question, namely, whether, in order to avoid a proliferation of different arbitration statutes, it would be wise to adopt the essence of either the UNCITRAL Model Law or the recent BC Act in a new arbitration statute, a question the answer to which could be deferred until the reader has considered the specific issues which we raise in the balance of the paper.

The specific issues are included in a number of clusters, which we will deal with in different chapters. These clusters are: issues about the scope of an arbitration statute (Chapter 3); issues about the arbitrator (Chapter 4); issues about the conduct of the arbitration (Chapter 5); issues about the arbitrator's award (Chapter 6); and issues about the nature and extent of judicial supervision (Chapter 7), which are the most controversial.

In Chapters 3 to 7 we will set out individually each issue, the arguments relevant to it, the answers given to it by the present law and by UNCITRAL Model Law, the Law Reform Commission of British Columbia and the AIC draft.

We include as appendices some materials which we think will be useful to the reader and to which we refer throughout the paper. These material include:

1. The Arbitration Act (Alberta) as amended to 1986.

2. The International Commercial Arbitration Act (Alberta), to which the Model Law is Schedule 2 (Appendix B).

3. The recommendations made in the BC Report (Appendix C).

4. The AIC draft (Appendix D).

CHAPTER 2

HARMONIZATION OF LAW

ISSUE 2.1

Should a new arbitration statute be modelled upon either the UNCITRAL Model Law or the BC Act in order to maintain uniformity or harmony of laws? What degree of importance, if any, should be given to the maintenance of uniformity or harmony?

We raise Issue 2.1 now although at this stage it is probably too abstract to answer, and the reader may well want to consider the specific issues before answering it. We raise it here so that the reader can bear it in mind when considering those issues. Perhaps the question to bear in mind is this: is either (a) the UNCITRAL model or (b) the BC Act model so close to being a satisfactory model for a new Alberta statute that it should, in the interests of harmony and efficiency, be accepted and adopted without undue tinkering?

Until recently, there was only one body of arbitration law which applied in Alberta, and that body of arbitration law was very similar to that which applied in most of the common law provinces. That situation of legal harmony existed because the legal systems of the common law provinces started with the common law of England, including the English common law about arbitrations, and because most of the provinces enacted statutes based upon the English Arbitration Act of 1889.

That legal harmony has been disrupted. Three different sets of laws govern arbitrations which take place in Alberta: the Arbitration Act applies to domestic and inter-provincial

arbitrations; the ICAA applies to international commercial arbitrations which take place in Alberta; and the federal Commercial Arbitration Act applies to arbitrations which take place in Alberta to which a federal government department or a federal crown corporation is a party or which involve marine or admiralty matters.

Much the same situation obtains in most of the other common law provinces. However, the BC Act, which governs domestic and inter-provincial arbitrations in British Columbia, is now different in significant respects from the other provincial statutes, including Alberta's Arbitration Act, so that uniformity or harmony of laws from province to province has been somewhat interfered with.

There is a good deal to be said for keeping the law of the provinces as much in harmony with each other as the nature of Canada and its federal constitution permit. This is the reason for the existence of the Uniform Law Conference of Canada, which is a federal-provincial institution which proposes uniform statutes for adoption by the provinces. Similarity of provincial laws avoids much waste and inefficiency for business people and others whose affairs transcend provincial boundaries or who move from one province to another; it helps to develop a common jurisprudence for the benefit of all; and it helps to maintain the notion of Canada as one country. Basically, it can be said that the citizen is entitled to be upset with a lawgiver or group of lawgivers who turn the country into a Balkanized group of provinces whose laws are a patchwork jungle not justified by actual differences in conditions from province to province.

There are of course, other values. The existence of the common law and civil law systems is an important value. The fact that a law is adopted or neglected by everyone does not make it a good law. Local conditions vary. Local ideologies vary.

At the present time, if inter-provincial harmony of arbitration laws is to be maintained, it is difficult to see how this can best be done. Doing nothing would leave Alberta in substantial harmony with most of the provinces lying to the east, though some of them are considering revisions of their arbitration laws in directions which cannot be forecast. Adopting the BC Act would bring Alberta into substantial harmony with British Columbia, but would make Alberta law less harmonious with that of the provinces to the east. If inter-provincial harmony were to be taken as a goal, it would probably suggest that an attempt be made to persuade all the provinces to adopt substantially similar legislation, but such an attempt would be uncertain of success and slow in coming to fruition.

There is also much to be said -- and possibly more -- for maintaining internal harmony, that is, for having the laws which apply to different arbitrations within Alberta as similar to each other as possible. In theory at least, an Alberta arbitrator, or an Alberta lawyer who appears before arbitrators, might, under the present law which applies in Alberta, be required to master and work under three different systems of arbitration law.

It should be noted that two of the three systems of arbitration law which apply in Alberta are very similar to each other. That is because the ICAA and the federal Commercial Arbitration Act both substantially adopt the UNCITRAL Model Law.

That is a consideration which might lead to the conclusion that a new arbitration statute governing Alberta domestic and inter-provincial arbitrations should also adopt the UNCITRAL model. There would then be internal harmony in the arbitration laws, federal and provincial, which apply to arbitrations in Alberta.

It should also be noted that the AIC draft is strongly influenced by the UNCITRAL Model Law, and that if it were used as a model, there would be a significant degree of harmony between the three sets of laws applicable to arbitrations in Alberta.

Two arguments can be made against a conscious decision to use an UNCITRAL model instead of a special design which might be thought to be better. The first is that the importance of internal harmony is overblown: there are not in fact many international or federal arbitrations in Alberta, so that any inconvenience resulting from the application of different systems is insignificant. The second is that the UNCITRAL Model Law was devised for international commercial arbitrations, which are very different from domestic Alberta arbitrations in that it is almost inevitable that substantial amounts of money will be at stake and in that it is much more important to international business people than to local people that the local courts be kept out of the process as far as possible.

By way of final rejoinder, it may be argued that Alberta should try to avoid the tendency, which is implicit in human nature, to want to produce its own detailed version of the perfect law when there are models which competent people have devised, and that the idiosyncratic perfect should not be allowed

to drive out the harmonious good.

We have raised these various arguments for what they are worth. We express no opinion about what view the reader should take of them.

CHAPTER 3

APPLICATION OF ARBITRATION ACT

ISSUE 3.1

(1) Should a new arbitration statute

(a) apply to all agreements to submit present or future differences to arbitration?

(b) whether or not in writing?

(c) excepting only arbitrations governed by special legislation?

(2) If the new arbitration statute is not to apply to oral agreements, should it make oral agreements to arbitrate void, or should it leave them to the common law, or should something else be done about them?

COMMENT:

The Arbitration Act now applies only to a written submission to arbitration. In the absence of a statute, parties who agree to arbitrate will be governed by the old common law.

The BC Report, the BC Act, and the AIC draft include all arbitration agreements, whether written or oral. The ICAA applies to "international commercial arbitration", which sounds exhaustive of all international commercial arbitrations, but provides that "the arbitration agreement shall be in writing", which may mean that an oral international commercial arbitration agreement is invalid or merely that it is not subject to the ICAA.

Agreements to arbitrate are usually in writing. An oral agreement is likely to lead to problems of proof of the agreement, to confusion about what is to be referred to

arbitration, and to general confusion. These considerations suggest that a new arbitration statute should cover written agreements only. The exclusion of oral agreements from the Arbitration Act and its counterparts is not known to have caused any difficulties for anyone, probably because there are few or none of them.

On the other hand, the law recognizes the validity of an oral agreement to arbitrate, and it may safely be said that the parties to such an agreement would not want to be under the old common law, which would be antiquated and difficult to find. This suggests that an arbitration statute should cover an oral agreement, if one is made, as the better choice among evils.

If the choice is to have the arbitration statute apply only to written agreements to arbitrate, it should be possible to determine what the legal situation of an oral agreement is to be (though the rarity or non-existence of oral agreements to arbitrate may make the issue insignificant). The practical choices are (a) to use words which prohibit the making of oral agreements so that the law will take no notice of them, and (b) to leave them, as the Arbitration Act does, to the common law.

ISSUE 3.2

Should a new arbitration statute continue to apply after the death of a party?

COMMENT:

Under the common law, an arbitration agreement does not bind the estate of a deceased party unless it so provides, expressly or by necessary implication. This is because the common law

considered an arbitrator an agent of the parties, and death revokes an agency (BC Report 10). The BC Report (Rec. 2), the AIC draft (s. 4) and the BC Act (s. 10) agree that an arbitration agreement should remain in force despite the death of a party. For the sake of clarity, however, all three go on to provide, in effect, that keeping an arbitration agreement in force does not keep alive any substantive legal right which under the general law is extinguished by the death of a party.

We have no contrary argument to advance.

ISSUE 3.3

Should the arbitration statute apply to the Crown?

COMMENT:

The general rule is that the Crown is not bound by a statute unless the statute says that it is. Although the courts may be pruning the rule back, this is still the apparent effect of section 14(1) of the Interpretation Act, RSA 1980 c. I-7. The Arbitration Act does not refer to the Crown and therefore presumably does not bind it. The question is whether a new statute should do so.

The argument for binding the Crown is that it is not either fair or efficient to leave the Crown out of the statute. In Gauthier v. The King (1918) 15 SCR 176, the Crown in right of Canada was not bound by the Ontario provision that a submission to arbitration is irrevocable except by leave of the Court, and was therefore able to back out of an arbitration to which it had agreed, which seems unfair. On the other hand, it seems likely

that the Crown, if it should wish to do so, could hold the other party to the terms of the Arbitration Act, and it seems unfair that it should have the option of adopting the Act or not adopting it.

Gauthier v. The King threw the Crown's situation back into the old common law. It seems inefficient both to compel parties to go back and find out what the common law was in the absence of a statute, in order to apply nineteenth century rules to a late twentieth century situation.

The ICAA (s. 11) binds the Crown, so that presumably the Crown in right of Alberta has no objection in principle to being bound by an arbitration statute. The federal Commercial Arbitration Act binds the Crown in right of Canada (indeed, Crown arbitrations are an important part of the statute's reason for existence). Section 32 of the AIC draft would bind the Crown. On the other hand, the BC Act does not mention the Crown.

We have not been able to devise a signficant argument against the Crown being bound. There may be something in the Crown's special position which would found such an argument, but the fact that the Crown would come under a new arbitration statute only when it had agreed to arbitrate, and the fact that Parliament and the Legislature have recently subjected the Crown in right of Canada and the Crown in right of Alberta to arbitration statutes, seems to militate against an argument based upon special position.

No doubt there could be problems of enforcement of an award against the Crown. However, if the enforcement of an award is to

be carried out by court order or process, it seems that the problems of enforcement would be much the same as the problems of enforcement of court judgments and orders, and the latter problems are not accepted as a reason why proceedings should not be taken against the Crown in court.

ISSUE 3.4

Should the arbitration statute give a court power to order that parties to a court action go to arbitration instead?

COMMENT:

A court could be given power to refer a dispute to arbitration. The arbitration could be conducted either inside or outside the court system. We are somewhat doubtful whether the subject of court-initiated or court-administered or assisted arbitration belongs in an arbitration statute, but we raise it for discussion. We will described three possible models.

The first model is an outright reference by court order to arbitration outside the court system. Under this model, the court order would perform the same function as an arbitration agreement, and the arbitration would proceed in the same way and with the same consequences as an arbitration started by arbitration agreement. We think that the power to order such a reference could be useful, though we have not considered whether the appointment by a court of an arbitrator to decide a dispute of a kind usually decided by a judge appointed under section 96 of the Constitution Act would infringe that section, as it has been interpreted. The resulting arbitration could hardly, however, be considered voluntary or consensual unless all parties

agree to the reference.

The AIC draft (s. 28) provides for a court reference to arbitration. The provision suggests that the reference would be of the kind we have described. It seems that in England, the High Court's power to refer to arbitration can be exercised only with the consent of the parties.[13]

We will next refer to a model which seems to have found favour in several of the United States.[14] Under it, trial courts are authorized to require the arbitration of civil damage suits which meet certain criteria and to refuse to deal with such suits until the arbitration process has been gone through. The arbitrator's decision is said to be final and binding, but a party may reject it and ask for a trial *de novo*, that is, a trial which is held as if the arbitration had not been held. The arbitration proceedings are comparatively informal. This procedure is intended to relieve the courts of many lawsuits, and is thought to be successful in so doing. Whether or not the procedure is useful, our inclination is to the view that it should be dealt with as part of the litigation process and not under an arbitration statute.

The third model is that set up by Sections 35 and 36 of the BC Act, which read as follows:

> 35. In any proceeding, other than a criminal proceeding,
>
> (a) if all parties interest, and not under

[13] 37 Halsbury, 4th ed., 482.

[14] This brief description is based upon an article by Deborah R. Hensler, What we know and don't know about court-administered arbitration (1986) 69 Judicature 270.

disability, consent,

(b) if the proceeding requires a prolonged examination of documents, or a scientific or local investigation which cannot, in the opinion of the court, conveniently be made before a jury or conducted by the court through its other ordinary officers, or

(c) if the question in dispute consists wholly or in part of matters of account,

the court may at any time order the whole matter, or a question of fact arising in the proceeding, to be tried before an arbitrator agreed on by the parties.

36.(1) In a reference by the court to an arbitrator, the arbitrator is deemed to be an officer of the court and has the authority and shall conduct the reference in the manner prescribed by rules of court and as the court may direct.

(2) The report or award of an arbitrator on a reference is, unless set aside by the court, equivalent to the verdict of a jury.

These provisions appear to us to contemplate a procedure which is very much like a reference to a referee for a report (though it gives the report somewhat more standing than a referee's report usually has) and which leaves the process very much under the control of the court. Further, it is not clear whether, even in the limited cases mentioned in section 35 (b) and (c), the BC court could make an order in the absence of consent, as the power is only to refer to an arbitrator agreed on by the parties and it is by no means clear that the court could appoint an arbitrator if the parties did not agree on one.

It seems to us that a power to refer to an official who is within the court system and under the judge's supervision is better considered in connection with the conduct of litigation

than in connection with the arbitration process and is better dealt with in rules of court than in an arbitration statute.

CHAPTER 4

THE ARBITRATOR

A. Appointment

ISSUE 4.1

Should the parties to an arbitration agreement be able to agree on the appointment of an arbitrator or upon the procedure to be followed to appoint one?

COMMENT:

The BC Report (p. 15) and the BC Act say by implication that the parties are free to provide as they wish for the choice of arbitrators. The AIC draft (s. 6) expressly leaves the parties free to agree on a procedure for appointing an arbitrator, including naming another person to make the appointment.

We have not identified any private or public policy which suggests that the power of arbitrating parties to choose their own tribunal should be restricted in any way (though they cannot, of course, compel anyone to agree to act as arbitrator).

ISSUE 4.2

(1) Should the Court of Queen's Bench have power to appoint an arbitrator

(a) when persons (including parties) whose agreement on the appointment of an arbitrator is contemplated by an arbitration agreement or by statute, do not agree?

(b) when a person or persons by whom the arbitration agreement contemplates the making of an appointment does or do not do so?

(c) when an arbitrator dies, is or becomes

incapable, or simply does not act, and either there is no machinery in the arbitration agreement or the machinery for some reason has not worked?

(2) Should the new statute give the Court any guidance about whom to appoint?

(3) Should the parties be able to exclude the Court's power of appointment?

(4) Should there be an appeal from an order by which the Court appoints an arbitrator?

COMMENT:

An arbitration agreement may provide for the appointment of a single arbitrator by agreement. It may merely provide for arbitration, leaving the number of arbitrators and the method of their appointment to the arbitration statute. It may name the arbitrator. It may appoint a third person to name the arbitrator. It may provide that each party shall appoint one arbitrator and that those two shall appoint a third. No doubt human ingenuity will find other ways to deal or not deal with the appointment of arbitrators.

Each of the Arbitration Act (s. 5), the BC Report (Rec. 4), the BC Act (s. 17), the AIC draft (s. 8), and the ICAA (ICAA/Model Law Article 11(3) and (4)) gives the Court power to appoint an arbitrator when the procedures set out in an agreement and the statute do not result in the requisite appointment or appointments. Each sets out in detail the circumstances to which it applies. We do not see any point in analysing these detailed provisions in this paper. We think it better to address the issue in terms of general policy.[15]

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[15] The specific question of the replacement of an arbitrator whose appointment is discussed under Issue 4.7.

One policy would be to try to save every arbitration where the parties have agreed to arbitrate. This policy would lead to a new statute which would empower the Court to appoint an arbitrator in every case in which there is an arbitration agreement but in which there is no other machinery for the making of the appointment. If that policy is adopted, the provisions in the models mentioned above could be examined to see which provisions best carry out that policy, or some form of comprehensive wording could be devised, as seems best at that time.

The alternative policy would be to leave the parties to what they had agreed to, whether in some circumstances which their agreement has failed to cover, or in all circumstances. If a reader is of the view that this is the correct policy, we would appreciate a statement of reasons for it, and a statement of the circumstances in which the Court should not have power to appoint an arbitrator in default of other machinery.

There is one kind of case in which we can see difficulty with a policy of saving the arbitration when the parties' arrangements have failed. That is the case in which the parties name an arbitrator in the agreement to arbitrate and the named arbitrator is unwilling or unable to act. Does this happen? If it does, is it better to assume that personality of the arbitrator is so important that the arbitration should not go on with another arbitrator, or is it better to assume that the intention to arbitrate is overriding? Presumably, whatever the answers to these questions, the intention of the parties as expressed in the agreement to arbitrate should govern if that

intention can be discerned.

We have raised the question whether the statute should give the Court guidance about whom to appoint as arbitrator. We would have thought that a party who applies to the Court to appoint an arbitrator would put forward a scheme and that the other party would either accept that scheme or put forward one of his own, so that the Court could make a choice between the two. It has been suggested to us that in fact there is sometimes a difficulty. May we have comment?

Finally, we have raised the question whether there should be an appeal from a Court order appointing an arbitrator. The appeal would go to the Court of Appeal. The arguments in favour of permitting an appeal are much the same as those permitting an appeal from any interlocutory order. The arguments against permitting an appeal are the additional cost and delay which would in fact occur, the opportunity which a party would have to use an appeal for the purpose of achieving delay, and the lack of likelihood that the Court would make an appointment which would seriously prejudice the interests of a party.

B. Impartiality and Independence

ISSUE 4.3

(1) Should an arbitrator as a general rule be required to be impartial and independent of the parties?

(2) Should there be any exceptions to the general rule? Should a party-appointed arbitrator be subject to the general rule?

(3) Should circumstances giving rise to a reasonable apprehension of bias be grounds for the removal of an arbitrator?

(4) Should the parties be able to dispense with the impartiality rule

(a) by agreement?

(b) by waiver through conduct?

COMMENT on Issue 4.3(1):

The Arbitration Act does not say that an arbitrator must be impartial or independent, nor does the more recent BC Act or the ICAA. The judicial authorities are, however, emphatic that he must be.

The arbitrator must conduct himself in an impartial way, that is, his conduct must not show bias. Further, he must avoid putting himself, or being put, into a position which will give rise to "a reasonable apprehension of bias", that is, a position which would give a fair-minded person reason to doubt his impartiality. If an arbitrator has a business relationship with one of the parties -- if he is a member, officer or director of a corporate party to an arbitration, for example, or a party is a good customer or regular client, or even if the arbitrator can be shown to have an antipathy to a party -- that may create a reasonable apprehension of bias. If an arbitrator, though with no particular relationship to a party, stands to gain or lose through the decision on the arbitration, that may cause a reasonable apprehension of bias. If an arbitrator has expressed an opinion on the particular dispute in such a way as to give rise to an inference that his mind is closed, there may be a reasonable apprehension of bias.

Speaking as a general matter, it is difficult to find an argument against the proposition that each party to an

arbitration is entitled to be treated fairly and impartially. However, readers may want to comment on the law as we have stated it.

COMMENT on Issue 4.3(2):

If the answer to Issue 4.3(1) is that as a general rule an arbitrator should be required to be impartial and independent of the parties, it is necessary to consider whether or not, in the absence of special agreement between the parties, that general rule should apply to an arbitrator who is nominated by a party to the arbitration.

The first thing to note is that there is a specific English practice under which the parties appoint two arbitrators who attempt to arbitrate the dispute and then, if they do not agree, appoint an umpire who then becomes the sole adjudicator. Sometimes the two arbitrators will then function before the umpire as advocates for the parties who appointed them. The practice is accepted in England. While we are not aware that it is followed in Alberta, there is nothing to stop it being followed, and a new arbitration statute would not prevent it being followed unless it specifically prohibited it.

The next thing to note is that some practical considerations apply to a party-appointed arbitrator which do not apply to an arbitrator appointed in some other way.

The first of those considerations is that a party to an arbitration is likely to want to obtain a favourable decision and is therefore likely to appoint an arbitrator whose pre-dispositions are likely to lead him to make a favourable

decision. This circumstance does not necessarily lead to bias upon the part of a party-appointed arbitrator, but it is an initial element in producing an atmosphere of partisanship among the arbitrators.

The next additional consideration is that an arbitrator who is appointed by a party is likely to have a feeling of responsibility for that party's interests, and he may do anything from ensuring that his appointer's case is properly understood through to identifying with it and advocating its acceptance. There is a personal relationship which is not present under another method of appointment, and it is likely to be a more significant element in producing an atmosphere of partisanship.

Much can be said for requiring all arbitrators, whether appointed by parties or not, to be impartial. Much can be said for a system which clearly allows party-appointed arbitrators to be partisan for their appointers. If, however, a system purported to require all arbitrators to be impartial but in fact permitted a party-nominated arbitrator to be less than impartial, there would be gross unfairness to any party who played by the rules and appointed an impartial arbitrator.

If it is the reader's view that even a party-nominated arbitrator should be impartial, we would appreciate comment upon the practicalities of the situation. We would particularly appreciate receiving comment from those with experience as arbitrators (particularly as chairmen not appointed by parties) on this question: is it possible to be reasonably sure that arbitrators named by the parties maintain strict impartiality? If it is possible, is there anything that an arbitration statute

can do to ensure that strict impartiality will be maintained?

COMMENT on Issue 4.3(3):

This issue also raises the question whether the Court should have power to remove an arbitrator on grounds of actual or perceived bias. It has that power now (and bias on the part of an arbitrator may also be grounds upon which the Court may refuse to stay a court action which will pre-empt the arbitration or upon which it may set aside an award). Comment is requested.

COMMENT ON ISSUE 4.3(4):

Next, it is necessary to consider whether the parties should be able to enter into an arbitration agreement which allows each to appoint an arbitrator who is not impartial, who is not independent, or who is neither impartial or independent.

Sometimes the contracting parties agree to the appointment of an arbitrator even though his relationship to a party or to the subject matter obviously raises doubts about his impartiality for which one party afterwards wants the arbitrator to be removed. An example is an arbitration agreement which provides that the owner's architect shall arbitrate disputes between owner and contractor. This could amount to a waiver of the right to object to the arbitrator on the grounds of apprehended bias.

Section 24(1) of the Arbitration Act 1950 (UK) provides that such an agreement is not a grounds for refusing to revoke the arbitrator's authority or to restrain the arbitration from proceeding. The BC Report (Rec. 20) recommended that the BC Act contain a similar provision, and it does so (BC Act 2. 16(3)).

ICAA/Model Law Article 12(2), however, takes the opposite view. It provides that a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

We can see forceful arguments for both sides. On the one hand, parties should be held to their contracts, and a party who has accepted an onerous arbitration provision may well have done so because of other benefits he has obtained under the contract which contains it, or because at the time he wanted to keep the courts out of any disputes which might arise. On the other hand, an arbitration by a biased, or apparently biased, arbitrator offends against a sense of justice, which is important, and many parties accede to pressure to adhere to standard form contracts or otherwise do not address their minds to potentially dangerous provisions which appear to be part of the standard boiler-plate of a contract.

It seems clear, also, that the parties can agree to the appointment of biased party-appointed arbitrators. A series of decisions on labour arbitrations has recognized this, and in this respect, the decisions seem applicable to all arbitrations, though the actual results of the cases depended upon the interplay of the general principle with the special circumstances of labour arbitrations and special legislation applicable to them.[16]

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[16] Under the *Gainers* decision, a labour arbitrator could act although he was neither independent nor impartial. Under the Court of Appeal decisions, under somewhat different legislation, a labour arbitrator need not be impartial but must be and appear to be independent.

Should the law be changed?

ISSUE 4.4

Should an arbitrator or prospective arbitrator be required to disclose circumstances likely to give rise to justifiable doubts as to his impartiality or independence?

COMMENT:

ICAA/Model Law Article 12(1) imposes this requirement.

C. Regulation of arbitrators

ISSUE 4.5

Should arbitrators, as a professional or occupational group, be subject to any form of regulation?

Needless to say, the function of an arbitrator is an important one and can affect very substantial interests of parties to arbitrations. At present, the law does not require an arbitrator to have any form of qualification, nor does it require an arbitrator to submit to a code of ethics or to any form of regulation of conduct. Professional organizations such as the Arbitrators' Institute of Canada, Inc., and the Alberta Arbitration and Mediation Society exist to promote standards and to provide instruction, but membership is purely voluntary. Is there a public interest which would suggest that some form of regulation is required, and, if so, what?

D. Number

ISSUE 4.6

How many arbitrators should be appointed?

COMMENT:

We are not aware of any argument which would suggest that the parties to an arbitration should not be entitled to agree upon the number of arbitrators to be appointed. Sometimes, however, the parties do not agree upon the number, and a question arises as to what, if anything, the law should do about the point.

The first point to note is that if the parties do not agree upon the number of arbitrators, and if the law does nothing to fill in the void, the agreement to arbitrate might fail.

The Schedule to the Arbitration Act provides that if no other mode of reference is provided, the reference shall be to a single arbitrator. The BC Act (s. 4) and the AIC draft (s. 5) say the same thing. On the other hand, Article 10(2) of the ICAA/Model Law provides for 3 arbitrators, the reason given by the Analytical Commentary being that the number 3 was adopted because it is the most common number in international arbitrations.

The law need not say specifically how many arbitrators there shall be in default of agreement, though this is convenient. It could provide that the Court can fix the number, which might lead to better tailoring of the number to specific circumstances, but which would lead to additional cost and delay.

The question is not one of major policy. If a number is to be prescribed, presumably a tribunal of 3 arbitrators is likely to have more expertise than a tribunal of one, and there may be something to be said for having a tribunal which contains an

element friendly to each side in the person of a party-appointed arbitrator. However, a tribunal of one is likely to be cheaper and faster, and it can be argued that the law should provide as simple a structure as is practicable, leaving it to the parties to fashion a more complex structure if they have a more complex subject or if they think that a larger tribunal will give a better adjudication.

E. Removal

ISSUE 4.7

Should the appointment of an arbitrator be terminated by (a) resignation? (b) agreement of the parties?

COMMENT:

Article 14(1) of the ICAA/Model Law and s. 8 of the AIC draft provide for termination by resignation or agreement only if the arbitrator becomes unable to perform his functions or does not do so. It seems self-evident that inability or neglect to perform his functions should allow the parties to agree to terminate the appointment of an arbitrator.

Should the parties be able to agree at any time to remove an arbitrator? Section 10(1) of the AIC draft provides for termination of an arbitrator's appointment if all parties agree in writing. So does ICAA section 6(2). Is there an argument that, once an arbitration is commenced, the parties must stay with the arbitrator or arbitrators originally appointed except in a case of resignation or non-performance of function? Or, since an arbitration is something purely personal to the parties, should they be able to agree, if they agree unanimously, to have

a new arbitrator?

Removal of an arbitrator by the Court is dealt with in Chapter 7.

ISSUE 4.8

(1) If the appointment of an arbitrator is terminated, (a) should a successor be appointed, and, (b) if so, by whom?

(2) If one arbitrator resigns, dies, or is removed, should the proceedings have to be started again from the beginning?

(3) Should the same rules apply if the arbitrator was named in the agreement?

COMMENT:

Issue 4.7(1) arises whether an appointment is terminated by the resignation of the arbitrator or the agreement of the parties, or by the removal of the arbitrator by the Court. It is dealt with in somewhat different ways by the BC Report (Rec. 6), the BC Act (s. 17(3), s. 19(3), (4)), the ICAA (Model Law Article 15), and the AIC draft (s. 10).

First principles would suggest that the parties to an arbitration should be free to agree upon a procedure for filling a vacancy created by the death, resignation or removal of an arbitrator, or even to agree that a vacancy should not be filled. First principles would also suggest that the arbitration should be saved unless the identity of the arbitrator was fundamental to the arbitration agreement. Are there any arguments to the contrary?

All the models mentioned above recognize the primacy of an agreement between the parties. The BC Report, where an

arbitrator is removed by the Court, would give the Court power to appoint a replacement unless the arbitration agreement provides for the filling of vacancies. The BC Act follows this thought where there is a resignation or a removal by the parties, but where there is a removal by the Court it throws the appointment of a replacement into Court unless the parties "have agreed in the appointment of another arbitrator". The ICAA and the AIC draft would, in the absence of agreement, go back to the rules which governed the appointment of the arbitrator in the first place.

The principle stated in the AIC draft is both comprehensive and succinct: if an arbitrator dies or resigns, or if his appointment is terminated by the parties, "a substitute arbitrator shall be appointed in accordance with the rules that were applicable to the appointment of the arbitrator being replaced, unless the arbitration agreement otherwise provides".

However, it is possible that the principle should be qualified by providing that if the arbitrator is named in the arbitration agreement, there can be no substitution, with the result that the arbitration cannot continue unless the parties agree upon a replacement arbitrator. Should the principle be qualified in that way?

If one arbitrator out of, say, three, dies, resigns, or is removed, a question might arise whether the proceedings should be held all over again. No doubt good sense will prevail, but what if it does not? One the one hand, it may be that much time and cost will be wasted by the repetition of proceedings. On the other, an arbitrator should hear the whole case, even a

substitute arbitrator. Under ICAA section 6 (which does not appear in the Model Law), the hearings must be repeated unless the parties otherwise agree.

ISSUE 4.9

(1) How should the arbitrator's compensation be determined?

(2) Should an arbitrator have a lien on the award for his fees?

COMMENT:

Under section 19 of the Arbitration Act, regulations may prescribe maximum fees, although under section 20, the parties may agree to pay more than the prescribed maximum. Regulation 459/81 provides for daily fees of $30 for a "non-professional" arbitrator and $60 for a "professional" arbitrator. The clerk of the court has power to tax or assess an arbitrator's fees, but is bound by a maximum stated in regulation or agreement. We understand that the daily maximum is often waived by the parties, but that some arbitrators forget about the regulation and are bound by it.

The BC Report (Rec. 7-9) was content with the existing situation in British Columbia. The 1979 regulation to which it referred said that the prescribed fee was the fair value of the arbitrator's services and that the prescribed expenses were the necessary and reasonable expenses incurred. The BC Act gives effect to the substance of the recommendation in the BC Report, but has provided for the whole procedure, and the allowance of fair costs and necessary and reasonable expenses, in the statute itself (s. 26).

It can be argued that parties should be protected against excessive charges by arbitrators. If so, a statutory maximum serves the purpose of protecting the unwary, while a provision for waiving the statutory maximum gives some flexibility which a rigid maximum would lack. On the other hand, a provision for taxation leaves the parties free, on the one hand, to make an agreement with a prospective arbitrator which both regard as fair, or to have the amount assessed by an independent functionary who is accustomed to assessing fees charged by professionals and other.

By judicial decision, an arbitrator has a lien on an award for his costs, and it appears that in England an arbitrator customarily holds the award until he is paid (Mustill 200). The BC Report (Rec. 7) recommended that the lien be abolished on the grounds that a provision for reasonable fees and taxation would eliminate the need for it. On the other hand, the AIC draft (s. 35) provides that nothing in the draft should affect an arbitrator's right to a lien.

CHAPTER 5

THE ARBITRATION

A. General Discussion

The older arbitration statutes leave the conduct of arbitrations to the parties, and, failing agreement by the parties, to the common law. What the statutes have to say is mostly about powers. The Schedule to the Arbitration Act, for example, provides that the parties and persons claiming through them must submit to be examined on oath, produce documents and do all other things which during the proceedings on the reference the arbitrators may require, though the parties may agree otherwise. The Act itself makes provision for the administration of oaths and for compelling witnesses to attend and to produce documents. That is all the statute says about the conduct of an arbitration.

The BC Report (page 21) says: "While the Act imposes no particular procedure to be followed by arbitrators in determining a dispute referred, they must act in accordance with natural justice, they must not exceed the jurisdiction conferred by the submission and they must decide the dispute in accordance with the applicable law". The British Columbia counterpart of the Arbitration Act, in the Law Reform Commission's view, did not encourage the use of simple, informal procedures. Mustill & Boyd (page 17) say that in the absence of express or implied agreement to the contrary, an arbitrator should adopt a procedure which is adversarial in nature and which should broadly be on the same lines as those followed in a High Court Action.

The present law, then, encourages arbitrations to fashion themselves after lawsuits. No doubt, the lawsuit is often a suitable model. But should the law encourage arbitrations to follow it? Or should it provide an alternative model? We do not raise these issues here, as they fall within Issue 1.1 in Chapter 1, but the reader may wish to keep them in mind when addressing the specific issues which follows.

B. Arbitrations in General

(1) Procedure

ISSUE 5.1

(1) Should an arbitration statute provide procedures to enable a party to force the other to arbitration?

(2) If so, what should kind of provisions should be included?

(3) Should the provisions be in the statute or in rules or regulations made under the statute?

COMMENT:

We are told that, if one party to an agreement to arbitrate is recalcitrant, it is often difficult for the other to get an arbitration effectively started. We invite suggestions as to what might be done. We will make some observations, but, since we have not taken any outside advice on the subject, these observations are merely made to help to focus discussion.

We assume for this discussion that there is in existence a valid agreement to arbitrate and a dispute which falls within the terms of the agreement, so that a claimant party has a contractual right to have the dispute arbitrated, but that the

respondent will not co-operate in getting an arbitration going. The question is how to enforce the claimant's contractual right, which is a legal right. The usual remedies for breach of contract are a court order that a party observe or perform his obligation (injunction or specific performance) or that he pay damages for his failure to do so. Damages is not likely to be a useful remedy for a refusal to co-operate in an arbitration, and a court cannot compel a party to arbitrate, so that the usual remedies are not much help.

What needs to be done is to ensure that a party who wants to arbitrate can get the arbitration proceedings validly constituted so that they can proceed even if the other party does not take part. Then, the claimant can get his award and take appropriate steps to enforce it.

Two things are needed to get the arbitration proceedings validly constituted. One is a properly constituted arbitrator with jurisdiction to hear whatever dispute is referred for arbitration. The second is a dispute the nature of which is known or ascertainable and which is covered by the arbitration agreement. Once these two elements are in place, the arbitrator can proceed. If an arbitration statute or rules made under it guarantee that a party can take steps which will put them in place, the necessary legal foundation will be there.

As a matter of strict law, it appears to us that both elements are available under the Arbitration Act. If the arbitration agreement sets out the procedure to be followed, a party can follow it and see that the arbitration is validly constituted. If it does not, and if the agreement to arbitrate

(or, in default of the agreement, section 1 of the Schedule to the Arbitration Agreement) calls for one arbitrator, the claimant can serve a notice under section 5(1) of the Act, and if the appointment is not made within 7 clear days, the party can apply to the Court to appoint an arbitrator. The wording of section 5(1) leaves something to be desired as it seems to call on the respondent to appoint the arbitrator, whereas it should call on him to join with the claimant in appointing the arbitrator, but it seems that a notice specifying a prospective arbitrator and calling on the other to join in the appointment would do.

If the agreement to arbitrate calls for each party to name an arbitrator, the claimant can serve the respondent with a notice under section 5(1) giving the respondent the name of the claimant's nominee and requiring the respondent to appoint the respondent's nominee. Again, the Court may make the appointment if the respondent does not do so, and it may also appoint a third arbitrator if the two party-nominated arbitrators fail to do so. Subject to the discussion of Issue 4.2 showing the need of some tidying up of the provision dealing with the Court's appointing power, it seems that it should be possible to get a properly appointed arbitrator or arbitrators with jurisdiction to make a binding award.

So far as the dispute is concerned, it seems that a notice from the claimant to the respondent setting out the nature of the dispute should, in the absence of the second party acceding to the first party's view of the result, establish that for legal purposes.

The ICAA adds some flesh to these legal bones. ICAA/Model Law Article 21 provides that, in the absence of agreement to the contrary, the arbitral proceedings commence on the date on which a request for a dispute to be referred to arbitration is received by the respondent. Under Article 11, if the respondent will not participate in the appointment of an arbitrator, the Court can make the appointment. Under Article 23, with a period of time fixed by agreement or by the arbitral tribunal, the respondent must submit a statement of his defence to the claimant's statement of claim, and, if he does not do so, the arbitral tribunal can proceed without it. Finally, under Article 16, if the second party contests the jurisdiction of the arbitral tribunal, he must do so at the earliest possible moment or lose his right, subject to the power of the tribunal to admit at a later time a plea attacking jurisdiction (though this provision might not override the right of the second party to sit back and later sue for a judicial declaration that the whole proceedings were invalid).

But it may be that all this, even if we have stated the law correctly, is too vague and difficult for practical use. Perhaps a detailed code of rules for starting an arbitration should be set out either in the arbitration statute, or, more appropriately, in rules made under the statute, so that those who are engaged in arbitrations could see them. Such a code could provide, for example: (a) that a party to an arbitration agreement could start the arbitration proceedings by serving on the second party a notice setting out a dispute which that party wants referred to arbitration; (b) that the notice should state what the first party was doing, if anything, to get the

arbitrator or arbitrators appointed and demand that the second party take whatever next step is necessary to get the process advanced; (c) that upon appointment, the arbitrator may, and upon the application of the first party shall, make whatever directions are necessary to get on with the arbitration; and (d) specifying what actions the arbitrator may take to deal with default of either party, so that any such default will not stop the other party from proceeding. If there are to be such rules, an important question is whether the parties should be free to change them.

The AIC draft (s. 36) provides for making rules of procedure for the commencement and conduct of proceedings. Presumably the draft has in mind the sort of thing mentioned in the last paragraph above, and a good many other things as well.

One thing that should be noted is that the making of rules may well -- though it need not logically -- lead to greater formality. If the arbitration process is to be useful for, for example, consumer disputes, it may be that any degree of prescribed formality, even a requirement that a claimant put in writing the issue which he wants arbitrated, will make the procedure too inhibiting and will discourage the use of arbitration. Is there anything in this suggestion?

ISSUE 5.2

(1) Who should determine the procedure to be followed?

(2) Should rules be promulgated, and, if so, by whom?

COMMENT:

Two supplementary question which arise from the discussion of Issue 5.1 come under this Issue.

The first of these supplementary questions is: if there are to be rules, who should make them and keep them up to date? The Alberta Rules of Court are amended by Order in Council upon the recommendation of the Attorney General, who in turn customarily acts upon the recommendation of a Rules Committee composed of judges and lawyers, with the judges in numerical preponderance. The composition of the Rules Committee is dictated in large part by the principle of the independence of the judiciary, which is not at stake in arbitrations, and a recommending authority composed entirely of judges and lawyers may not be appropriate for a process in which non-lawyers play so large a part. Comment is invited on this point.

The second subsidiary question is whether, if rules are promulgated, they should override a contrary agreement of the parties. The AIC draft says no: section 36 of the draft provides for rules which would apply if the parties do not agree on procedure or if an arbitration agreement is silent or deficient with respect to a specific question of procedure.

That leads into the principal question of policy: should the parties be free to agree upon their own procedure? The common law, the BC Report, the AIC draft, and the ICAA all recognize such a freedom. This is consistent with the notion of arbitration as a private contractual arrangement between the parties. The freedom includes freedom to agree to follow the rules of a professional or business association or of an organization under whose auspices the parties agree to hold an

arbitration. But do the parties, or does the public, have a contrary interest in having uniform principles of conduct apply to arbitrations?

In the absence of agreement by the parties or binding rules, an arbitrator may prescribe his own procedure. The ICAA/Model Law (Article 19) specifically says so. The AIC draft is to much the same effect (s. 12, 15(2)), and would go on to give specific power to the arbitrator to lay down pre-hearing procedures, including statements of claim and defence, disclosure of documents and protection of evidence.

ISSUE 5.3

Should the parties to an arbitration be required to define the issues in writing?

COMMENT:

It has been suggested to us that it is vital for a good arbitration that the parties define the issues which are to be arbitrated. Without defined issues an arbitration will have no focus (and even the exercise of defining areas of disagreement may cause the parties to settle). On the other hand, a rigid procedural requirement may inhibit an unsophisticated party from starting arbitration proceedings, and the arbitrator can exert pressure on the parties to define their issues once they are before him.

The ICAA (ICAA/Model Law Article 23) requires the claimant to state the facts supporting his claim, the points at issue and the relief sought. It requires the respondent to state his defence in respect of these particulars. This must be done

within the time periods agreed on by the parties or set by the arbitrator. The parties may agree otherwise "as to the required elements of such statements". The ICAA, of course, applies mostly to arbitrations which are among sophisticated business people and which involve substantial amounts of money.

ISSUE 5.4

Should a hearing be mandatory?

COMMENT:

Under the present law, the parties can agree that there be no hearing. They may agree that the arbitrator can make a decision upon files or other material which they submit to him, or that he can examine goods to decide whether they meet a contractual term about quality.

The AIC draft (s. 14) provides that hearings should not be mandatory, and that if the parties agree, the statute should permit decisions to be made on written submissions, affidavit evidence, or other agreed means.

The effect of Articles 19 and 24(1) of the ICAA/Model Law appears to be this: first, the parties can decide whether or not to hold a hearing, and if they do, that is the end of the matter; second, if they make no agreement on the point, the arbitrator can decide whether to hold a hearing or to proceed on the basis of documents and materials; but that, third, either party can still demand a hearing if the arbitrator decides against one (though the draft text contained in the Analytical Commentary is easier to understand than the text attached to the ICAA).

The effect of the BC Act on the point is rather puzzling. The operative sections of the Act do not impose a requirement of a hearing. However, the definition of "arbitration" is "a hearing before an arbitrator to hear and resolve a dispute in accordance with a commercial arbitration agreement" and the definition of "arbitrator" is "the person who . . . hears and decides an arbitration". Whether a court would hold that the submission of documents to, and their consideration by, an arbitrator, could be a "hearing" which would be within the scope of the BC Act is difficult to forecast. If the answer is negative, presumably parties who agree to dispense with a hearing would not fit under the Act at all.

ISSUE 5.5

(1) Should it be mandatory that an arbitrator adhere to the rules of natural justice or to some of them?

(2) If so, should the arbitration statute talk in terms of "the rules of natural justice", or should it lay down specific rules intended to ensure fairness to the parties?

(3) If the arbitration statute should lay down specific rules intended to ensure fairness to the parties, what should those rules require?

COMMENT:

The Arbitration Act does not talk of natural justice. It does, however, give a Court power to remove an arbitrator or to set aside or remit an award on the grounds that an arbitrator has "misconducted himself", and the Courts have held that an arbitrator who has failed to follow the rules of natural justice has misconducted himself. Therefore, a mixture of statute and

common law effectively requires an arbitrator to follow those rules. The BC Act (ss. 18, 30), following the BC Report (Rec. 5, 37), is to the same effect, though it uses different wording.

The ICAA's approach is different. It does not refer to "natural justice", but it does lay down rules which are included in that term. We have already discussed its requirements about the impartiality and independence of an arbitrator. It also lays down the following rules for the conduct of an arbitration:

> ICAA/Model Law Article 18: the parties shall be treated equally and each party shall be given a full opportunity of presenting his case;
>
> ICAA/Model Law Article 24(2): 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;
>
> ICAA/Model Law Article 24(3): all statements, documents or other information supplied by one party shall be communicated to the other, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to all parties.

Under Article 34(2)(a) of the ICAA/Model Law, an award may be set aside on the grounds that the party applying to set it aside was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case. The AIC draft (s. 28) contains a similar provision.

There are strong arguments in favour of legal requirements that arbitrations be conducted fairly, though it may be argued on the other side that the judicial system, which the parties have

agreed to avoid, should not intrude itself through a back door. If fairness is to be required, there are strong arguments in favour of having the fundamental requirements of the arbitration process stated in the arbitration statute, so that there may be no doubt about them, though these requirements have been imposed by the common law and could be left to the common law. The desirability of having the fundamental principles stated in the arbitration statute is increased by the fact that many non-lawyers, whose access to the common law is limited, participate in the arbitration process and it can be argued that they should have the important parts of the law stated in one accessible place.

If the arbitration statute is to legislate fairness, there is a further question whether it should refer to "the rules of natural justice, as the BC Act does, or whether, without using the term "natural justice", it should lay down rules for the conduct of arbitrations which are designed to ensure fairness, as the ICAA does. The argument in favour of referring to "natural justice" is that it is a concept which is flexible and which continues to be developed by the courts. The argument against it is that it is a term which is likely to be forbidding and unintelligible to many of the non-lawyers who use it and who should be able to find in the statute rules which are plain and comprehensible.

(2) Consolidation of Arbitrations

ISSUE 5.6

Should a new arbitration statute provide for consolidation of arbitrations? If so,

(a) should the consolidation be effected by

the arbitrator or by the Court?

(b) should the consent of all parties be required, and, if so, to what?

COMMENT:

Presumably, if there is more than one dispute between the same parties, those parties can agree to have all of the disputes dealt with in the same arbitration.

The BC Act (s. 21) provides that where a similar dispute has arisen under two or more commercial arbitration agreements, the disputes may be heard in one arbitration. However, this can be done only if all the parties to the arbitration agreements agree on the appointment of the arbitrator and the steps to be taken to consolidate the disputes into the one arbitration.

Section 6 of the ICAA, which is one of the few additions which the ICAA makes to the UNCITRAL Model Law, also provides for the consolidation of arbitrations. The Court may order consolidation, or it may order a joint hearing or a sequential series of hearings. It can do so only on the application of "the parties" to the arbitrations, which appears to require unanimous consent, though section 6(3) reserves to the parties the right to take steps themselves by consent. Section 6(2) is rather puzzling. Where the Court orders consolidation and the parties agree on the choice of the arbitral tribunal, the Court shall appoint the tribunal,[17] but if the parties cannot agree, the Court may appoint the tribunal. The difference seems to be that where the parties have not agreed on the tribunal, the Court has

[17] The subsection does not say, but it must mean, that the Court shall appoint the tribunal which the parties have agreed upon.

a discretion whether or not to appoint the tribunal. The strangeness is that, having consolidated the arbitrations, the Court is left with a discretion not to appoint the tribunal, and there is no other mechanism to appoint a tribunal for consolidated arbitrations.

The AIC draft also provides for consolidation. It (s. 27) requires that all parties agree on the consolidation (but not on all the details) and then leaves it to the Court to make the necessary decisions, including the composition of the arbitral tribunal.

(3) Mediation during arbitration

ISSUE 5.7

Should the arbitration statute contain a provision authorizing an arbitrator, with the consent of the parties, to try to mediate the dispute which he is arbitrating, and then, again with the consent of the parties, to continue the arbitration?

COMMENT:

Section 5 of the ICAA authorizes an arbitrator to try to mediate the dispute which he is arbitrating and then to go on with the arbitration. Each of the role changes -- arbitrator to mediator and mediator back to arbitrator -- requires the consent of the parties.

It is not clear that this provision is necessary: even without it, there seems to be no reason why the parties to an arbitration could not agree to what the section allows them to agree to. However, the provision is one of the few additions made by the ICAA to the UNCITRAL Model Law and was presumably

regarded as sufficiently important to justify such treatment. It may be intended to have an educational effect.

International commercial arbitrations are likely to involve large sums of money and to be carried on by sophisticated business people with all necessary professional help. If it is desirable to promote mediation under such circumstances -- as to which we express no view -- it seems that it would be even more desirable to promote mediation in domestic Alberta arbitrations where the parties will often be less sophisticated and less thoroughly advised.

We invite comment.

(4) Evidence

ISSUE 5.8

Should the arbitrator be bound by the rules of evidence applicable to proceedings in court? If not, what evidence should the arbitrator be entitled and obliged to receive?

The BC Report recommends that: (a) the arbitrator have power to admit evidence whether or not it would be admissible in court, (b) that he be required to admit evidence which would be admissible in court, and (c) that he have power to admit evidence "on oath, affidavit, or otherwise as in his discretion he considers proper" (Rec. 12). The BC Act does not deal with the subject.

The BC Report also recommended (Rec. 11) that an arbitrator have power to call a witness on his own motion but that a witness called by him be subject to cross-examination and rebuttal. The

BC Act (s. 24) follows this recommendation. ICAA/Model Law Article 26 is to much the same effect and gives the arbitrator power to require a party to give an expert called by the arbitral tribunal relevant information and to allow inspection of documents and things.

The AIC draft provides that the arbitrator should be able to determine admissibility, relevance, materiality and weight and should not be bound by the rules of evidence (s. 18).

(5) Enforcement of Procedural Orders

ISSUE 5.9

How should procedural orders and directions given by an arbitrator be enforced?

COMMENT:

Section 6 of the Schedule to the Arbitration Act, which applies in the absence of agreement to the contrary, provides that the parties and all persons claiming through them must submit to be examined by the arbitrator on oath or affirmation, produce documents, and do all things which the arbitrator may require.[18] The Act, however, is silent about the consequences of the failure of a party to do any of these things.

Mustill and Boyd first suggest[19] that if one party simply

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[18] Mustill & Boyd 255 express the view that the UK counterpart section does not empower an arbitrator to compel a party to testify, but their argument is based upon the interpretation that all that it does is to allow an arbitrator to insist upon the testimony being under oath or affirmation. Since section 7 of the Alberta Schedule gives an arbitrator precisely the latter power, it does not seem that section 6 should be interpreted as also giving it, so that the argument does not seem to apply in Alberta.

[19] Mustill 479

does nothing in the face of a procedural direction, the other party can, as a matter of contract law, treat the reference to arbitration as having been repudiated and as being at an end. This would not be helpful if the non-defaulting party wants the arbitration to continue, that is, if he is the claimant or wants some relief against the claimant.

The arbitrator may be able to do a number of things about a party who defaults in carrying out a procedural direction, the appropriateness of which will vary with the circumstances of the particular case. If the default relates to part of the defaulting party's case -- failure to provide particulars of an allegation, for example, or failure to provide discovery with respect to it -- the arbitrator can refuse to allow the defaulting party to put forward that part of his case. If the defaulting party refuses to disclose his claim or defence or does not appear at a hearing, the arbitrator can proceed to hear the other side (being careful to give proper notice and otherwise to act correctly). In an extreme case in which a party has totally failed to carry out his procedural obligations, an arbitrator might even make an award against the defaulting party (particularly a claimant who fails to proceed) without going through a hearing, but this is likely to prove to be unwise. Any of these procedures should be carried through only with great attention to procedural fairness to the defaulting party, both on principle and in order to avoid having the award set aside.

The BC Report and the BC Act leave the subject much where it is now in Alberta.

The ICAA (ICAA/Model Law Article 25), requires the arbitral tribunal to terminate the proceedings if the claimant fails to communicate his statement of claim as required; requires the tribunal to continue the proceedings if the respondent fails to communicate his statement of defence as required (the failure to communicate the defence not being taken to be an admission of the claimant's case); and permits the tribunal to proceed and make an award if a party fails to appear or to produce documentary evidence.

In most cases, the ICAA powers described in the immediately preceding paragraph should be adequate, and the common law powers briefly described in the second preceding paragraph should also be adequate, though an arbitrator might well find it difficult to get through the maze without legal advice. In some cases, however, particularly one in which one party needs to get information from the other in order to make a case, these powers may prove inadequate.

The AIC draft (s. 13) would do two things. First, it would allow a party to an arbitration to seek enforcement of an arbitrator's order or direction through the courts, presumably the Court of Queen's Bench, with no appeal. Second, it would give the arbitrator authority to enforce his own orders.

If the arbitration statute is to confer upon the Court of Queen's Bench a supportive jurisdiction to make orders directing parties to comply with an arbitrator's procedural orders and directions and compelling witnesses to attend arbitration proceedings, it would be necessary to consider what consequences would flow from disobedience. The Court would presumably have

power to commit a party to prison for failing to comply with its order, but that is not the usual sanction for procedural orders. Should the Court have power to give directions about the conduct of the arbitration in the event of disobedience, that is, directions to the arbitrator either to proceed anyway or to make an award against the recalcitrant party? We invite comment.

The English Arbitration Act 1979 adopted a slightly different approach. It allows the High Court -- the counterpart of the Alberta Court of Queen's Bench -- to confer upon an arbitrator power to proceed upon default "in like manner as a judge of the High Court might continue with proceedings" where a party fails to comply with a court order or with rules of court. This provision creates some difficulties of interpretation. Mustill and Boyd[20] think that a High Court order made under it confers powers much like the common law powers mentioned above, but that it is likely to protect the arbitrator and the award from charges of misconduct. On the other hand, applying for the order is likely to cause further delay.

We turn next to the AIC proposal that an arbitrator be able to enforce his own orders. It may be argued that such a provision would give arbitrators some comfort. If the provision would merely give an arbitrator power to carry on proceedings despite the default, or power to disregard part of a party's case or proceed in his absence, we do not see difficulty with it, but on that interpretation it might not add too much to the existing powers of arbitrators. If it would give an arbitrator power to commit for contempt of his order, we think that a strong case

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[20] Mustill 483-85.

would have to be made for it, as this is the kind of power which is usually reserved for the judiciary. Indeed, it may be constitutionally impossible to confer it on an arbitrator.

Comment is requested on whether or not there is any problem in enforcement of procedural requirements at the present time, and whether or not a significant increase in the use of arbitration would disclose one. Comment is also requested on whether the arbitration statute should confer upon the Court a supportive jursdiction either to make procedural orders or to confer powers upon an arbitrator to do so, or whether it should confer special powers upon an arbitrator to enforce his own orders, and, if so, what the special powers should be.

There is one further point. Under section 8 of the Arbitration Act, a party may serve a prospective witness with a notice to attend, which "has the same effect as a notice requiring the attendance of a witness and the production of documents by him at the hearing or trial of an action". It is not clear what sanction this section contemplates. It is unlikely that it would be held to give an arbitrator the power to send out the sheriff to bring in the witness, although it might be held to give that power to the Court of Queen's Bench.

(6) Time Periods

ISSUE 5.10

Should a time period for the conduct of an arbitration be prescribed? Should an arbitrator or the Court have power to relieve against a time limitation?

The effect of Section 3 of the Schedule to the Arbitration

Act, which applies in the absence of agreement to the contrary, is to impose a 6-week time limit upon an arbitrator for the completion of the arbitration, but to allow the arbitrator to extend the time.

The BC Report saw no purpose for the BC counterpart of this provision, and it is not included in the BC Act. The reason appears to be that the time requirement is customarily enlarged by arbitrators and is futile. The BC Report thought that a better answer to the problem of delay is to give the Court power to remove an arbitrator on grounds of delay, a subject which is dealt with in Chapter 7.

The BC Report went on to recommend (Rec. 25) that even if the parties agree on a time period, the arbitrator or the Court be empowered to extend it, even if the extension is not made until after the expiration of the agreed period. The BC Act (s. 13) gives effect to this recommendation.

C. Gas purchase price arbitrations

ISSUE 5.11

Should the law continue to make special provisions for the determination of price and the qualification of arbitrators such as those contained in section 17 of the Arbitration Act?

COMMENT:

Section 17 of the Arbitration Act, as we have mentioned in the Introduction, makes the following provisions with respect to arbitrations which determine or redetermine the price of gas sold under a gas purchase contract: (a) it prescribes a number of factors which an arbitrator must take into consideration, and (b)

it requires that a single arbitrator, or half of two or more arbitrators, must beordinarily resident in Alberta. The parties to an agreement can contract out of the section.

We have not investigated the reasons for the introduction of what is now section 17 of the Arbitration Act. We presume that it represented government policy in 1973 when the predecessor of the section was enacted. Is it still appropriate?

CHAPTER 6

AWARDS

A. Interim Awards

ISSUE 6.1

Should an arbitrator have power to make an interim award?

An interim award is one which disposes of one or more issues in the arbitration but which does not dispose of all issues. It may, for example, be useful for an arbitrator to decide about liability before entering upon a complex determination of amount which may be wasted if there is no liability. Or it may deal with the management or enjoyment of what is being fought over pending final decision, or it may require one party who is liable to make a partial payment pending final determination of the total amount for which the party is liable. It has been suggested to us that an interim award might be a means whereby an arbitrator could make an order that something be done and reserve jurisdiction to see that it is done properly or that some other remedy be made available if it is not done.

Mustill and Boyd[21] suggest that interim awards should be used with extreme caution: in practice, they say, they tend to lengthen rather than shorten proceedings; a question to be dealt with by an interim award has to be formulated early in the arbitration when the real issues may not yet be clear; and what looks like an answer to the whole question being arbitrated may turn out not to be the final answer. It appears that a law

[21] Mustill 331-32.

reform agency in the Australian State of Victoria thought that piecemeal awards are seldom satisfactory and should be permitted only if an arbitration agreement provides for them (BC Report 46).

The general view seems to be that in the absence of an express power, an arbitrator cannot make an interim award. The BC Report (page 46-47) pointed out that there is British Columbia Court of Appeal decision which can be interpreted as holding that a British Columbia arbitrator -- and we see no difference between Alberta law and British Columbia law as it stood at the date of the BC Report -- could make an interim award, but the decision is weakened for this purpose because counsel for the litigants agreed that an arbitrator did have the power. The BC Report (Rec. 29) recommended that the point be cleared up by a provision that, unless the parties otherwise agree, an arbitrator can make an interim award, and the BC Act (s. 9) gives effect to that recommendation. The English statute[22] has a similar provision.

B. Final Awards

ISSUE 6.2

Should an arbitrator have power to decide about his own jurisdiction?

COMMENT:

It seems that an arbitrator cannot make a binding decision as to whether or not the arbitration agreement came into existence, because if there never was a contract he could not

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22 Arbitration Act 1950 s. 14.

have power to act as arbitrator, and it has seemed wrong to say that he has the power to decide that he has no power to decide.[23] It seems also that he cannot make a binding decision as to a fact upon which his jurisdiction depends, e.g. that a certain event has occurred which must occur before a party has a right to arbitrate.[24] Otherwise, it seems that he can make a binding decision about his own jurisdiction if the wording of the arbitration agreement is broad enough. However, as will be seen in Chapter 7, if an arbitrator strays beyond the wording of the arbitration agreement, or beyond the wording of what was referred to him for arbitration, the Court will be able to set aside the award.

The ICAA/Model Law (Article 16) provides categorically that an arbitrator may rule on his own jurisdiction, including objections with respect to the existence or validity of the arbitration agreement, and that an arbitration clause is to be treated as an independent agreement which will not be invalid merely because the arbitrator rules that the contract in which it is contained is invalid. It goes on to require a party to raise a question of jurisdiction promptly, though it does not say expressly that failure to raise a question promptly means that it cannot be raised later. It also provides that if an arbitrator rules that he has jurisdiction, a party may, within 30 days, request the Court to decide the question (with no appeal), though the arbitrator can continue with the arbitration in the meantime. The AIC draft (s. 17) is similar, but provides that failure to raise a jurisdictional argument at the earliest reasonable

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23 Mustill 78-79.

24 Mustill 82-83.

opportunity should be a waiver of the right to raise it unless the arbitral tribunal permits it to be raised later.

The BC Report (Rec. 37) recommends that an arbitrator's "arbitral error" for which the Court should be able to remove an arbitrator or set aside an award should include acting in excess of jurisdiction, and the BC Act, by its definition of arbitral error, gives effect to this recommendation. This appears to be consistent with the earlier law of British Columbia and the present law of Alberta.

The AIC draft (s. 29(d)) provides for an appeal to the Court of Queen's Bench if the award deals with a dispute which does not fall within the terms of the arbitration agreement or was not referred to the arbitrator. The ICAA/Model Law (Article 34(2)(b)(iii)) is to the same effect, but it goes on to give the Court power, where possible, to set aside only those parts of an award which are in excess of the arbitrator's jurisdiction.

The legal notion of "jurisdiction" is difficult and complex. The BC Report (page 63) said that it has been held that an arbitrator who makes an award without any supporting evidence has exceeded his jurisdiction. Mustill & Boyd[25] say that the decision in Anismic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147 may mean that an award of nothing is in excess of jurisdiction if a party has an absolute right to something when certain specified conditions are found to be satisfied and the arbitrator has found that those conditions are satisfied.

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25 . Mustill 84n.

An attempt to go deeply into this difficult and complex notion is likely to lead to a difficult and complex provision in the new statute. There is a question whether an attempt to do so will confer any significant countervailing advantage upon the people who wish to use the statute. Is one of the approaches outlined above adequate?

ISSUE 6.3

(1) Should an arbitrator be obliged to make his decision on the basis of the law which a court would apply?

(2) If so, should the parties be able to agree to the contrary

(a) at any time?

(b) only after the commencement of the arbitration?

COMMENT:

The effect of the ICAA (ICAA/Model Law Article 28) and the AIC draft (s. 24) is that the general rule is that an arbitrator must apply the law, but that the parties can agree that he should be able to decide on another basis. The ICAA provision is that "the arbitral tribunal shall decide *ex aequo et bono*[26] or as *amiable compositeur*[27] only if the parties have expressly authorized it to do so.

The BC Report (Rec. 10) and the BC Act (s. 23) also allow the parties to agree that an arbitrator may decide on grounds of equity and good consience (though the words "grounds of conscience" in section 23 do not seem entirely appropriate), but

[26] That is, according to equity and good conscience, or the arbitrator's sense of fairness.

[27] That is, as conciliator.

only if they do so after the "arbitration hearing" has commenced. Presumably the Law Reform Commission of British Columbia considered the application of law to be so fundamental that dispensing with it should not be agreed to at a time when the parties have not fully addressed their minds to dispensing with it, or at a time when the bargaining power of the parties may be unequal.

Mustill & Boyd[28] discuss at some length the problems which a common law system may have in dealing with a clause in the original contract such as that suggested by the ICAA provision quoted above. Such a clause could, though it probably would not, be interpreted as meaning that the parties did not intend to enter into a legally binding obligation and that there is therefore no contract at all. If that is too extreme, it will still be difficult to know whether the arbitrator is to be bound by the express terms of the contract, and, if so, how he is to be held to them, or whether he can simply ignore public policy as set out in a statute or in such rules as that against enforcing contracts to commit crimes.

It is beyond the scope of this project to try to resolve such complex questions, and the question is really whether the arbitration statute should leave the parties free to contract out of the application of law and, if so, under what circumstances. The unanimity among the models we have discussed in favour of allowing the parties to contract out of the applicable law suggests that the new statute should provide for contracting out at some time, but the question whether it should allow

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[28] Mustill 605-616.

contracting out by the original contract or only after the dispute has arisen is a significant one.

There is one small point. The BC Report and the BC Act require an agreement that the arbitrator can decide on equity and good conscience to be made after the commencement of the hearing of the arbitration. It seems to us that the principle behind this rule would be satisfied, if it is to be satisfied, by providing that the agreement could be made at any time after the dispute has been referred, as by that time the parties are into the arbitration.

ISSUE 6.4

How should a choice be made between various systems of law which might apply to an arbitration?

COMMENT:

If an arbitration takes place in Alberta between Alberta residents and the arbitration agreement is silent on the question of what law will apply, there is no reason to apply any law but Alberta law. This is the most common case. But there will be cases in which the place of the arbitration, the residence of one or more parties, or the terms of the agreement may suggest that the law of another province or country should apply. Should the arbitration statute do something about this?

Under the ICAA (ICAA/Model Law Article 28), the parties may choose the rules of law which will apply to the arbitration. If they do not make a choice, the arbitral tribunal is to apply the law determined by the conflict of laws rules which it considers applicable. This is pretty well what the common law is without

any reference in an arbitration statute. These provisions apply to international commercial arbitrations, but they do not apply to international arbitrations which are not commercial arbitrations or to what might be called interprovincial arbitrations, as distinguished from international arbitrations.

If the parties have not made a choice, the substantive law which should be applied is that of the system of law with which the transaction has its closest and most real connection, but identifying that system of law is not always easy or scientific. If the parties have stipulated that the arbitration will take place in a given territorial jurisdiction, that is a pointer to the choice of the law of that jurisdiction. Other pointers are: the nationality and residence of the parties; the place where the contract was made; the place or places where it was to be performed; and the languague and terminology of the contract.

It should be noted that, even if the substantive law of Jurisdiction X is the proper law to apply, an arbitration in Alberta will generally be governed by the procedural law of Alberta, and vice versa. Procedural law includes not only such things as procedural steps and powers, but also such things as rules of evidence and limitation periods for the commencement of proceedings.

The questions here are (a) whether the common law rules should be changed, and (b) whether, even where they are not changed, they should be set out in the arbitration statute as a guide to arbitrators and parties.

A small technical point should be noted here. The ICAA provision says that where the parties have made a choice of law, the reference to the law of a State does not, in the absence of express language to the contrary, include the State's conflicts rules. This is to avoid having the conflicts rules of the State which is referred to throw the arbitration into the substantive law of some other State. If the ICAA model is to be followed, consideration should be given to including this point as well.

ISSUE 6.5

Should an arbitrator be able to apply legal and equitable doctrines of estoppel, including promissory estoppel?

COMMENT:

If one party to a lawsuit has by words or conduct made a representation of fact which a reasonable person would think was intended to be acted upon, and if the other party has acted upon the representation to his prejudice, a court will not allow the first party to deny the truthfulness of the fact. A mortgage lender, for example, who has given the purchaser of property a statement of the amount owing under a mortgage of the property will not be allowed to claim more. The technical term used to describe this result is "estoppel" or "estoppel in pais"".

If one party to a lawsuit has by words or conduct made a promise which was intended to affect the legal relationship between himself and the other party and to be acted upon, and the other party has acted upon it, the party who made the promise cannot go back to the previous state of the legal relationship. For example, if a contract calls for a payment on a certain day,

and if the party entitled to receive the payment tells the paying party that a later date will do, a court will not allow the receiving party to hold the paying party in default for missing the original date. The technical term used to describe this result is "promissory estoppel". It differs from ordinary estoppel because it has to do with a promise instead of an existing fact.

There is doubt about an arbitrator's ability to apply these doctrines. Should the arbitration statute make it clear that he can?

ISSUE 6.6

(1) Should an arbitrator have power under the arbitration statute

(a) to order a party to perform an obligation?

(b) to order a party not to breach an obligation?

(c) to supervise the performance of an order under (a)?

(2) Should the parties be able to confer additional powers by agreement, and, if so, how should an award under such additional powers be enforced?[29]

COMMENT:

We consider these questions difficult and their analysis and answers complex. The difficulties arise from the legal nature of arbitration and from the rule that an arbitrator who makes an award is *functus officio*, that is, his powers are ended.

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[29] This discussion to some extent overlaps the discussion under Issue 6.12.

An arbitrator has no direct means of enlisting the power of the state to enforce an award. If a party is recalcitrant, the arbitrator cannot apply sanctions to him. The award must be taken to the Court. This has two consequences. One is that the Court has a discretion to refuse to enforce the award, though it will try to save the arbitration. The second is that the arbitrator's award cannot effectively grant a remedy which the Court could not grant itself. The courts have traditionally refused to order parties to perform obligations other than money obligations except in some limited circumstances which usually involve the delivery of property and which do not include the provision of personal services.

It might seem sensible to allow an arbitrator to say what a party must do and to retain jurisdiction to see that he does it. This does not appear possible now, because his power is finished when he delivers his award. Nor can he pass on a supervisory function to the Court, the power of which is limited to enforcing his final award in accordance with the usual law relating to the enforcement of Court judgments. A party who refuses to comply with an award is in breach of contract, but the remedies for breach of contract, other than the payment of damages, are limited.

One thing which the law might try to do is to confer additional powers upon arbitrators to give additional remedies, and the models which we refer to have done so. Section 15 of the Arbitration Act 1950 (UK) implies a term in an arbitration agreement, unless a contrary intention is expressed, that an arbitrator shall have the same power as the High Court to order

specific performance (that is, to order a party to perform his obligation) of any contract other than a contract relating to land.

Mustill & Boyd[30] say that there would seem to be no reason in principle why an arbitrator should not be given power to make an award in the form of an interim or final injunction, though they point out that an injunction is usually needed quickly, while an arbitrator's award cannot be enforced until steps have been taken to have it enforced as a judgment. The BC Report and Act do not provide for injunctions.

We have difficulty in assessing a proposal that an arbitration statute should purport to confer upon an arbitrator a power to grant specific performance or an injunction. The difficulty arises from the nature of these remedies, and from the way in which they are enforced.

The sanction for an order for specific performance or for an injunction is committal to prison for contempt (or, occasionally, in the case of specific performance, an order that a court official execute the conveyance which should have been executed by a party). A power to grant an order for specific performance or an injunction does not seem to us to have any real content unless it is supported by a power to commit for contempt for failure to comply.

At present, under the Alberta, UK and BC Acts, an arbitrator's order can be enforced in the same manner as a judgment or order of the Court, but only by leave of the Court.

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[30] Mustill 344.

The AIC draft would go one step further and make an arbitrator's order enforceable without any requirement of leave. We are troubled by the question whether a provision of either kind is sufficient to carry the arbitration process to an effective completion. The ICAA (ICAA/Model Law Article 35) may be construed as going one step further. It says that an arbitral award shall be recognized as binding, and, "upon application to the competent court, shall be enforced . . .". This could be taken to mean that the competent court, which is the Court of Queen's Bench, **must** lend all its powers, including its committal powers, to the enforcement of the award.

As Mustill & Boyd[31] point out, the UK section purporting to confer upon an arbitrator the same power as the High Court to order specific performance does not give the award the same force as a High Court order: it is still necessary either to sue on the award or obtain leave to enforce it in the same manner as a judgment or order. This is true even of a money award, but the conceptual problem is greater in the case of a remedy which in the first instance is discretionary and which can ultimately be enforced only by the discretionary application of the contempt power (or occasionally by ordering a functionary to execute a conveyance which a party had been ordered to execute).

Is an arbitrator to have the power to make an order which will inevitably and inexorably of its own force result in the committal to prison of a party who refuses to comply with it, the committal being enforced by the machinery of the state? The law does not give this result to a Queen's Bench order for specific

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[31] Mustill 344

performance, which must be enforced by a further application to the Court based upon the contumacious party's contempt of the order for specific performance.

Is an arbitrator to have the power to make an order which will compel a Queen's Bench judge to make an order to commit to prison a party who refuses to comply with it? This would indirectly confer the substantive power on the arbitrator and leave the judge bound to sign his name as required. Powers which are inherent in the Court would be used, but an outside adjudicator would be able to require the Court to use them. Should the law go this far?

On the other hand, is the Court to have a discretion to refuse to recognize an arbitrator's order? Presumably, a reference in the arbitration statute to specific performance would be a reference to the equitable remedy, which the arbitrator should grant only if the conditions laid down by the rules of equity are satisfied -- that the claimant has clean hands, that no legal remedy is satisfactory, and so on. Subject to the possibility (if any) of an appeal against the award, the Court should presumably recognize the arbitrator's order as having been properly given.

But is a refusal to carry out an arbitrator's order a contempt of Court for which the Court should be able to commit the contumacious party to prison? Presumably, if it is, the Court would still have a discretion to refuse to commit, unless the arbitration statute takes it away. If it would still have that discretion, the arbitrator's powers would not be complete.

If the law does not empower an arbitrator to ensure that an award of specific performance or an injunction is followed through to committal but it is thought that parties to an arbitration should be able to get either or both of those remedies, there is an argument for saying that the new statute should make it clear that there is in fact a bi-partite procedure under which an arbitrator may declare a party's right to one of these remedies, but under which the Court has a discretion as to whether or not to enforce it. This would reflect the legal realities of the situation.

We think that merely adding into the present law a power conferred upon arbitrators to grant specific performance or an injunction, whether or not the requirement of the leave of the Court to enforce it remains, could lead to a further difficulty. If the sole remedy granted by an arbitration were specific performance or an injunction, the arbitrator's powers would be exhausted, and if the Court then refused to grant the ultimate sanction for that order -- that is, committal of a contumacious party to prison -- the apparently successful party would have nothing. The arbitrator would not be able to grant further relief, and the Court would have not power to do so, unless circumstances existed under which it could remit the award to the arbitrator for further consideration. If an arbitrator is to be able to give specific performance or an injunction, it would be desirable to allow the Court to refer the matter back to the arbitrator, who would then have power to grant another remedy.

Perhaps we are wrong in our view of the law. If so, we would be grateful for having this pointed out. If we are right

in law, perhaps we are too timid in fact. It should be noted that Mustill & Boyd[32] raise no difficulty about the enforcement by the English High Court of an order for specific enforcement by sequestration or committal, nor do they raise that kind of difficulty with respect to an injunction. It may be that there is not a practical problem. We do think, however, that the linking of the arbitral decision-making process to the judicial system's enforcement process gives rise to some conceptual problems which might cause practical problems in the future, and about which we would like to receive advice now.

There is another possible approach which would not enlarge the remedies which an arbitrator can provide but which would provide for some flexibility in the enforcement of those available to him. This would be to permit him to make an award, which could be characterized as interim or provisional, in which he orders the respondent -- a contractor who is building a house for the claimant or a body shop which has repaired the claimant's car, for example -- to do certain specified things, and retains jurisdiction to follow through and see that those things are done.

The arbitrator would still not have any way of forcing the respondent to perform his obligations. However, if the respondent proved contumacious, the arbitrator would retain jurisdiction to order him to pay damages, and that order would be enforceable through the Court. That may not be as good as causing the obligation to be performed, but it might be as good as the nature of things permits.

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[32] Mustill 344.

ISSUE 6.7

Should an arbitrator be able to award

(a) costs?

(b) interest on costs,

(c) pre-award interest?

(d) post-award interest?

COMMENT:

Costs

A court has power to order one party, usually the loser, to pay costs to the other party, usually the winner. The first question is whether and when one party should be entitled to collect from the other all or part of the costs incurred by the first party in the arbitration proceedings. The general effect of the Arbitration Act and the AIC draft is that the arbitrator should have a discretion to require one party to pay costs to the other. The BC Report (Rec. 14) and Act (s. 11) say that the parties can agree about costs, that in the absence of agreement, the arbitrator can decide who is to pay them, and that in the absence of a direction by the arbitration each party will bear his own costs and his proportionate share of the arbitrator's costs.

According to Mustill & Boyd,[33] the English courts have held that an arbitrator, in exercising a discretion about costs, must apply the same principles as are applied in the High Court, the most important of which is that the costs must, in the absence of good reason to the contrary, be awarded to a winner against a

[33] Mustill 347-355.

loser.

The UK Act (s. 18(3)) says that a provision in an arbitration agreement that the parties will pay their own costs is void. According to the BC Report (pages 27-28), this provision was aimed at insurance contracts which had often imposed such clauses. The BC Report recommended against such a provision in British Columbia on the grounds that it would derogate from freedom of contract and that there was no evidence that there was a problem of this kind with standard form contracts in BC.

Should the arbitration statute permit the parties to agree about costs, with a discretionary power in the arbitrator to give costs to a party if there is no agreement? Should it make any additional provision?

The next question is how the amount of costs is to be determined.

In Queen's Bench matters, reasonable expenses are usually allowed, plus partial compensation for lawyers' fees based upon a schedule to the Alberta Rules of Court which allows specified amounts for specified steps in actions. The Court may designate a lower or higher standard, and may award all the lawyer's costs which the successful party has incurred, but the schedule is the customary standard.

The Arbitration Act (ss. 23, 24) leaves the determination of the amount of costs to the clerk of the court under the taxation process, subject to a maximum daily fee for the arbitrator, which limit the parties may waive. The BC Act (s. 11), following the

BC Report (Rec. 14), provides that if the parties do not agree, the arbitrator has a discretion to fix the costs and that if he does not do so, each party bears his own costs and is liable for his proportionate share of the arbitrator's costs. The AIC draft provides that the arbitrator has a discretion to determine costs (s. 22(1)) but that the arbitrator's own costs can be taxed (s. 36(1)).

We do not see any argument against the parties being able to agree how the amount of costs should be fixed, unless there is an argument based upon inequalities in bargaining power. In the absence of agreement, it can be argued that the fixing of costs should be left to the arbitrator, who is the tribunal chosen by the parties, but it can also be argued that, although an arbitrator may have expertise in deciding a dispute, he is likely to have little expertise in the fixing of costs. The clerk of the court is likely to follow the practice of the courts in setting costs, which in general results in the successful party receiving partial but not complete compensation for his or her costs. Then there is the special question of the arbitrator's own fees.

What should be done about determining the amount of costs?

Interest

The BC Report (page 50) suggested that,under the existing law, an arbitrator's award becomes a judgment debt and bears interest as such, so that if the successful party sues on the award, the court can give post-award interest. It also suggests, however, that if the successful party applies for leave to

enforce the award as a judgment of the Court, the Court cannot award interest. The Alberta Arbitration Act being silent on the point, these suggestions could apply to Alberta.

The BC Report (Rec. 32) recommended that a sum directed to be paid by an arbitrator's award carry post-award interest, and the BC Act (s.28) gives effect to the recommendation. The AIC draft (s. 22(1)) would merely permit the arbitral tribunal to award interest.

It can be argued that the right of a party to post-award interest should be dealt with in the same way whether he is before a court or before an arbitrator, so that the law should treat an award the same as a court judgment for this purpose. There can then be a question as to whether the interest should be at the contractual rate (if there is one which is applicable) or at a standard statutory rate as is the case with a money judgment of a court.

Then there is the question of pre-award interest. If an arbitration agreement provides for it, an arbitrator can no doubt award interest. Even if it doesn't, he can no doubt award it if the general law says that a party is entitled to interest. However, doubt about powers of courts to award pre-judgment interest which has led to the enactment of statutes dealing with the subject in a number of provinces, and it is unlikely that the powers of arbitrators are more adequate than are the powers of the courts.

Again, the BC Report recommends that an arbitrator's award carry pre-award interest, and the BC Act gives effect to the

recommendation by equating an award with a court judgment for the purpose. Again, the AIC draft would make an award of pre-judgment interest discretionary.

The Alberta pre-judgment interest scheme is somewhat different from that of British Columbia. Where an Alberta court orders the payment of money, the Judgment Interest Act[34] requires the court, with certain narrow exceptions, to award interest from the date on which the cause of action arose to the date of judgment, although the court has a discretion to make a different or no award if it considers it just to do so, having regard to changes in market interest rates. The interest on "non-pecuniary damages" is to be calculated at 4% per annum. The interest on "pecuniary damages" is to be calculated at rates prescribed by Order in Council for each year. It seems that this scheme could be made applicable to arbitrations if that should seem to be a good idea.

There is one part of the Judgment Interest Act which would be difficult to apply to arbitrations. Under section 3, where a party pays money into court and the other party does not accept the money and obtains judgment for an equal or lesser amount, the court must award interest only up to the date of the payment into court. The arbitration process does not provide a receptacle to receive payment. There is a counterpart provision in section 3 that if a party makes an offer of judgment and the other party does not accept the offer and does worse in the judgment, interest is to run only until the date of the offer. This could be accommodated in the arbitration process if that seems

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[34] 1984 SA c. J-0.5.

desirable.

Should an attempt be made to make the Judgment Interest Act scheme apply to arbitration awards? If so, what should be done about the payment into court provision? If not, should the award of pre-judgment interest simply be left to the arbitrator, with or without statutory guidance?

ISSUE 6.8

Should the statute provide that awards shall be final and binding in the absence of agreement to the contrary?

COMMENT:

Section 8 of the Schedule to the Arbitration Act, which applies unless a contrary intention is expressed in the arbitration agreement, provides that an award shall be final and binding on the parties and the persons claiming under them. The BC Report pointed out (page 42) that this provision merely reflects the common law.

This rule has a number of consequences.[35] An award gives a successful claimant a new right in place of the right on which his claim was founded. The original claim cannot be re-litigated either by arbitration or in court, and the claimant cannot claim any further damages which have arisen or may arise from it. Nor can any issue of fact or law which an arbitrator has determined be raised again between the parties to the arbitration. The rule also means that the arbitrator has no right to re-open the award unless the statute gives him one or a competent court remits it to him for further consideration.

[35] See Mustill & Boyd pages 360-364.

Although the finality provision merely states the common law, the BC Report (Rec. 23) recommended that the substance of it should be retained, on the grounds that the object of the arbitration process should be suported by a statutory provision.

The BC Act (s. 14) does not say that an award is binding upon persons claiming through the parties. This omission may be desirable, and we invite comment: if the award, in effect, becomes part of the contract between the parties to the arbitration, it may be better to leave its effect to the ordinary rules of contract to determine whether it is binding upon someone claiming through a party.[36]

The BC Act, however, also drops the reference to the contrary agreement between the parties, and simply declares the award final and binding on all parties. We think it clear that the parties should be able to agree whether or not an award is to be binding, though an agreement that it is not to be binding may take them outside either the existing or proposed arbitration legislation entirely.

ISSUE 6.9

(1) Should a majority decision of arbitrators be sufficient?

(2) Should the parties be able to agree otherwise?

(3) What if there is no majority?

COMMENT:

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[36] Mustill & Boyd (page 365) refer to the UK counterpart provision (Arbitration Act 1950, s. 16) as "obscure and difficult", at least in connection with its effect on third parties.

We can see no argument, other than the paternalistic one of protecting parties against their own improvidence, which would tend to show that the parties to an arbitration agreement should not be able to agree that only a unanimous award should be valid. The BC Report (Rec. 13) and the AIC draft (s. 22) would recognize such an agreement. The BC Act (s. 12) does not.

In the absence of agreement, courts have held that under the common law an award must be unanimous. The Arbitration Act does not deal with the point, so that the common law presumably applies in Alberta.

A court decision does not have to be unanimous, and it is important that a reference to arbitration should not be frustrated by the dissent of an arbitrator. The BC Report (Rec. 13), the BC Act (s. 12) and the AIC draft (s. 22) all provide for majority decisions. We are not able to think of an argument in favour of requiring unanimity unless the parties have opted for such a requirement.

The BC Report (Rec. 13), the BC Act (s. 12) and the AIC draft (s. 22) all say that if there is no majority, the award made by the chairman is the award of the tribunal. The BC Report and the AIC draft would recognize an agreement to the contrary. Such a provision avoids the frustration of the reference to arbitration if, for example, one of three arbitrators would find for the respondent, one would award substantial damages to the claimant, and the third would award nominal damages to the claimant.

Can adopting the chairman's award lead to injustice? Suppose that in the example just given it is the chairman who finds for the respondent. Adopting the chairman's award will give the victory to the party whom the majority of the arbitrators thought should lose. It is not clear whether choosing the arbitrator's award is an arbitrary means of avoiding a hiatus or whether it is thought that the chairman's award is likely to be the best one. It could be that a chairman is chosen primarily because he is legally trained and considered best able to run the arbitration but lacks the professional expertise which is the most important qualification of arbitrators for the particular arbitration.

We invite comment.

ISSUE 6.10

What requirements should be made about the form of the award?

COMMENT:

Writing and signature

One question is whether an award should have to be in writing and signed. The BC Report (Rec. 27) recommended that there be no requirement of writing or signature, unless the parties otherwise agree, but that a party could within 15 days demand a written statement of the terms of the award. The BC Act (s. 25) went the other way and requires both writing and signature. The ICAA (ICAA/Model Law Article 31) requires both (the signatures of a majority of the arbitrators being sufficient), and the AIC draft (s. 19) also requires both writing

and signature.

Writing and signature will usually be desirable in order to communicate information accurately, avoid misunderstanding, and facilitate enforcement. However, it can be argued that the parties should be able to agree, if they wish, that either or both should or should not be required. On the other hand, an arbitrator's award is a legal act with legal consequences, and, if a court is asked to recognize it or enforce it, it can be argued that it is highly unsuitable and inefficient that it be proved by calling as a witness the arbitrator or someone who heard him make the award. Indeed an argument could be made for requiring a written award certified or attested by the arbitrator in order to get it into the judicial enforcement system.

What should the law say?

Reasons

A second question is whether an arbitrator should be obliged to give reasons for his award. There is no such requirement under the Arbitration Act. However, the ICAA (ICAA/Model Law Article 31) requires the award to state the reasons on which it is based unless the parties have agreed otherwise or the award is by consent, and the AIC draft (s. 20) is to the same effect. The BC Act (s. 32), which follows the BC Report (Rec. 28), does not impose an initial obligation upon the arbitrator to give reasons, but it does give the Supreme Court power to order that reasons be given, but only if either a party gave notice before the award was made that reasons were wanted, or a good reason is given for not giving the notice. Section 1(5) and Section 1(6) of the

Arbitration Act 1979 (UK) are much like the BC section.

There are a number of arguments for requiring reasons. An arbitrator who gives his reasons is more likely to give a rational award, and the very process of formulating reasons may show him that his first reaction was wrong. A mere arbitrary decision offends against a sense of fairness. Without reasons a party has difficulty in knowing whether to exercise legal recourse against the award. An appeal on a question of law (if such an appeal is to be allowed) is a hit or miss affair if the court does not know what facts the arbitrator found.

The principal argument on the other side seems to be that a requirement of reasons is onerous and may add to cost. It may also be that the parties wanted an arbitrator with the expertise to make a well-founded decision, who may not be an arbitrator who is skilled at setting out his reasons in appeal-proof form, or who may be upset on appeal simply because he did not understand what a statute means when it calls for reasons. There may also be cases in which giving a bare decision will settle the matter but in which giving reasons will exacerbate feelings and lead to continued ill-will between the parties. It may also be said that the fact that the law does not compel a judge to give reasons for judgment shows that there is no principle upon which it should do so in the case of an arbitrator.

Where should the balance be struck?

ISSUE 6.11

Should an arbitrator be able to vary his award?

COMMENT:

The Arbitration Act does not give an arbitrator power to vary his award even to correct clerical errors. This seems unduly and unnecessarily rigid.

The ICAA (ICAA/Model Law Article 33) adds a power to correct errors in computation, clerical and typographical errors and errors of similar nature, which power the arbitrator must exercise on his own motion within 30 days of the date of the award or upon application by a party within the thirty days or within an agreed time. The US Model Arbitration Act confers a similar power.[37] The AIC draft (s. 25) would confer the power without the time constraints.

In addition to the power to correct errors, the ICAA (ICAA/Model Law Article 33) confers upon an arbitrator two additional powers to make changes in the award, which powers can be exercised only upon application by a party. The first is to give an interpretation of a specific point or part of the award. The second, which can be excluded by agreement, is to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

The BC Report (Rec. 31) recommended that an arbitrator be given power, upon application made by a party within 15 days of notification of the award, to reopen the award and to amend or vary it. The Law Reform Commission thought that such a power would be useful and could make unnecessary many applications to the Court to remit and set aside awards, and it noted that that

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[37] See BC Report p. 49 n. 72.

there was no evidence that a Manitoba provision to this effect had been abused or led to any great difficulties. The BC Act (s. 27), however, did not follow this recommendation, and substituted for it a provision similar to ICAA/Model Law Article 33, which is described in the preceding paragraph.

Would all of the limited powers granted by ICAA/Model Law Article 33 be useful? Would they lend themselves to significant abuse? Would they keep a significant number of appeals out of the Court? Or should an arbitrator have the wider powers of variation which the BC Report would have given him?

C. Enforcement of Awards

ISSUE 6.12

How should arbitrators' awards be enforced?[38]

COMMENT:

The Arbitration Act (s. 12) provides that an award may, by leave of the Court of Queen's Bench, be enforced in the same manner as a judgment or order of that Court to the same effect. In addition, under the common law, a party may bring an action in the Queen's Bench to enforce an award. The BC Act (s. 29) includes Alberta's section 12, but goes on to provide that judgment may be entered in the terms of the award. This was added pursuant to the BC Report (Rec. 32). The BC Act did not, however, go on to include a further provision recommended by the BC Report to the effect that the Court, on an application for leave to enforce an award, should have the power to make such

[38] This discussion to some extent overlaps the discussion of Issue 6.6.

orders as are necessary to carry the award into effect.

The enforcement of an award under the Alberta and BC summary procedure is by leave of the Court, and the Court can refuse to grant leave to enforce. The AIC draft and the ICAA go further. Section 21 of the AIC draft says that an award should be capable of being filed and enforced as if it were a judgment or order of the Court without the party seeking to enforce the award having to apply for an order of enforcement. ICAA/Model Law Article 35 says that an award shall be recognized as binding and shall be enforced, except in the very limited cases in which the article gives the Court power to set aside an award. The result of this provision seems to be that the only question for the Court is how to enforce an award which is brought to it for enforcement.

We have earlier expressed concern about what we perceive as conceptual problems in the relationship between the arbitral system's decision-making process and the judicial system's enforcement process, which we think may give rise to some practical problems.

Absent a procedure under which an award is proved and the Court gives leave to enforce it, an arbitrator's award comes into the judicial system as an unverified piece of paper delivered to the clerk of the Court. Even if the piece of paper were verified in some way, the arbitration agreement, the occurrence and propriety of the arbitration proceedings, the coincidence of the award and the provisions of the arbitration agreement, and the appointment, identity and signature of the arbitrator, are all unverified. It may be that it is a sufficient answer that the respondent has recourse under appeal or setting aside provisions,

but should the judicial system, without any kind of examination, accept rights founded upon an unverified piece of paper introduced from outside the system?

Once introduced and accepted, a money award pure and simple will fit well enough into the judicial system's procedures for enforcing money judgments. If so directed, the clerk of the Court can issue a writ of execution or delivery based upon it, and the writ can be enforced in the usual ways. The clerk can issue a garnishee summons, which also fits into the system. The Court can grant receiverships and equitable execution. There do not seem to be any great difficulties here, though unless the award is formally declared to be a judgment of the Court there might be questions whether limitation of action provisions apply to it.

Court judgments and orders are shaped by lawyers, judges, or clerks. Arbitration awards may not be, and they may not fit legal categories. It may be unclear whether an award is a money award or a mere declaration of right. An award may purport to order payment by instalments, but it cannot itself be a judgment for each instalment nor can it provide for the entry of a new judgment, which would require a new Court action. An award may provide for pre-award interest without settling the amount properly, or the amount of post-award interest may require to be determined. Without judicial intervention, and with the arbitrator having exhausted his powers by issuing the award, there may be difficulties in determining such things without the bringing of a new action to declare what the rights of the parties under the award are.

We have earlier raised specifically the relationship between an arbitrator's power to grant specific performance or an injunction, if the law is to grant such a power, and the equitable factors which a Court takes into consideration and the Court's discretion to refuse the extreme remedy of committal which stands behind its own similar powers.

It seems to us that some painstaking work should be done to dovetail the arbitral decision into the judicial enforcement system. It seems likely to us that the ultimate provisions really require some form of judicial supervision. We are conscious, however, that the problems which we have outlined have not given much concern to others, and it may be that it is enough to provide for the enforcement of arbitrator's awards in the same manner as the judgments of the Court of Queen's Bench, either with or without a leave provision, a provision that the award can be entered as a judgment or order of the Court, and a provision that the Court can make whatever orders are necessary to enforce the award.

We would appreciate comment.

CHAPTER 7

JUDICIAL SUPERVISION OF ARBITRATIONS

A. Relationship of Arbitration to the Judicial Process

The view which will be taken of the policy questions which we will discuss in this chapter depends upon the general view taken of the relationship between arbitration and the judicial process.

A view that arbitration is a process carried on entirely in private among consenting equals and according to their design would be an extreme view. It would exclude court supervision and control. A view that arbitration is simply an alternative incarnation of the justice system would be the view at the other extreme. It would extend to the arbitration system the traditional supervision and guardianship which the courts exercise over the rest of the justice system.

It is doubtful that either of these extreme views is the prevailing view. Of the models we have referred to, the ICAA and the AIC draft give less scope to judicial supervision than do the BC Report and the BC Act. The scope for supervision given by the BC models is probably somewhat less than that given by the existing law because of the restrictions which they place on the right to appeal on a question of law. However, the ICAA and the AIC draft do not exclude court supervision entirely, and the BC Report and Act do not make it applicable everywhere. The question is what balance should be struck between the special interests which arbitrating parties expect from the arbitration system to satisfy and the interests which the justice system

protects.

A piece of legal antiquarianism should be mentioned here.[39] Section 2 of the Arbitration Act provides that "a submission, unless a contrary intention is expressed in it,...has the same effect as if it had been made an order of the Court". This provision is relevant to the discussion (though not necessarily to any consideration of what should be done) because it is a relic of a time when court supervision was broader than it is now.

In the 17th century in England, the right of an arbitrating party to revoke an arbitrator's authority and thus to bring the arbitration to an end was a serious flaw in the arbitration process. It was, at least to some extent, cured by a practice under which the parties to a court action would apply to the court for a consent order referring the dispute to arbitration. The court retained jurisdiction to control the arbitration because the arbitration was a step in the action. Then, the courts began to treat the order as an undertaking by the parties to obey the order and to comply with the arbitrator's award, which meant that refusal to do these things was contempt of court and could be punished as such. Then, the English statute of 1889 said, as does Alberta's section 2, that the submission has the same effect as if it had been made an order of the Court, unless there is contrary agreement.

It seems that this provision could have been used -- and it is possible that it could be used even now -- to give the Court control over everyone concerned in the arbitration through the

[39] This account is based upon Mustill 382-398, 463.

contempt power. However, the provision went out of use because the other powers of the Court -- the powers to remove arbitrators and to set aside and remit awards -- seemed to be sufficient.

We mention this bit of history merely to show that it would be possible, if it were thought desirable, to treat an arbitration as an adjunct to a case in court, and by that means, to leave the court in control of it in the same way as courts control other court proceedings. We do not propose that the specific wording of section 2 of the Alberta Arbitration Act be carried forward.

B. Judicial Supervision During Arbitration

(1) Policy questions

We think that there are two policy questions about judicial supervision of arbitrations before the awards: (a) when, if ever, should a court have power to decide that a matter should not be arbitrated despite an agreement to arbitrate? and (b) when, if ever, should a court have power to remove an arbitrator?

We think that the traditional forms of proceedings tend to obscure these questions. The removal of a matter from arbitration is commonly considered upon an application to stay proceedings in an action which a party brings in Court to resolve a dispute which, under an arbitration agreement, both parties have agreed to refer to arbitration. Alternatively, it may be accomplished by an application to have the Court grant a party leave to revoke the submission, but that appears to have got tangled up with the notion of the revocation of the authority of the arbitrator.

We propose to address the two policy questions directly. Then we will turn to the forms of proceedings and the statutory drafting.

(2) Grounds for removal of proceedings from arbitration

ISSUE 7.1

(1) When, if ever, should a court have power to decide that, despite an agreement to arbitrate, a dispute should not be arbitrated?

(2) In particular, should an agreement by the parties that completion of an arbitration is a condition precedent to court action be binding upon the parties?

None of the models under consideration suggests that a court should have a direct power to abrogate an agreement to arbitrate. Under every one of them, however, a court, under some circumstances and by some procedures, can remove a dispute from arbitration or allow court proceedings to pre-empt an arbitration, though courts lean against doing so. The specified circumstances vary considerably. The models we have referred to allow the Court to set aside an award under the following circumstances (starting with the most restrictive):

(1) the arbitration agreement is null and void, inoperative, or incapable of being performed (ICAA/Model Law Article 8).

(2) the arbitration agreement was made by a party under a legal incapacity, is not valid, or does not cover the dispute or all the parties to it; the subject-matter is not legally arbitrable; there is evidence of fraud or corrupt practice; or

public policy favours court proceedings (AIC draft s. 33).

(3) a court should have a discretion whether or not it should remove a dispute from arbitration, and in the exercise of the discretion it should consider a number of circumstances: whether or not the agreement to arbitrate was freely made; whether there are complex factual or legal issues and whether it is appropriate that these issues be settled by arbitration in the light of the qualifications of the arbitrator; the comparative expense and delay of court and arbitration proceedings; whether parties to the arbitration agreement other than the applicant want court proceedings; whether there are parties to the court proceedings who are not parties to the arbitration agreement; the stage which the court proceedings have reached; whether the applicant has taken a step in the court proceedings; whether the applicant has been, since the date of commencement of arbitration proceedings, ready, willing and able to do all things necessary to the proper conduct of the arbitration; whether the arbitrator may not be capable of impartiality; whether fraud is alleged; and any other matter the court considers significant (BC Report, Rec. 15; BC Act s. 15, relating to the staying of court actions).

The ICAA position is that an arbitration should go ahead unless there is something fundamentally wrong with the arbitration agreement itself. It is the most protective of the arbitration process against the court process, probably because of the desire of those involved in international commercial arbitrations to avoid entanglement with the local courts of the place where the arbitration is held. The BC position is that the Court should have a discretion to stop an arbitration or let it

proceed, which discretion it can exercise as seems best to it, subject only to the requirement that it consider a number of relevant factors. This is the model which is most favourable to court intervention, though it should be noted that it places upon the party who brings the court action the burden of showing that a stay of the court action should not be granted. The AIC draft position is in between, but considerably closer to the ICAA position.

As we have indicated at the beginning of this chapter, we think that the question comes down to one of the values to be applied in the interests of arbitration litigants. Are the desire for the cheapness and expedition of the arbitration process, the specific expertise of the arbitrator, the informality, privacy, and less adversarial nature of the arbitration (to the extent to which these advantages in fact exist), and the desire to avoid the judicial process, to have priority? If so, the ICAA model or the AIC model will be the best. Or are the impartiality, the independence and the legal expertise of the judicial system a greater priority? If so, the BC model will be best.

We invite comment.

We turn now to the "Scott v. Avery" clause, which makes completion of the arbitration process a condition which must be fulfilled before a party can take court action. This is the only kind of clause which English and Canadian courts have accepted as ousting their jurisdiction to this extent.

Under the ICAA, the court must keep a matter in the arbitration process unless the arbitration agreement is null and void, inoperative or incapable of being performed (ICAA/Model Law Article 8). Under it, there is therefore no need for a Scott v. Avery clause: the matter must at almost all events go to arbitration whether or not there is such a clause.

Under the other models we have referred to -- the BC Report, the BC Act and the AIC draft -- a Scott v. Avery clause becomes a mere agreement to arbitrate. This is consistent with the approach of the BC Report and the BC Act, which tend to be more favourable to court intervention than do the ICAA and the AIC draft. At first blush it seems rather less consistent with the general approach of the AIC draft, which tends to be less favourable to court intervention. However, the grounds upon which the court can intervene to remove a dispute from under an arbitration agreement are rather limited in the AIC draft, so that the inconsistency, if one exists at all, is not very great.

As it is probable that there are and will be for some time to come a substantial number of agreements to arbitrate which contain a Scott v. Avery clause, we invite comment as to whether the arbitration statute should deal with such a clause, and, if so, how.

(3) Removal of arbitrator

ISSUE 7.2

When, if ever, should a court have power to remove an arbitrator?

COMMENT:

Again, the models to which we have been referring set out a range of definitions of circumstances in which a court (which in Alberta would be the Court of Queen's Bench) should be able to remove an arbitrator:

(1) if there are circumstances which raise justifiable doubts about the arbitrator's impartiality or independence (but the challenge must be made promptly); or if an arbitrator becomes unable to perform his functions or fails to act without undue delay (ICAA/Model Law Articles 13, 14).

(2) if an arbitrator engages in corrupt or fraudulent practice; unduly delays proceedings or an award; or is biased (AIC draft s. 11).

(3) if an arbitrator engages in fraudulent or corrupt conduct, is biased, exceeds his powers, fails to observe the rules of natural justice, or fails to use reasonable dispatch in the arbitration or in the award (BC Report, Rec. 7, BC Act s. 18). (If the removal is for fraudulent or corrupt conduct or delay, the court should have power to deny the arbitrator compensation for his services and order him to pay costs: BC Report Rec. 17.)

The divergence between the ICAA and AIC draft models, on the one hand, and the BC model on the other, is not as great here as in the case of the removal of proceedings from arbitration, probably because the removal of an arbitrator is not as fundamental an interference in the arbitration process as is the removal of an issue from the arbitration process into court. The principal difference is that the BC model allows the Court to

remove an arbitrator on the grounds that he is not following the rules of natural justice. The ICAA and the AIC draft allow removal on grounds of bias (subject, in the case of the ICAA, to a requirement that the aggrieved party move quickly), but not on other grounds having to do with natural justice.

We invite comment as to what approach should be taken to the grounds for the removal of an arbitrator by the Court.

(4) Provisions of a new statute

ISSUE 7.3

What statutory provisions should be adopted to give effect to the answers to the policy questions under Issues 7.1 and 7.2?

COMMENT:

A simple provision that the Court of Queen's Bench has power to remove an arbitrator under specified circumstances is sufficient to deal with Issue 7.2, the circumstances under which the Court should be able to remove an arbitrator.

The situation is more complex with regard to the question when the Court should be able to remove an issue from arbitration altogether.

For the last hundred years at least, this issue has been dealt with in proceedings which raise it only indirectly. The first kind of proceedings is an application to stay a court action: if a party to an arbitration agreement brings a court action involving a dispute which the agreement requires to go to arbitration, the other party may apply for a stay of the court action. If the court grants a stay, the court action is

effectively stopped and the arbitration must continue. If the court refuses a stay, the arbitration is effectively pre-empted by the court action.

The second kind of proceedings is an application by a party to an arbitration agreement either for leave to revoke the submission to arbitration or to revoke the authority of an arbitrator. The former, an application for leave to revoke the submission, does raise the issue squarely, though it is only for leave to revoke and not for a revocation. The latter does not on the face of it raise the issue at all, though there is some judicial authority for the proposition that it should be decided on much the same grounds as an application for a stay of a court action would be decided.

Should these forms of proceedings continue?

A statute which provided for an application by a respondent to remove a dispute from arbitration into court, or an application by a claimant to remove a claim in court into arbitration, or both, would be more readily intelligible. In the first case, it could go on to provide that a removal into court would stay the arbitration. In the second, it could go on to provide that a removal into arbitration would stay the court proceeding.

Alternatively, the present manner of speaking could be continued. The stay or the revocation of authority or of the submission could continue to be the rubrics. The law could be improved by making the consequences of either proceeding explicit instead of implicit, that is, for example, the statute could

continue to talk of the primary relief for the claimant as being a stay of the court proceedings which have been brought by the respondent, but it could then go on to say that if the stay is granted the arbitration is to continue, and that if the stay is refused the arbitration is not to continue. These provisions could be made almost as explicit, and would avoid the upset which comes from changes in traditional terminology.

What course of action should be followed?

Whichever course of action is followed, we do not see any point in the present provision in the Arbitration Act under which the Court of Queen's Bench can grant a party leave to revoke a submission, nor the alternative expression under which a court can grant leave to a party to revoke the authority of an arbitrator. If the Court is to have power to take an issue from arbitration, it should be subsumed either under the continuation of a stay provision or under a provision under which the Court can remove an issue from arbitration. If the existing provision is regarded as a power to allow a party to revoke the authority of a specific arbitrator rather than a power to allow a party to revoke an arbitration agreement, it should be subsumed under a power to remove an arbitrator.

(5) Special case

ISSUE 7.4

Should the arbitrator be able to state a case for the court?

Under section 7 of the Arbitration Act, an arbitrator may "state an award as to the whole or part in the form of a special

case for the opinion of the Court". Under section 14, he may "state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference". Further, under section 14, the Court has power to order an arbitrator to state a special case. The special case under section 14 can be stated at any time during the arbitration as a form of consultation of the Court by the arbitrator. It can be stated in the award itself: the arbitrator says what his award would be if the question is answered in one way and what his award would be if it is answered in another way, and either leave it at that or make his award subject to the Court's opinion on the question of law.

The English Arbitration Act of 1979 did away with the special case. According to one English judge,[40] the special case procedure was a satisfactory" method of correcting errors of law, but it had come to be manipulated to produce very considerable delay and had resulted in English arbitration beginning to fall into disrepute. The 1979 Act substituted an appeal on a question of law under some circumstances for the English counterpart of Alberta's section 7, and it substituted a provision for the determination by the High Court of a preliminary question of law (with the consent of either the arbitrator or all parties) for Alberta's section 14. The BC Report recommended, and the BC Act adopted, a similar set of provisions.

The ICAA does not have any provision for either the statement of a special case or the determination of a preliminary question of law. Neither does the AIC draft.

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[40] Sir John Donaldson MR, Commercial Arbitration -- 1979 and After (1983) 48 Arbitration 259.

On the one hand, it may be thought unfortunate that an arbitration should have to be carried through to completion when there is doubt, for example, whether the arbitrator has jurisdiction or whether, even if the arbitrator finds the facts put forward by the claimant, the claim is valid. It would be useful for the legal foundation to be established first. This can be done in court proceedings through the determination of a preliminary question of law, and similar considerations apply to arbitrations.

On the other hand, the special case procedure can be used as a means of delay and to bring an undesirable element of control by the courts into proceedings in which the parties want a decision by arbitrators whom they have chosen or who will have special qualifications. The application for the determination of a preliminary question of law might raise some of the same problems.

We invite comment.

(6) Competent court

ISSUE 7.5

What court or courts should have the powers provided for under Issues 7.1 to 7.4?

The tenor of the BC Report suggests that the Supreme Court of British Columbia would be the court to exercise the powers conferred under Issues 7.1 to 7.4. In general, this appears to be the right approach, as it is the superior courts of unlimited jurisdiction which have customarily exercised such powers.

There is one possible exception. Under the Arbitration Act, it is the court in which an action is brought which has power to stay the action because of an agreement to arbitrate. On the one hand, it seems appropriate enough that a court which has power to adjudicate upon a dispute should also have power to decide whether the dispute should be arbitrated or decided judicially, and it is not desirable that an applicant for a stay of an action brought in the Provincial Court should be sent off to the Queen's Bench to get it. On the other hand, there is something to be said for having the supervision of the arbitration system in the hands of one court, which would have to be the Queen's Bench, and, if the stay has the effect of stopping the arbitration process, it could have have implications for other disputes under the same arbitration agreement.

We invite comment.

B. Judicial Supervision After an Award

(1) Form of proceedings: preliminary discussion

Under the Arbitration Act (ss. 10, 11), the Court of Queen's Bench has two specific powers. One is to set aside an award. The second is to remit the award to the arbitrator for further consideration and award. The BC Report recommended both that the BC Supreme Court continue to have this power and that a right of appeal to the Supreme Court be added. The ICAA provides for setting aside an award but not for an appeal. The AIC draft provides for an appeal to the Court of Appeal but not for setting aside an award.

We propose to defer consideration of the form which judicial supervision after the award may take until we have raised the policy issues. So as to avoid using any of the traditional terms, which might be taken to be an election to adopt a particular form of proceeding, we will talk of grounds for "upsetting" an award.

(2) Grounds for exercise of judicial supervisory powers

ISSUE 7.6

Upon what grounds should the Court be able to upset an arbitrator's award?

COMMENT:

(a) Mistake in the award

It seems that the Court will remit an award to an arbitrator if the arbitrator says that the award does not properly express his intention and asks to have it remitted.[41] Is this power desirable?

(b) New evidence

It seems that the Court will also remit the award if a party wants to put in new evidence to which the arbitrator could give some weight and if the party could not, by the exercise of reasonable diligence, have put the evidence in at the hearing. Is this power desirable?

(c) Mistake of fact

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[41] BC Report 68-69.

It is said that the Court has an inherent power to set aside an award for a mistake of fact which is apparent on the face of the award. The BC Report (Rec. 37) specifically recommended that the Court have no power to set aside an award for mistake of fact, and the BC Act (s. 30(3)) so provides. The ICAA and the AIC draft would not give the Court power to consider error of fact. It is doubtful that such a power should be continued. Should the Court have power to consider error of fact?

There are decisions to the effect that an arbitrator who makes a finding of fact without evidence has exceeded his jurisdiction and committed "misconduct".[42] Presumably the BC Report and the BC Act would carry forward the Court's power to set aside or remit an award on that grounds. Neither the ICAA nor the AIC draft, upon any ordinary interpretion, would do so. Should making a finding of fact without evidence be a grounds for upsetting an award?

(d) Mistake of law

The question whether and when a court should have power to upset an award on the grounds that the arbitrator has made an error of law is more difficult.

The traditional statement of the law is that, by way of exception to the general proposition that an arbitrator's award is final and binding, the courts can set aside an arbitrator's award if the award is based upon an error of law which appears on the face of the award. It can be argued that the exception is unsatisfactory because it extends court interference with the

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[42] BC Report 63.

tribunal which the parties have been chosen, or it can be argued that the exception is justified by the need to avoid injustice. If the exception is justified at all, it is difficult to justify restricting it to cases in which the error of law is apparent on the face of the award: an arbitrator can stultify the court's jurisdiction by the simple expedient of ensuring that his reasons are not apparent on the face of the award, and it seems that there are times and places when and where arbitrators have commonly done so.

There is, however, an exception to the exception. If the parties have specifically referred a question of law to an arbitrator, then the fact that the arbitrator answers the question wrongly is not a grounds for setting aside the award. Some recent judgments[43] indicate that the law on the exception to the exception has become almost unbearably complex. There is difficulty in determining when a question of law has been specifically referred. It has been authoritatively stated that there are exceptions to the exception to the exception. There is even a suggestion that if the question of law is a question of interpretation of a contract, the administrative law test that a decision should not be set aside unless it is patently unreasonable applies, though this suggestion does not appear to be well-founded. Some clarification of the law, at least, is needed.

The BC Act (s. 32), which gives effect to the BC Report (Rec. 37), allows a party to appeal on a question of law (though,

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[43] Particularly *Volvo Canada Ltd.* v. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 720* (1980) 99 DLR (3rd) 193.

as we will note below, the right is limited). This is in substitution for the existing power to set aside for error on the face of the award. Neither the AIC draft nor the ICAA would give a party any access to a court on grounds of an error in law.

The question whether there should be an appeal on a question of law is another question the answer to which depends upon the fundamental view of arbitration which is taken. If what is paramount is the perceived desire of those who choose arbitration for the perceived cheapness, expedition, expertise, informality, privacy, and less adversarial nature of arbitration, and their perceived desire to avoid the judicial process, it would be better to allow the Court to intervene only in restricted circumstances, not including alleged errors in law. If what is paramount is the supervision of arbitration by the courts to ensure fairness and avoid legal injustice, then relief on grounds of error in law should be provided.

It should be noted that the appeal provided by the BC Act is limited. First, an appeal can be taken only with leave of the Court. Second, the Court is to grant leave only in limited circumstances: if the importance of the result of the arbitration to the parties justifies the intervention of the Court and the determination of the point of law may prevent a miscarriage of justice; if the point of law is of importance to a class of which the appellant is a member; or if the point of law is of general or public importance. Third, the parties may agree to exclude the jurisdiction of the Court to hear such an appeal, though they can do so only after the hearing of the arbitration has commenced.

A member of the Law Reform Commission of British Columbia dissented from this model on the grounds that the system was complicated, involving, as it does, an application for leave and an appeal to the Supreme Court followed by another appeal to the Court of Appeal. He would have recommended an appeal as of right on a question of law directly to the Court of Appeal, but he would have allowed the parties to contract out of the right of appeal by agreement at any time.

The questions here are: Should a court have the power to upset an award on the grounds of error of law? Should leave be required? Should the parties be able to contract out of a right of appeal, either at any time, or after the commencement of the arbitration?

(e) Wrongful procurement of award

Under the Arbitration Act (s. 11(2)), the Court can set aside an award which has been improperly procured. The examples of improper procurement which cannot be dealt with under the heading of misconduct or arbitral error appear to involve a party deceiving an arbitrator or fraudulently concealing material evidence (BC Report page 62). The BC Act (s. 30) carries this forward as a grounds for setting aside or remitting the award. The ICAA and the AIC draft do not. Should the Court have power to upset an award on the grounds that the award was improperly procured?

(f) Misconduct or arbitral error

The BC Act (s. 30), following the BC Report,provides that the Court can set aside or remit the award on the grounds of

arbitral error. It (s. 1) defines "arbitral error" to be misconduct and to include corrupt or fraudulent conduct, bias, acting in excess of powers, and failure to observe the rules of natural justice.

The AIC draft deals with bias under the heading of removal of the arbitrator and the ICAA deals with it by providing a limited opportunity to challenge the arbitrator. The AIC draft also deals with corrupt or fraudulent practice in the same way.

The ICAA and the AIC draft do not refer to natural justice. They do, however, allow the Court to upset an award on the grounds that 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 his case.

What should be done? Provisions for pre-award and post-award court supervision and control should form a coherent pattern. If the narrower ICAA or AIC draft provisions for pre-award supervision and control are adopted, it is likely that this consideration would suggest that the narrower ICAA or AIC draft provisions for post-award control should also be adopted. Similarly, if the broader BC provisions for pre-award supervision and control are adopted, it is likely that the broader BC provisions for post-award supervision control should be adopted.

We invite comment.

(g) Fundamental invalidity of proceedings

The ICAA and AIC drafts provide for upsetting an award on grounds that a party was under a legal incapacity when the

arbitration agreement was made, or if the arbitration agreement was invalid, or if the dispute does not fall within it or was not referred to the arbitrator, or if the arbitral tribunal was not properly constituted, or if the dispute is not arbitrable, or if the award is in conflict with the public policy of the province.

Neither the Arbitration Act (Alberta) nor the BC Act mentions these latter grounds for upsetting an award. It is likely, however, that the Court would, if any of them exists, grant a judicial declaration that the arbitration proceedings were invalid.

(3) Powers of the Court

ISSUE 7.7

What powers should the Court have when it upsets an arbitrator's award?

COMMENT:

The next question is what a court should be able to do if it finds that an arbitrator's award should be upset on any grounds provided for in the arbitration statute. Should it be able to set aside the award so that the award has no effect? Should it be able to send the dispute back to the arbitrator to make a further award based on the court's opinion about the facts, the procedure or the law? Should it be able to substitute its own opinion for that of the arbitrator?

The BC Act, following the BC Report, provides for setting aside or remitting an award on grounds of improper procurement or arbitral error. It also provides for an appeal on a point of law, upon which the Court may confirm, vary or set aside the

award, or remit the award to the arbitrator for further consideration together with the Court's opinion on the question of law that was the subject of the appeal. Thus, when a question of law is concerned, the Court can substitute its own opinion for that of the arbitrator, but it can otherwise only set aside or remit.

The ICAA provides only for setting aside an award, though the Court can suspend the setting aside in order to give the arbitrator an opportunity to take steps to remove the grounds for setting aside. The AIC draft does not specify the powers of the Court upon an appeal, but the nature of the grounds of appeal are such that the Court could do little else than to set the award aside.

(4) Form of proceedings: conclusion

There are two primary forms of proceedings disclosed by the models under discussion: a summary application to the Court, and an appeal to the Court. The summary application is associated with setting aside an award or remitting it to the arbitrator for reconsideration. The appeal is associated in the BC model with a question of law as grounds and with the wider powers which an appellate court normally has on an appeal. In the AIC draft, the appeal appears to be associated either with setting aside an award or finding that the whole arbitration process was a nullity or fundamentally flawed.

If there is an appeal on a question of law, the use of a procedure called an appeal is probably indicated, as the Court will presumably have the power to change the outcome of the

arbitration if the arbitrator was wrong in law. There is, however, no reason why the appeal could not be conducted in accordance with a summary procedure. Most of the other grounds mentioned above lend themselves to a summary application to the Court to set aside or remit. It seems that the choice of procedure depends upon the choice of grounds.

Neither model refers to the granting by the Court of a judicial declaration or injunction. Probably much of what gives grounds for setting aside an award would also give grounds for a declaration that the arbitration proceedings are defective or that the award is ineffective, and it may also give grounds for an injunction against the continuance of the arbitration proceedings. Under the Arbitration Act and the BC Act, some of the fundamental defects mentioned in the ICAA and in the AIC draft can probably be dealt with only by an action for a declaration or an injunction or both.

There is a question whether all remedies should be brought into the arbitration statute. However, it is likely that the courts will continue to exercise some form of jurisdiction to deprive of legal effect any award made after arbitration proceedings which have such a fatal flaw that they are really totally improper.

(5) Competent court

ISSUE 7.8

What court or courts should have power to upset an award?

COMMENT:

In Alberta, the Appellate Division of the Supreme Court for many years exercised jurisdiction to set aside and remit awards, but when Court of Queen's Bench and the Court of Appeal were created in 1979 the jurisdiction was transferred to the Queen's Bench. In British Columbia, the Supreme Court is the supervising court, following a divided recommendation from the Law Reform Commission. The AIC draft refers to an "appellate court", which means the Court of Appeal.

It is easier, quicker and cheaper to go to the Court of Queen's Bench than it is to go to the Court of Appeal, and the Court of Queen's Bench sits throughout the province. That suggests the choice of the Queen's Bench as the supervising court. On the other hand, a party may appeal a Queen's Bench order to the Court of Appeal, and in such a case the appeal to the Queen's Bench is an additional step, and the benefit from it is not likely to be commensurate with the additional cost and delay involved in it. That suggests the choice of the Court of Appeal as the supervising court, though the effect of the argument may be lessened because most cases are not appealed further after a Queen's Bench order. Further, where the question on which an appeal is founded is a question of law, there may be some feeling that the Court of Appeal is the proper court to deal with it. There may also be some feeling that an appeal from a multi-member body, which an arbitral tribunal often is, should not go to a single judge.

We invite comment.

C. Appeals from Supervisory Orders

ISSUE 7.9

Should appeals be permitted from order of the Court of Queen's Bench which assist and control arbitration proceedings?

COMMENT:

The AIC draft, presumably with the intention of ensuring that appeals are not used to delay arbitration proceedings, provides in a number of instances that an order of the Court of Queen's Bench is not to be subject to an appeal to the Court of Appeal. These instances include the following: an order by which the Court assists the process by taking an action, performing a function or making a decision or ordering someone to do so (s. 8); an order consolidating arbitrations (s. 27); and a decision of the Court to grant or to refuse a stay of a court action on the dispute (s. 33). On the other hand the draft provides for an appeal from an order removing an arbitrator (s. 12).

D. Contracting out of Court Supervision

ISSUE 7.10

(1) Should the parties to an arbitration agreement be able to exclude any or all of the jurisdictions which the Court has or should have under the arbitration statute?

(2) If an exclusion agreement is to be permitted, should the parties be able to enter into it at any time or only after an arbitration has been commenced?

COMMENT:

The Arbitration Act confers on the Court of Queen's Bench the various jurisdictions which have been described in this paper. The existence of those jurisdictions is something

prescribed by law and has nothing to do with the intentions of the parties to an arbitration agreement. It is unlikely that the parties can agree to oust them (though they may do an end run around any particular system of laws by contracting to make another system of laws applicable to the arbitration agreement).[44]

The English Arbitration Act 1979, which substituted a right of appeal on a question of law for the power of the Court to set aside an award for error of law on its face, provided that the right can be excluded by agreement between the parties. In the case of a domestic arbitration (except three specific categories), the agreement can be made only after the commencement of the arbitration. In the case of a non-domestic arbitration, the agreement to exclude the the right of appeal can be made in advance, a concession which, it appears, was made in order to maintain England's competitive advantage as an arbitration forum.

The BC Act (s. 34) provides that if the parties so agree, the Supreme Court does not have jurisdiction either to hear such an appeal or to determine a question of law arising in the course of an arbitration proceeding. The agreement would not, however, have effect unless it is entered into after the commencement of the hearing of the arbitration. This gives effect to the BC Report's recommendations (Rec. 44).

The question is whether, and to what extent, the jurisdiction of the Court to supervise and control an arbitration should be capable of being excluded by agreement of the parties.

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[44] Russell 218-220.

On the one hand, it can be argued that Court supervision and control is a safeguard to ensure that the parties to an arbitration receive justice according to law. On the other hand, it can be argued that applications to the Court are costly and time-consuming and can be used to stultify the proceedings, and that there is no objective evidence that the justice dispensed by the Courts is superior to the justice dispensed by arbitrators. It can also be argued that the parties have chosen their forum and should be able to confine themselves to it if they wish, though, on the other hand, it may be argued that the choice is illusory, given that many arbitration clauses appear in standard form contracts, which a party has little choice but adhere to, or as standard boiler-plate to which parties do not in fact address their minds.

The issue will be decided to some extent by the view which is taken of the proper relationship between the arbitration process and the judicial process.

APPENDIX A

THE ARBITRATION ACT

CHAPTER A-23

[as amended to 1986]

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

1 In this Act,

(a) "clerk" means the clerk of the Court for the judicial district in which the arbitration takes place;

(b) "Court" means the Court of Queen's Bench;

(c) "professional arbitrator" means an arbitrator who is by profession a barrister, solicitor, architect, Dominion land surveyor or Alberta land surveyor;

(d) "submission" means a written agreement to submit present or future differences to arbitration whether an arbitrator is named in it or not.

2 A submission, unless a contrary intention is expressed in it,

(a) is irrevocable except by leave of the Court and has the same effect as if it had been made an order of the Court, and

(b) shall be deemed to include the provisions set out in the Schedule so far as applicalbe to the reference under the submission.

3 If a party to a submission or a person claiming through or under him commences legal proceedings in a court against another party to the submission or a person claiming through or under him in respect of a matter agreed to be referred, a party to the legal proceedings may at any time before delivering any pleadings or taking any other steps in the proceedings, apply to that court for an order staying the proceedings.

4 The Court to which an application is made under section 3 may make the order on being satisfied

(a) that there is no sufficient reason why the matter should not be referred in accordance with the submission, and

(b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.

5(1) A party to a submission may serve on the other party or parties or on the arbitrators, as the case may be, a notice in writing requiring him or them to appoint an arbitrator, umpire or 3rd arbitrator

(a) when a submission provides that a reference shall be to a single arbitrator and after differences have arisen all the parties to the difference do not concur in the selection of the arbitrator,

(b) when an appointed arbitrator refuses to act or is incapable of acting or dies and the

submission does not show that it was intended that the vacancy should not be filled and the parties do not fill the vacancy,

(c) when the parties or 2 arbitrators are at liberty to appoint an umpire or 3rd arbitrator and do not appoint him, or

(d) when an appointed umpire or arbitrator refuses to act or is incapable of acting or dies and the submission does not show that it was intended that the vacancy should not be filled and the parties or arbitrators do not fill the vacancy.

(2) If the appointment is not made within 7 clear days after the service of the notice, the Court may on application by the party who gave the notice appoint an arbitrator, umpire or 3rd arbitrator, as the case may be, who has the same powers to act in the reference and make an award as if he had been appointed by consent of all parties.

6(1) If a submission provides tht the reference will be to 2 arbitrators, one to be appointed by each party, then unless the submission expresses a contrary intention,

(a) if either of the appointed arbitrators refuse to act or is incapable of acting or dies, the party who appointed him may appoint a new arbitrator in his place, or

(b) if one party fails to appoint an arbitrator either originally or by way of substitution for 7 clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment,

(i) the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and

(ii) the award of that arbitrator is as binding on both parties as if he had been appointed by consent.

(2) The Court may set aside an appointment made under this section.

7 The arbitrators or umpire acting under a submission may, unless the submission expresses a contrary intention,

(a) administer oaths or take the affirmations of the parties and witnesses,

(b) state an award as to the whole or part in the

form of a special case for the opinion of the Court, and

(c) correct in an award a clerical mistake arising from an accidental error or omission.

8(1) In order to procure the attendance of a person as a witness at an arbitration, a party to a submission may serve him with a notice requiring him to attend at the time and place named in the notice.

(2) The notice shall be served in the same way and has the same effect as a notice requiring the attendance of a witness and the production of documents by him at the hearing or trial of an action.

(3) No person shall be compelled under the notice to produce a document that he could not be compelled to produce on the trial of an action.

9 Whether or not the time for making an award has expired, the time may be enlarged by order of the Court.

10(1) In all references to arbitration the Court may from time to time remit the matters referred or any of them for reconsideration by the arbitrators or umpire.

(2) When an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within 6 weeks after the date of the order.

11(1) If an arbitrator or umpire has misconducted himself, the Court may remove him.

(2) If an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the Court may set the award aside.

11.1(1) An application to the Court under section 11(2) to set aside an award shall be made within 45 days from the day of the publication of the award.

(2) Notwithstanding subsection (1), if an award has been made after June 29, 1979 but prior to the commencement of this provision, an application to set aside that award under section 11(2) shall be made within 45 days from the commencement of this action.

(3) Notwithstanding subsection (1) or (2), the Court, on an application made before or after the expiration of the 45-day period, may extend the time within which an application may be made under section 11(2).

12 An award on a submission may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect.

13 the Court may make an order in the nature of a writ of habeas corpus ad testificandum to bring up a prisoner for examination before an offical, special referee, arbitrator or umpire.

14 A referee, arbitrator or umpire at any stage of the proceedings under a reference may, and if so directed by the Court shall, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

15 An order made under this Act may be on any terms in respect of costs or otherwise that the authority making the order considers just.

16 When

(a) an Act directs that a person or persons appoint arbitrators, or proceed to arbitration under this Act, or

(b) any similar direction is made with respect to arbitration under this Act,

the direction shall be deemed a submission.

17(1) In this section,

(a) "arbitrator" includes an umpire and referee in the nature of an arbitrator;

(b) "end user" means the buyer of gas under a gas contract who purchases the gas for the purpose of using or consuming it;

(c) "gas" means a gaseous mixture consisting primarily of methane;

(d) "gas contract" means a contract under which gas is sold and delivered by a seller to a buyer, and includes an agreement that varies or amends that contract and an arbitration award that relates to that contract.

(2) Subject to subsection (3), this section applies to every submission, whether coming into existence before or after the coming into force of this section, that provides for the arbitration of present or future differences relating to

(a) the initial determination or a redetermination of the price of gas delivered under a gas contract,

(b) the creation, replacement or modification of a method or formula for the calculation of the price of gas delivered under a gas contract, or

(c) the determination of the price of gas delivered under a gas contract in place of a method or formula for the calculation of the price of gas delivered under the gas contract.

(3) The buyer and seller under a gas contract may agree to vary or make inapplicable all or anyof the provisions of this section in relation to a submission to which this section applies only if the greement is made after the coming into force of this section.

(4) In an arbitration under this section the arbitrator shall have regard to at least the following matters to the extent that evidence is adduced with respect to those matters:

(a) the prices of substitutable energy sources

(i) that compete with gas for the various end uses of gas in the markets served by the buyer, where the buyer is not the end user of the gas, or

(ii) that are available for use or consumption by the buyer in place of gas, where the buyer is the end user of the gas,

taking into account any differences in the efficiencies of gas and those substitutable energy sources;

(b) the prices of other gas

(i) that competes in the same markets as those being served by the buyer, where the buyer is not the end user of the gas, or

(ii) that is available for use or consumption by the buyer, where the buyer is the end user of the gas;

(c) the explicit or implicit prices of other gas produced in Alberta and delivered under other gas contracts;

(d) the prices for gas in markets outside Canada that could be served by gas produced in Alberta if there were no quantitative restrictions imposed on the export of gas from Canada by or under any law in force in Canada.

(5) The arbitrator, in having regard to each of the matters enumerated in subsection (4), shall take at least the following matters into account to the extent that evidence is adduced with respect to those matters:

(a) differences in transportation costs;

(b) the times at which prices were agreed to between the respective sellers and buyers;

(c) similarities and dissimilarities between the provisions of the gas contract and the provisions of contracts for the purchase of thes substitutable energy sources and gas referred to in subsection (4).

(6) In an arbitration under this section,

(a) the arbitrator must be ordinarily resident in Alberta, if the arbitration is conducted by a single arbitrator, and

(b) at least half of the arbitrators must be ordinarily resident in Alberta, if the arbitration is conducted by 2 or more arbitrators.

18 In sections 19 to 26

(a) "arbitrator" includes umpire and referee in the nature of an arbitrator,

(b) "award" includes umpirage and a certificate in the nature of an award.

19 Subject to section 20, an arbitrator is not entitled to demand or take for his attendance and services as an arbitrator in addition to his necessary disbursements greater fees than are prescribed in the regulations.

20(1) The parties to a submission may, by writing signed by them or by making the agreement a part of the submission, agree to pay to the arbitrator or arbitrators for their taking on themselves the burden of the reference and making the ward such fees or sums for each day's attendance, or such gross sums, as the parties see fit.

(2) The amounts agreed upon under subsection (1) shall be substituted for those prescribed in the regulations, and shall be taken and allowed by the clerk.

21 No greater fees shall be taxed and allowed to a person called as a witness before an arbitrator than would be taxed and allowed to the same person in an ordinary action before a court having jurisdiction over the subject of the reference.

22(1) When at a meeting of arbitrators of which due notice as been given no proceedings are taken, either because of the absence of a party, or because the arbitrators postponed the proceedings at the request of a party, the arbitrators

(a) shall make up an account of the cost of the meeting, including the proper charges for their own attendance and that of any witnesses, and of the counsel or solicitor of the party present and not desiring the postponement, and

(b) shall charge the amount thereof or of the disbursements against the party in default or at whose request the postponement is made, unless in the special circumstances they consider it unjust to do so.

(2) The party in default or at whose request a postponement is made shall pay the amount charged whatever may be the event of the reference and the arbitrators shall in the award make any direction necessary for the purpose of this subsection.

(3) If the amount referred to in subsection (2) is payable by the party in whose favour the award is otherwise made it may, unless previously paid, be set off against and deducted from an amount awarded in favour of that party.

23(1) A party to an arbitration may have the fees of the arbitrator or the costs of the arbitration, including those fees, taxed by the clerk. (2) An appointment for the taxation of the fees or the costs mentioned in subsection (1) may be granted by the clerk to the paty applying for it on the filing of an affidavit setting forth the facts.

(3) An appointment for the taxation of the fees may be granted by the clerk at the instance of the arbitrators upon the filing of a similar affidavit.

24(1) Except when an agreement in writing to that effect has been entered into under this Act, the clerk shall not allow on taxation higher fees than those prescribed in the regulations.

(2) On reasonable grounds established by affidavit and having regard to

(a) the length of the arbitration,

(b) the value of the matter in dispute, and

(c) the difficulty of the question to be decided,

the clerk may on taxation reduce the amount of the fees allowed to professional arbitrators as prescribed in the regulations but not to an amount less than the fees allowed to non-professional arbitrators as prescribed in the regulations.

(3) The clerk shall not allow on taxation more than one counsel's fee for each party for any meeting of the

arbitrators.

(4) The clerk may tax and allow a reasonable sum for the preparation and drawing up of the award.

(5) An appeal may be had from the taxation in the same manner as from the clerk's taxation in an action.

25(1) An arbitrator who after having entered on the reference refuses or delays after the expiration of one month from the publication of the award to deliver the certificate of award until a larger sum is paid to him for his fees than is permitted by this Act forfeits and shall pay to the party who has demanded delivery of the sward treble the excess demanded by the arbitrator contrary to this Act.

(2) An arbitrator who after having entered on the reference receives for his award or for his fees as arbitrator a larger sum than is permitted by this Act forfeits and shall pay to the party who has paid to the arbitrator the larger sum in order to obtain the award or as consideration for having obtained the award treble the excess paid to the arbitrator and received by him contrary to this Act.

(3) The trebled excess may be recovered with costs by action n the Court.

26(1) Where an award is made the arbitrator may maintain an action for his fees on the award, after they have been taxed.

(2) In the absence of an express agreement the arbitrator may maintain an action under subsection (1) against all parties to the reference, jointly or severally.

27 The Lieutenant Governor in Council may make regulations prescribing the fees to be paid to arbitrators and may prescribe different fees for professional and non-professional arbitrators.

SCHEDULE

(Section 2)

Single Arbitrator

1 If no other mode of reference is provided, the reference shall be to a single arbitrator.

Umpire

2 If the reference is to 2 arbitrators, the 2 arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

Time and Manner of Award

3 The arbitrators hall make their award in writing

(a) within 6 weeks after entering on the refernece, or after having been called on to act by notice in writing from any party to the submission, or

(b) on or before any later day to which the arbitrators by writing signed by them may from time to time enlarge the time for making the award.

Arbitrators Disagreeing; Umpire to Act

4 If the arbitrators have allowed their time or extended time to expire without making an award or have delivered to any party to the submission or to the umpire a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

Time for Umpire's Award

The umpire shall make his award

(a) within one month after the original or extended time appointed for making the award of the arbitrators has expired, or

(b) on or before any later day to which the umpire by writing signed by him may from time to time enlarge the time for making his award.

Examination of Parties

6 the parties to the reference and all persons claiming through them shall, subject to any legal objection,

(a) submit to be examined by the artibtrators or umpire on oath or affirmation in relation to the matters in dispute,

(b) produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power which may be required or called for, and

(c) do all other things which during the proceedings on the reference the arbitrators or umpire may require.

Oath or Affirmation

7 The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation.

Finality of Award

8 the award to be made by the umpire or arbitrator shall be final and binding on the parties and the persons caliming under them.

Costs of Reference

9 The costs of the reference and award are in the discretion of the arbitrators or umpire who may direct to and by whom and in what manner the costs or any part of them shall be paid.

APPENDIX B

THE INTERNATIONAL COMMERCIAL ARBITRATION ACT

CHAPTER I-6.6

(Assented to August 15, 1986)

Table of Contents

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

1(1) In this Act,

(a) "Convention" means 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 June 10, 1958, as set out in Schedule 1;

(b) "International Law" means the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in Schedule

2.

(2) Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the Convention or the International Law, as the case may be.

PART 1

FOREIGN ARBITRAL AWARDS

2(1) Subject to this Act, the Convention applies in the Province.

(2) The Convention applies to arbitral awards and arbitration agreements whether made before or after the coming into force of this Part, but applies only in respect of differences arising out of commercial legal relationships, whether contractual or not.

3 For the purpose of seeking recognition of an arbitral award pursuant to the Convention, application shall be made to the Court of Queen's Bench.

PART 2

INTERNATIONAL COMMERCIAL ARBITRATION

4(1) Subject to this Act, the International Law applies in the Province.

(2) The International Law applies to international commercial arbitration agreements and awards, whether made before or after the coming into force of this Part.

5 For the purpose of encouraging settlement of a dispute, an arbitral tribunal may, with the agreement of the parties, employ mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure.

6(1) Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the International Law, any hearing held prior to the replacement or removal shall be repeated.

(2) With respect to article 15 of the International

Law, the parties may remove an arbitrator at any time prior to the final award, regardless of how the arbitrator was appointed.

7 Notwithstanding article 28(2) of the International Law, if the parties fail to make a designation pursuant to article 28(1) of the International Law, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances respecting the dispute.

8(1) The Court of Queen's Bench, on application of the parties to 2 or more arbitration proceedings, may order

(a) the arbitration proceedings to be consolidated, on terms it considers just,

(b) the arbitration proceedings to be heard at the same time, or one immediately after another, or

(c) any of the arbitration proceedings to be stayed until after the determination of any other of them.

(2) Where the Court orders arbitration proceedings to be consolidated pursuant to subsection (1)(a) and all the parties to the consolidated arbitration proceedings are in agreement as to the choice of the arbitral tribunal for that arbitration proceeding, the arbitral tribunal shall be appointed by the Court, but if all the parties cannot agree, the Court may appoint the arbitral tribunal for that arbitration proceeding.

(3) Nothing in this section shall be construed as preventing the parties to 2 or more arbitration proceedings from agreeing to consolidate those arbitration proceedings and to take such steps as are necessary to effect that consolidation.

9(1) The functions referred to in article 6 of the International Law shall be performed by the Court of Queen's Bench.

(2) For the purposes of the International Law, a reference to "court" or "competent court", where in the context it means a court in the Province, means the Court of Queen's Bench.

PART 3

GENERAL

10 Where, pursuant to article II(3) of the Convention

or article 8 of the International Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

11 This Act binds the Crown.

12(1) This Act shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the Act in their context and in the light of its objects and purposes.

(2) In applying subsection (1) to the International Law, recourse may be had to

(a) the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3-21, 1985), and

(b) the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration,

which shall be published in The Alberta Gazette.

SCHEDULE 1

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether

contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

a) The duly authenticated original award or a duly certified copy thereof;

b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and

enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

a) The parties to the agreement referred to in article II were, under the law applicable to them, 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

b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

c) The award deals with a difference 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

d) The composition of the arbitral authority 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

e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement or arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the day of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

a) Signatures and ratifications in accordance with article VIII;

b) Accessions in accordance with article IX;

c) Declarations and notifications under articles I, X and XI;

d) The date upon which this Convention enters into

force in accordance with article XII;

e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

SCHEDULE 2

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

(As adopted by the United Nations Commission on International Trade Law on 21 June 1985)

CHAPTER I.

GENERAL PROVISIONS

Article 1. *Scope of application*

(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(3) 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 States; or

(b) one of the following places is situated outside the State 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.

(4) For the purposes of paragraph (3) of this article:

(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 his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2. *Definitions and rules of interpretation*

For the purposes of this Law:

(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;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law 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;

(f) where a provision of this Law, other than in articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3. *Receipt of written communications*

(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 his 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;

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

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

Article 4. *Waiver of right to object*

A party who knows that any provision of this Law 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 his 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 his right to object.

Article 5. *Extent of court intervention*

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

Article 6. *Court or other authority for certain functions of arbitration assistance and supervision*

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ..... (Each state enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.)

CHAPTER II.

ARBITRATION AGREEMENT

Article 7. *Definition and form of arbitration*

agreement

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them 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) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or 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 another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 8. *Arbitration agreement and substantive claim before court*

(1) A court before which an action is brought in a matter which isthe subject of an arbitration agreement shall, if a party so requests not later than when submitting his 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 article 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.

Article 9. *Arbitration agreement and interim measures by court*

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.

CHAPTER III.

COMPOSITION OF ARBITRAL TRIBUNAL

Artilce 10. *Number of arbitrators*

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

(2) Failing such determination, the number of arbitrators shall be three.

Article 11. *Appointment of arbitrators*

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

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

(3) Failing such agreement,

(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 or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(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 institution, fails to perform any function entrusted to it under such procedure,

any party may request the court of other authority specified in article 6 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 article to the court or other authority specified in article 6 shall be subject to no 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 third arbitrator, shall take into accout as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. *Grounds for challenge*

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his 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.

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

Article 13. *Challenge procedure*

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

(2) Failing such agreement,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 circumstances referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from 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 article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 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.

Article 14. *Failure or impossibility to act*

(1) If an arbitrator becomes *de jure* or *de facto* unable to perofrm his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office of it the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or oer authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or aticle 13(2), an arbitrator withdraws from 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 article or article 12(2).

Article 15. *Appointment of substitute arbitrator*

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV.

JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. *Competence of arbitral tribunal to rule on its jurisdiction*

(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 he 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 article 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 request, within thirty days after having received notice of that ruling, the court specified in article 6 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.

Article 17. *Power of arbitral tribunal to order interim measures*

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

CHAPTER V.

CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. *Equal treatment of parties*

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. *Determination of rules of procedure*

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

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, 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.

Article 20. *Place of arbitration*

(1) the parties are free to agree on the place of 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 article, 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.

Article 21. *Commencement of arbitral proceedings*

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 the respondent.

Article 22. *Language*

(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 therein, 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.

Article 23. *Statements of claim and defence*

(1) Within the period fo time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporitng his claim, the points at issue and the relief or remedy sought, and the respondent shall state his 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 will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his 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.

Article 24. *Hearings and written proceedings*

(1) Subject to any contrary 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 a party.

(2) 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.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely6 in making its decision shall be communicated to the parties.

Article 25. *Default of a party*

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

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(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.

Article 26. *Expert appointed by arbitral tribunal*

(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 his inspection.

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

Article 27. *Court assistance in taking evidence*

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

CHAPTER VI.

MAKING OF AWARD AND

TERMINATION OF PROCEEDINGS

Article 28. *Rules applicable to substance of dispute*

(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 shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(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.

Article 29. *Decision making by panel of arbitrators*

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.

Article 30. *Settlement*

(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 article 31 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.

Article 31. *Form and contents of award*

(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.

(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 article 30.

(3) the award shall state its date and the place of arbitration as determined in accordance with article 20(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 article shall be delivered to each party.

Article 32. *Termination of proceedings*

(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 article.

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

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his 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 ofthe arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33. *Correction and interpretation of award; additional award*

(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 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 interpreation 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 article 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 awardwithin 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 article.

(5) the provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII.

RECOURSE AGAINST AWARD

Article 34. *Application for setting aside an exclusive recourse against arbitral award*

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraph (2) and (3) of this article.

(2) An arbitral award may be set aside by the court spefified in article 6 only if:

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

(i) a party to the arbitration agreement referred to in article 7 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 this State; or

(ii) the party making the applicatin was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his 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 Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; 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 article 33, 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 fdetermined 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.

CHAPTER VIII.

RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. *Recognition and enforcment*

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application n writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

2) The aparty relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

Article 36. *Grounds for refusing recognition or*

enforcement

(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 article 7 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 his 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 matter submitted to arbitration can be separated from those not so submitted, that part of the ward 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 article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the applicatin of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

APPENDIX C

RECOMMENDATIONS OF THE LAW REFORM COMMISSION OF BRITISH COLUMBIA

[The following recommendations are copied from pages 90 to 95 of the Report on Arbitration of The Law Reform Commission of British Columbia and are included here with the kind permission of the Commission.]

The Commission recommends:

1. The *Arbitration Act* should apply to all agreements, whether or not in writing, to submit present or future differences to arbitration, whether or not an arbitrator is named in the agreement. (Page 10)

2. Unless the parties agree otherwise:

   (a) An arbitration agreement should not be discharged by the death of any party and in such an event it shoudl be enforceable by or against the personal representatives of the deceased.

   (b) The authority of an arbitrator should bot be revoked by the death of any party.

   (c) Nothing in (a) and (b) should affect the operation of any enactment or rule of law by virtue of which any right of action is extinguished by the death of a person. (Page 11)

3. The phrase in section 3 "and has the same effect in all respects as if it had been made an order of the court" should be repealed. (Page 13)

4. Sections 7 and 8 of the *Arbitration Act* should be replaced by legislation similar to section 8 of *The Arbitrations Act* of Ontario. (Page 16)

5. The court should have the power to remove an arbitrator or umpire who makes an arbitral error or who does not proceed with reasonable dispatch in conducting the arbitration and making an award, and the court should have a discretion, where it removes an arbitrator or umpire for conduct amounting to corruption of fraud or for failing to use reasonable dispatch, to order that he is not entitled to receive any remuneration for his services and that he be liable for the costs that the parties have incurred to the date of his removal. (Page 18)

6. (a) Where an arbitrator or umpire is removed by the court under recommendation 5, the parties should be permitted to appoint a replacement as if a vacancy had been created.

   (b) Where the parties do not concur in the appointment of a replacement under recommendation (a), the

court should have the power to appoint a person to act as arbitrator or umpire in place of the person removed unless the person so removed was designated by name in the arbitration agreement. (Page 18)

7. The arbitrator's lien in respect of his fees and expenses should be abolished. (Page 20)

8. Notwithstanding any agreement prohibiting taxation, there should be a general power to tax an arbitrator's bill in respect of his fees and expenses at the instance of the arbitrator or any party to the arbitration. (Page 20)

9. The procedure for taxing an arbitrator's bill under recommendation 8 should be similar to that established under section 92 of the *Barristers and Solicitors Act* for the taxation of solicitor's bills, and when the bill of an arbitrator is taxed, the certificate of the taxing officer should be enforceable as a judgment of the Supreme Court. (Page 20)

10. Arbitrators should continue to be required to adjudicate dsputes according to the law, rather than by reference only to equity and good conscience, unless the parties agree otherwise in a valid exclusion agreement made pursuant to recommendation 44. (Page 23)

11. An arbitrator should be permitted to call a witness on his own motion but any party to the reference should have the opportunity to cross-examine the witness and offer evidence in rebuttal. (Page 24)

12. Unless the parties agree otherwise, an arbitrator should have the power to admit evidence and information on oath, affidavit or otherwise as in his discretion he considers proper, whether or not the evidence is admissible in a court of law, but he should not be permitted to refuse to admit evidence that is admissible in a court of law. (Page 25)

13. Where there are three or more arbitrators then, unless the parties agree otherwise,

(a) the arbitrators may act by majority, and

(b) if there is no majority, the decision of the chairman of the arbitration panel should be the decision of the panel. (Page 26)

14. Unless the parties agree otherwise:

(a) The costs of the reference and award should be in the discretion of the arbitrator, who should be able to direct to and by whom those costs are to be paid, and be able to tax or settle the amount of those costs, and

(b) if the arbitrator fails to make an award as to costs, either party, within 30 days of the award,

should be able to apply to the arbitrator for an order as to costs and for the amount to be fixed, but where no such application is made, or the arbitrator refuses or neglects to make an order as to costs, each party should as between themselves bear his own costs of the reference and his prorated share of the cost of the award. (Page 28-29)

15. If a party to an arbitration agreement, or a person claiming through him, commences legal proceedings against another party to the arbitration agreement, or a person claiming through him in respect of any matter agreed to be referred, any party to such legal proceedings or to the arbitration agreement should be permitted to apply to the court to stay the proceedings. (Page 34)

16. Once the party applying for a stay pursuant to recommendation 15 has shown that the matter is one that was agreed to be referred, the burden of showing cause why effect should not be given to the arbitration agreement should be upon the party opposing the application to stay. (Page 34)

17. In determining whether cause has been shown in recommendation 16, the court may consider:

(a) whether or not the agreement to arbitrate was freely made;

(b) whether the questions in issue raise issues of factual or legal complexity and whether it is appropriate that these issues be settled by arbitration in the light of the qualifications of the arbitrator;

(c) the comparative expense and delay involved in the proceedings as opposed to arbitration proceedings;

(d) if there are several parties to the arbitration agreement, whether those parties, other than the applicant, would prefer the proceedings to be continued;

(e) whether there are other parties to the proceedings who are not parties to the arbitration agreement;

(f) the stage the proceedings have reached;

(g) whether the applicant has delivered any pleadings or has taken any other step in the litigation;

(h) whether the applicant was, at the time the proceedings were commenced and at the date of the hearing remains ready and willing to do all things necessary to the proper conduct of the arbitration;

(i) whether the arbitrator may not be capable of

impartiality;

(j) whether fraud is alleged by any party to the proceedings;

(k) any other matter the court considers significant. (Pages 34-35)

18. The authority of an arbitrator shoudl continue to be irrevocable except by leave of the court. (Page 37)

19. The court in exercising its discretion in giving leave to revoke should as far as possible apply the same general principles that it applies in exercising its discretion to refuse a stay of litigation. (Page 38)

20. A provision comparable to section 24(1) of the *English Arbitration Act 1950*, should be enacted in British Columbia. (Page 38)

21. A clause in a contract that makes adjudication by arbitration a condition precedent to a cause of action or a defence (a *Scott* v. *Avery* clause) shoud not be given effect according to its terms but should be construed as if it were an agreement to submit differences under the contract to arbitration. (Page 40)

22. Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to whether the agreement applies, the court, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, should be able, on such terms, if any, as the justice of the case may require, to extend the time for such period as it thinks proper. (Page 41)

23. Every arbitration agreement should be deemed to include a provision that, subject to the provisions of the *Arbitration Act*, the award is final and binding on the parties and those claiming under or through them, unless the parties agree otherwise. (Page 42)

24. There should be no specific time in which an award must be made unless the parties have agreed otherwise. (Page 44)

25. Where the parties have agreed as to the time in which an award must be made the arbitrator or the court should have the power to extend such time notwithstanding any agreement to the contrary and whether or not the time has expired. (Page 44)

26. The right of an arbitrator to extend the time for making an award should not affect the power of the court to remove an arbitrator for delay under recommendation 5. (Page 44)

27. Unless the parties agree otherwise, an award should not be required to be in writing or signed by the arbitrator. (Page 45)

28. If an award is not in writing the arbitrator shoud, if requested by a party, give a statement of the terms of the award, in writing and signed by him, within 15 days of the request. (Page 45)

29. Unless the parties agree otherwise, every arbitration agreement should be deemed to contain a provision that the arbitrator may make an interim award. (Page 47)

30. Unless the parties agree otherwise, every arbitration agreement should be deemed to include a provision that the arbitrator has the same power as the court to order specific performance of any contract for the sale of goods. (Page 48)

31. Notwithstanding any agreement to the contrary,

(a) Any party to a reference should be permitted, within 15 days of being notified that an award has been made and of its term, to apply in writing to the arbitrator or umpire to reopen the award, and to amend or vary it in respect of anything that was raised on the reference.

(b) On receipt of an application made pursuant to recommendation (a), the arbitrator or umpire should notify the parties

(i) whether or not the arbitrator or umpire is willing to consider the application, and

(ii) if the arbitrator or umpire is willing to consider the application the place where, and a time and date when, the matters raised in the application shall be heard, and the date so fixed should be no more than 30 days after the receipt of the application.

(c) After hearing the application the arbitrator or umpire should be permitted to reopen the award and amend or vary it in such manner as is just and reasonable, and the award so amended or varied should be deemed to be the award of the arbitrator or umpire in the matter. (Page 50)

32. The *Arbitration Act* should provide that a sum directed to be paid by an award should carry both prejudgment and post-judgment interest. (Page 51)

33. An award on an arbitration agreement should be enforceable by leave of the court in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in the terms of the award. (Page 54)

34. The court, on an application for leave to enforce an award in the same manner as a judgment or order, should have the power to make such orders as are necessary for carrying the award into effect. (Page 54)

35. The right to bring an action on the award should be retained. (Page 54)

36. The Government of British Columbia should request the Government of Canada to accede to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and upon accession by Canada to that Convention, the Government of British Columbia should enact legislation to give effect to the Convention. (Page 58)

37. (a) Sections 10(b) and 21 of the *Arbitration Act* should be repealed.

(b) The *Arbitration Act* should provide specifically that subject to the right of appeal in the *Act* the court does not have jurisdiction to set aside or remit an award on the ground of errors of fact or law on the face of the award.

(c) The *Arbitration Act* shoud provide that the court may set aside an award where an arbitrator has committed or whose conduct amounts to an "arbitral error" to be defined as an error made by an arbitrator that constitutes misconduct and as including

(i) corrupt or fraudulent conduct,

(ii) bias,

(iii) exceeding his powers,

(iv) failure to observe the rules of natural justice.

(d) On an application to set aside an award for an arbitral error, where the sole ground of relief established is a defect in form or a technical irregularity, the court, if it finds that no substantial wrong or miscarriage of justice has occurred, should have the power to refuse to set aside the award. (Pages 76-77)

38. (a) An appeal should lie on any question of law arising out of an award.

(b) In an appeal brought under (a) the court should have the power to

(i) confirm, vary or set asdie the award, or

(ii) remit the award to the arbitrator. (Page 77)

39. (a) An appeal under recommendation 38 should lie to the Supreme Court of British Columbia. (Page 79)

(b) Local Judges of the Supreme Court have the jurisdiction of a Supreme Court Judge in proceedings under the *Arbitration Act*. (Page 79)

40. (a) An appeal should not be brought under recommendation 38 unless

(i) all the parties to the arbitration consent, or

(ii) the court has given leave.

(b) The court should not grant leave under recommendation 40(a)(ii) unless

(i) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a substantial miscarriage of justice,

(ii) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(iii) the point of law is of general or public importance.

(c) Where the court grants leave under recommendation 40(a)(ii), it should be permitted to attach conditions to the order that it considers appropriate. (Page 82)

41. (a) The Supreme Court should have jurisdiction to determine any question of law arising in the course of an arbitration proceeding on the application of any party to the proceeding

(i) with the consent of the arbitrator, or

(ii) with the consent of all the other parties.

(b) An appeal should lie to the Court of Appeal from a determination made pursuant to recommendation 41(a). (page 83)

42. The Supreme Court should not entertain an application under recommendation 41 unless it is satisfied that the determination of the question of law will produce substantial savings in costs to the parties. (Page 83)

43. (a) The Supreme Court should be empowered to order an arbitrator to state the reasons for his award in sufficient detail to enable the court, should an

appeal be brought, to consider ay question of law arising out of the award.

(b) The court should not make an order under this recommendation unless

(a) before the award was made, one of the parties to the reference gave notice to the arbitrator that a reasoned award would be required, or

(b) there is some special reason why such a notice was not give. (Page 85)

44. (a) The Supreme Court should not have jurisdiction to entertain applications made pursuant to recommendations 38 to 44 where the parties to a reference have entered into an agreement in writing which excludes the right of appeal under recommendation 38.

(b) An exclusion agreement should be of no effect unless it is entered into after the commencement of the hearing of the arbitration. (Page 87)

APPENDIX D

PRINCIPLES FOR THE ENACTMENT OF ARBITRATION LEGISLATION (AIC Draft)

(Approved by the Board of Directors of the Arbitrators' Institute of Canada on June 18, 1987)

[These principles are included here with the kind permission of the Arbitrators' Institute of Canada.]

Introduction

The Arbitrators' Institute of Canada (AIC) has adopted a number of principles for consideration by any jurisdiction contemplating the enactment of arbitration legislation.

The principles draw on the experience of practising arbitrators across Canada and from the UNCITRAL MOdel Law, the British Columbia Law Reform Commission's Report on Arbitration and the Brief to the Ontario Attorney General prepared by the AIC some years ago.

The principles have been drafted in such a way as to facilitate the transfer of the principles into legislative form. The "Notes" following some of the principles are intended to illustrate and explain the purpose of the principle to which they are appended.

The Principles were adopted by the Board of Directors of the Arbitrators' Institute of Canada on June 18, 1987.

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PRINCIPLES FOR THE ENACTMENT OF ARBITRATION LEGISLATION

Definitions

1(1) The definitions should make it clear that

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

(b) "arbitral tribunal" means a sole arbitrator or two or more arbitrators;

(c) an "arbitration agreement" is an agreement by two or more parties to submit to arbitration all or certain disputes;

(d) an "award" includes an interim award, reasons for the award, if any, and any amendment or variation made to the award in accordance with the governing legislation;

(e) "court" means a judge of the court capable of making the order required, which will vary from jurisdiction to jurisdiction.

(2) The procedure to obtain a court order sought under the legislation should be simple, expeditious and supportive of the arbitral process.

(3) IN these principles the usual rules of interpretation are intended to apply (eg the male gender includes the female gender, singular includes the plural and vice versa. The word "person" is intended to mean an individual or a corporation).

(4) If the term "submission" is used in arbitration legislation it should be defined to describe the issue to be decided by the arbitral tribunal.

PART 1

SCOPE OF THE LEGISLATION

Application

2 The legislation should apply to every kind or arbitration agreement unless there is other legislation dealing with a particular type of arbitration (eg labour grievance arbitration).

Note: The legislation should not be restricted to "commercial arbitration". It should have an unlimited potential application. The Principles are not intended

to affect arbitrations that are already governed by statute but may be helpful if existing statutory provisions respecting arbitration are reviewed in the future.

Arbitration Agreement

3(1) An arbitration agreement may be in the form of a clause in an agreement or in the form of a separate agreement.

(2) An arbitration agreement may be oral or in writing.

Death of a Party

4(1) Unless the parties to an arbitration agreement otherwise agree:

(a) an arbitration agreement should not be discharged by the death of any party;

(b) if one of the parties to an arbitration agreement dies, the arbitration agreement should remain enforceable by or against the personal representatives of the deceased;

(c) the authority of an arbitral tribunal should not be revoked by the death of a party to an arbitration agreement.

(2) Nothing in this principle should affect the operation of any enactment or rule of law by virtue of which any right of action is extinguished by the death of a person.

PART 2

ARBITRATION PROCEEDINGS

Division 1

Appointment and Removal

Number of Arbitrators

5 If the parties to an arbitration agreement do not specify the number of arbitrators to decide a dispute, one arbitrator should be appointed.

Apointment Procedure

6 The parties to an arbitration agreement should be free to agree on a procedure for appointing an arbitral tribunal, including authorising another person to make the appointment.

Chairman

7 If more than two arbitrators are appointed to an arbitral tribunal the parties must agree on which arbitrator is to be chairman, or the manner in which the chairman is to be chosen, and in default, the arbitrators shall decide who is to be chairman.

Court Assistance

8(1) If, under a procedure agreed upon by the parties to an arbitration agreement, or in default of agreement a provision that would apply under another principle,

(a) a party fails to act as required,

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

(c) an arbitral tribunal is unable to reach a decision under the procedure,

(d) another person fails or refuses to perform any function entrusted to that person under the procedure, or

(e) a chairman of the arbitral tribunal is required, but if no one is appointed or can be agreed upon,

any party to the arbitration may request a court to take the action, perform the function, make the decision or order it to be performed.

(2) If a request is made to the court under subsection (1), the court should be able to act on the request itself, or designate some other person to act on its behalf, with the same effect as a court decision on the matter.

(3) There should be no appeal from a decision of the court or its delegate under this principle.

Failure or Impossibility to Act

9(1) If an arbitrator refuses or becomes unable to perform his functions or for any other reason fails to act

(a) the arbitrator may resign his office by notice in writing to the parties, or

(b) the parties may agree on the termination of the arbitrator's appointment by notice in writing ot the arbitrator.

(2) If any controversy arises under subsection (1) the court should settle it, with no appeal.

Substitute Arbitrator

10(1) The appointment of an arbitrator may be terminated if all the parties agree in writing.

(2) If

(a) an arbitrator dies or resigns, or

(b) the appointment of an arbitrator is terminated under subsection (1),

a substitute arbitrator shall be appointed in accordance with the rules that were applicable to the appointment of the arbitrator being replaced, unless the arbitration agreement otherwise provides.

Taking Office

11 An arbitral tribunal may exercise its powers,

(a) if the arbitral tribunal is a single arbitrator, when he accepts the appointment, or

(b) if the arbitral tribunal is composed of two or more arbitrators, when they have all accepted the appointment.

Removal of Arbitrator

12(1) A party to an arbitration may apply to a court to remove an arbitrator who

(a) engages in corrupt or fraudulent practice,

(b) unduly delays proceedings or in issuing an award, or

(c) is biased,

and the court may order that the arbitrator receive no remuneration or expenses and order the arbitrator to pay the

expenses incurred by the parties in the arbitration proceedings.

(2) The arbitrator should have notice of an application under subsection (1) and be permitted to make representations to the court.

(3) As part of the authority of a court under this principle, the court should be able to appoint a replacement arbitrator at the request of either party, or order that the appointment procedure is to start again in accordance with the arbitration agreement.

(4) There should be an appeal from an order of the court under this principle byeither party or the arbitrator, using the procedure described in section 3.

> NOTE: When one member of a 3 person arbitral tribunal is replaced the question arises as to whether proceedings can continue from where they stopped or whether they have to start all over again. Much will depend on the reason for the removal of an arbitrator and how far proceedings have progressed.
>
> Unless the parties otherwise agree, proceedings should probably start all over again.

Division 2

Pre-hearing Proceedings

Rules of Procedure

13(1) If the parties have not agreed on pre-hearing proceedings, (including statements of claim, defence and reply, disclosure of documents, and protection of evidence) the arbitral tribunal should have authority to adopt or establish appropriate rules or make directions as to how matters are to proceed.

(2) The arbitral tribunal should have full power to order disclosure of documents, order security for costs, and make such orders protecting evidence as are necessary.

Enforcement of Orders and Directions

14(1) Failure to comply with a procedural order or direction of an arbitral tribunal should permit the party seeking enforcement to enforce the order or direction by filing it with the court so that it can then be considered as an order or direction of the court. The party in default should be liable for costs.

(2) The arbitral tribunal should have subpoena powers.

> NOTE: The intention of the principle is to provide an

arbitral tribunal wiht a means of moving proceedings along with any necessary orders or directions that may be required. The ability to delay arbitral proceedings through any court supervision of the arbitral tribunal's ordes or directions should be severely limited, if it is permitted at all.

Division 3

The Arbitration Proceedings

Hearings

15(1) Hearings should not be mandatory.

(2) If the parties to an arbitration agree, a decision by an arbitral tribunal should be able to be made on the basis of written submissions, affidavit evidence or other agreed means, without a hearing.

Powers of Tribunal

16(1) An arbitral tribunal should be empowered:

(a) to administer oaths or affirmations;

(b) to order production of witnesses and documents at the request of one of the parties or on its own initiative, and to question those persons, subject to the right of the parties to cross examine any witness called by the arbitral tribunal;

(c) to proceed in the absence of a party if the party has had notice of the hearing;

(d) to fix the date, time and place of the hearing;

(e) to make inspections, or appoint someone to do so and report back in writing or in person (subject to cross examination by the parties);

f) to make rulings and decisions in the course of the proceedings and to issue interim awards.

(2) The arbitral tribunal should be empowered to make whatever orders are necessary to expedite proceedings and to make decisions on how the proceedings are to be conducted.

Jurisdiction

17(1) The arbitral tribunal should be able to rule on its own jurisdiction and to be able to continue with its proceedings notwithstanding an application to court.

(2) A jurisdictional issue must be raised at the earliest reasonable opportunity and certainly no later than the opening of the hearing or consideration of a matter, unless the arbitral tribunal permits a later plea.

(3) Failure to raise a jurisdictional argument at the earliest reasonable opportunity shall be deemed to constitute a waiver, unless the arbitral tribunal permits the matter to be raised later.

Evidence

18(1) The arbitral tribunal should have power to determine the admissibility, relevance, materiality, and weight of any evidence provided to it.

(2) The Tribunal should not be bound by the rules of evidence applicable to judicial proceedings.

> Note: Each jurisdiction should consider its Evidence Act to see whether the often wide definition of "court" and "action" should be stated not to apply to arbitration proceedings.

Division 4

Award

In Writing

19 An Award should be in writing, signed and dated by the arbitrator or arbitrators concurring in the Award. Signatures need not be witnessed.

Reasons

20 An Award should be accompanied by reasons unless the parties otherwise agree.

Filing as Judgment

21(1) The legislation should provide that any party to the arbitration should be able to file the Award with the clerk of the court, without having to apply for an order to do so.

(2) When an order is filed it should be able to be enforced as if it were an order or judgment of the court, unless an appeal has been commenced under section 31.

(3) An appeal should act as a stay of the order or judgment pending disposition by the court.

NOTE: There may be a need for court supervision over either the filing or the enforcement of awards of arbitral tribunals. If supervision is considered necessary

(a) it should apply to either the filing or the enforcement of the award, not both;

(b) the court should only consider whether the form of the award is in a sufficient format to allow enforcement. The Court should not provide a means for a reconsideration of the merits.

Of the alternatives, it is suggested that supervison, if it is desired at all, should occur prior to enforcement rather than filing to avoid what may otherwise be unnecessary court applications, delays and expense.

If the form of an award is not satisfactory to the court it should have power to remit the matter to the arbitral tribunal.

Costs and Interests

22(1) The arbitral tribunal should be able to determine and award costs and interest on costs.

(2) The arbitral tribunal should be able to award pre and post judgment interest as part of its Award.

NOTE: Existing legislation respecting interest payable on judgments may be applicable to this principle.

Majority Decisions

23 Unless the parties otherwise agree, in arbitration proceedings with more than one arbitrator, a decision should be made by a majority of the arbitrators, but if there is no majority, the decision of the chairman should be the decision of the tribunal.

Basis of Award

24 The arbitral tribunal should decide disputes on the basis of law, unless the parties agree otherwise.

Correction of Errors

25 An arbitral tribunal should be permitted to correct typographical, clerical, or mathematical errors on the application of a party or on its own initiative.

Authority

26 An arbitral tribunal should have whatever legal and equitable jurisdiction is necessary and constitutionally possible to make a decision on the matter in dispute, and to provide appropriate remedies.

PART 3

ARBITRATION AND THE COURTS

Division 1

Court Assistance

Consolidation of Cases

27(1) Where all the parties agree to consolidate proceedings, the court should be able to determine any of the following that are in dispute:

(a) the number of arbitration proceedings to be consolidated;

(b) the composition of the arbitral tribunal;

(c) anything necessary to settle jurisdiction and start or expedite proceedings.

(2) There should be no appeal from the order under subsection (1).

Court Referral

28 A court should be able to refer matters to arbitration.

Note: This provision might supplement, or with some expansion, replace existing Rules of Court dealing with the appointment of official referees for certain

purposes.

Division 2

Court Supervision

Grounds for Application

29 An application to strike down an award or to prevent an arbitration from proceeding should be limited to the following:

(a) If a party to an arbitration agreement was under some incapacity when the arbitration agreement was made;

(b) if the arbitration agreement is not valid under the law of the Province;

(c) if the party making the appeal was not given proper notice of the appointment of the arbitral tribunal or of the proceedings or was otherwise unable to present his case to the arbitral tribunal;

(d) if the award deals with a dispute not falling within the terms of the arbitration agreement, or a dispute not submitted to the arbitral tribunal for decision;

(e) if the composition of the arbitral tribunal or the arbitration procedure was not in accordance with the agreement of the parties or the legislation;

(f) if the subject matter of the dispute is not capable of being the subject of arbitration under the law of the Province;

(g) if the award is in conflict with the public policy of the Province;

(h) if the arbitral tribunal can be shown to

(i) have engaged in corrupt or fraudulent practice, or

(ii) have been biased.

Application to Appellate Court

30(1) An application under principle 29 must be made within 30 days of

(a) the date the award is issued, or

(b) the date of commencement of the proceedings giving rise to the application.

(2) The application should be made to an appellate court, but may only be commenced if leave is granted and the grounds of application have been settled by a judge of the appellate court.

Final Decision

31 Except as provided in these principles, the decision of an arbitral tribunal should be considered as final and binding.

PART 4

GENERAL

Crown Bound

32 The Crown in right of the Province should be bound by the legislation.

Stay of Proceedings

33(1) If a party to an arbitration agreement commences court proceedings against another party to the agreement, the other party should be entitled to an order that the court proceedings be stayed unless the court finds that the arbitration agreement

(a) is made by a party under some legal incapacity;

(b) is not valid under the law of the Province;

(c) does not cover the dispute, or all the parties that are the subject of the legal proceedings are not part of the arbitration agreement;

or the court decides that:

(d) the subject matter of the dispute is not capable of being the subject of arbitration under the law of the Province;

(e) there is evidence of fraud or corrupt practice;

(f) for reasons of public policy, the court proceedings should continue.

2) There should be no appeal from a decision of the court under subsection (1).

Scott v Avery Clauses

34 "Scott v Avery" clauses should be considered as an agreement to arbitrate.

Arbitrator's Fees

35(1) An arbitrator's fees should be capable of being taxed. Once taxed, the arbitrator should be able to collect his fees by an expedited process.

(2) Nothing in these principles should affect the right of an arbitrator to a lien for his fees.

Rules

36 Regulation making authority should provide for authority to:

(a) establish one or more rules of procedure for the commencement and conduct of arbitration proceedings, or to adopt rules enacted for that purpose, which would apply if the parties had not agreed upon the procedure of it the agreement they made was silent or deficient with respect to a matter;

(b) designate any person to establish rules under (a);

(c) prescribe rules for the holding of money or other security by an arbitral tribunal, the payment of interest on that money and related matters.

PART 5

TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

Transitional

37(1) The Act should apply to all arbitration agreements, whether made before or after the coming into force of the legislation.

(2) If an arbitral tribunal has been appointed under the former legislation then the arbitration proceedings should continue under the former legislation for all purposes, and the new legislation would not apply to those proceedings at all, unless the parties and the arbitral tribunal agree that the new legislation should apply to the proceedings.

Consequential

Note: Amendments to other legislation will probably be required.

Coming into Force