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TABLE OF CONTENTS

ARBITRATION

Arbitration is a dispute resolution mechanism whereby two or more parties voluntarily agree to submit their dispute, not to the courts, but to a private impartial individual or panel of individuals whose decision is agreed to be binding on them. Arbitration is becoming increasingly popular in modern society.

The preceding decade has witnessed the start of a major reformulation and upgrading of Canada's commercial arbitration laws. To date, this has occurred most extensively and uniformly in the law of international arbitration. However, modern and revised domestic arbitration laws have also been enacted in several provinces.[1] The desirability of such reform in Manitoba will be the focus of this Report.

A. THE VALUE OF ARBITRATION

Commercial arbitration is an increasingly well-established alternative to litigation in Europe, Japan and the United States. It is generally conceded that arbitration, as an alternative dispute resolution mechanism, offers a number of advantages to its participants:

1. Arbitration usually costs less to the disputing parties than litigation, even taking into account the "free" judge and courtroom that the state provides to litigants. A main factor in arbitration's lower cost is the reduction of pre-trial procedures and resultant lawyers' fees.[2]

   This factor alone accounts for the current boom in arbitration in the United States, where clients are rebelling against the high cost of litigation. Of course, in contrast to Canada, the "litigation situation in the United States is complicated by the widespread use of juries in commercial cases, punitive damage awards, contingency fees, class action suits, and high legal costs."[3]

2. Arbitration (with limited court access) costs less to the taxpaying public because the expensive public judicial system is not invoked at all or more rarely.

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[1] "Domestic" arbitration is where there is no international or foreign aspect to the arbitrable dispute so that all elements of the dispute are governed by Canadian law.

[2] J. Carson, "Dispute Resolution: Negotiation, Mediation, and Arbitration in Ontario" (Oct. 1992), 11 Advoc. Soc. J. 10 at 19. Reducing pre-trial procedures also saves time (and resultant cost) required to be invested in the case by senior company management: K. Braid, "Arbitrate or Litigate: A Canadian Corporate Perspective" (1991), 17 Can.-U.S. L.J. 465. For the contrary view that arbitration is not always cheaper than litigation, see J. Middlemiss, "Alternate dispute resolution nothing but a 'fad'", *Law Times*, Aug. 29-Sept. 4, 1994, 10.

[3] D. Stockwood, "Alternative Dispute Resolution" (Oct. 1992), 11 Advoc. Soc. J. 1.

3. Arbitration is usually faster than litigation. Complexity of pre-trial procedures plus court backlogs can extend litigation for years, compared to the months that arbitration may require.[4]

4. Arbitration is informal, accessible and flexible. "Red tape is minimized without sacrificing one iota of authority or enforcement power."[5] Moreover, such informality "is ideal for parties who have ongoing business dealings and wish to resolve legitimate disputes without poisoning their entire commercial relationship."[6]

5. Arbitration allows privacy; it is confidential unless one party pursues an appeal to the courts (although one might question the attractiveness of this quality from the public's perspective).[7] "Confidentiality is particularly important in cases involving personal matters, trade secrets, and other private commercial information."[8]

6. Arbitration permits the selection of a decision-maker who is specially skilled in the often esoteric matters of commercial disputes.[9]

Manitobans should have access to these advantages as well but currently do not because *The Arbitration Act*[10] of this province is outdated and serves to discourage, not facilitate, arbitration.[11]

B. PROBLEMS WITH THE CURRENT LAW

Like the uniform legislation in most provinces that have not yet reformed their laws, *The Arbitration Act* of Manitoba is based on the United Kingdom's *Arbitration Act, 1889*.[12] This model reflects the values of the 19th century, an era when neither legislators nor the judiciary had yet accepted the modern concept that a private tribunal could really be allowed to resolve disputes or dispense justice.

This model has two main difficulties for users. First, it provides insufficient guidance about how an arbitration should actually be conducted, thus leaving many practical problems unsolved. Secondly, due to legislators' historical distrust of private tribunals, the courts were given too broad a scope for discretionary intervention. This easy access to the courts defeats the purpose of arbitration.[13]

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[4]Carson, *supra* n. 2, at 19; Stockwood, *supra* n. 3, at 2.

[5]Carson, *supra* n. 2, at 19.

[6]Stockwood, *supra* n. 3, at 2.

[7]For a discussion of this issue, see K. Griffin, "Lack of public scrutiny in ADR bothers some lawyers", *Law Times*, Aug. 9-Sept. 4, 1994, 9. This article brings some perspective to the issue by pointing out that approximately 95% of all civil litigation cases are in fact settled out of court, usually with some sort of confidentiality agreement, so the net effect on the "public's right to know" may be similar in both litigation and arbitration.

[8]Stockwood, *supra* n. 3, at 2.

[9]Carson, *supra* n. 2, at 19.

[10]*The Arbitration Act*, C.C.S.M. c. A120.

[11]This argument supporting the need for reform was reiterated in letters to the Commission from the late Graeme Haig, Q.C., and the Arbitration and Mediation Institute of Manitoba, Inc.

[12]*Arbitration Act, 1889* (U.K.), 52 & 53 Vict., c. 49.

[13]Institute of Law Research and Reform, *Proposals for a New Alberta Arbitration Act* (Report #51, 1988) 4.

The judiciary, jealous of its jurisdiction and powers, also worked to defeat the viability of arbitration. For example, the English case of *Scott* v. *Avery*[14] (followed by Canadian courts) held that the jurisdiction of the courts could not be ousted simply by consent of parties to a contract. Parties would always be able to litigate, although an arbitrator's award could be made a condition precedent to the institution of legal proceedings. "Under these conditions, Canadian businessmen arbitrated at their peril - knowing that they may have to bear not only the costs of an arbitration, but also a myriad of court applications".[15]

Thus in Canada, commercial arbitration "remained virtually dormant by reason of 19th century legislation and a suspicious judiciary system"[16] while in other parts of the world commercial arbitration became a vital, growing and important process. To the extent that arbitration was used at all in Canada, it "grew and developed more in spite of the Act than because of it."[17]

C. ARBITRATION REFORM IN CANADA

Federal and provincial government apathy about arbitration reform started to change in the 1980s due to the desire to attract international arbitration business. Canada was one of the last major international trading countries to accede to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but it did so finally in 1986. This federal action was supported and implemented by uniform provincial statutes passed in 1986, the *International Commercial Arbitration Act*(s).

These statutes are patterned on the 1985 legislative model developed by the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL model was developed by a group of experts in the field of international arbitration and was reflective of the most progressive, developing views.[18] The implementation of this model in Canada was "like going from the 19th century to the 21st century"[19] in international arbitration law.

This momentum for change has been continued in the area of domestic arbitration law by some provinces. In 1986, British Columbia enacted a new *Commercial Arbitration Act*,[20] based on earlier recommendations of the British Columbia Law Reform Commission[21] which pre-dated the UNCITRAL model but anticipated many of its general reforms. In the civil law arena, Québec also adopted a more progressive domestic arbitration law in 1986.[22]

The Alberta Law Reform Institute did major work in adapting the UNCITRAL model for provincial domestic arbitration use;[23] this work was furthered by the Uniform Law Conference of

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[14]*Scott* v. *Avery* (1855), 5 H.L.C. 811, 10 E.R. 1121.

[15]B. Thompson and E. Chiasson, "From the Desert to the Mountains; and Now to Avoid the Precipice" (1991), 49 Advocate 19.

[16]J. Day, "Commercial Arbitration in Intellectual Property Matters" (1991), 25 C.P.R. (3d) 145 at 150.

[17]Carson, *supra* n. 2, at 18.

[18]Day, *supra* n. 16, at 153.

[19]Day, *supra* n. 16, at 154.

[20]*Commercial Arbitration Act*, S.B.C. 1986, c. 3 (Index ch. 53.7).

[21]Law Reform Commission of British Columbia, *Arbitration* (Report #55, 1982).

[22]*Code of Civil Procedure*, R.S.Q. 1977, c. C-25; the reform of Book VII on Arbitration was enacted by S.Q. 1986, c. 73.

[23]Institute of Law Research and Reform, *Towards a New Arbitration Act for Alberta* (Issues Paper #1, 1987); Institute of Law Research and Reform, *supra* n. 13.

Canada which in 1990 produced a model *Uniform Arbitration Act*.[24] This model uniform statute forms the basis for the new arbitration legislation enacted in Alberta,[25] Ontario[26] and Saskatchewan.[27] New Brunswick has also passed an Act based on this uniform model, but this statute has not yet been proclaimed.[28]

D. UNIFORM MODEL'S NEW POLICY DIRECTIONS

The *Uniform Arbitration Act* model addresses the two major shortcomings of the current statute by being more comprehensive about procedural matters and by restricting parties' access to the court's powers of intervention. It also has other features designed to facilitate the use and effectiveness of arbitration. The model's new policy directions may be briefly summarized as follows.

1. Restricted Access to the Courts

One way that this model restricts access to the courts is by removing the court's former discretion to stay arbitrations, which it often used to override contractual agreements to arbitrate. Parties who had unwisely agreed to arbitration or for whom litigation would be better tactically thus had a fairly easy "escape hatch" from their contract. The new model statute represents a distinct change in policy and ends the court's discretion. Now a court must stay litigation unless the case can be brought within narrow exceptions where the court still enjoys discretion.[29]

Court access is also restricted by limiting the court's ability to set aside awards, to remove arbitrators and to hear appeals (allowed only on questions of law, with leave).

2. Procedural Detail

The uniform statute lays out a sufficient procedural framework that especially works for the benefit of arbitrators and parties in small informal arbitrations (it was deliberately decided to put this detail into the statute rather than into more inaccessible regulations).[30] Procedural matters addressed by the statute include commencement of proceedings, service of documents, holding of hearings, dismissals upon default or want of prosecution, appointment of experts and other evidentiary matters, termination of proceedings, setting aside an award, and obtaining costs.

3. Necessity for Timely Objection

Any objections to jurisdiction must be raised in a timely manner (that is, within a short, specified time period) or be lost, which effectively ends many of the opportunities for "game-

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[24] Uniform Law Conference of Canada, *Proceedings of the Seventy-second Annual Meeting* (1990) 36, 86-123.

[25] *Arbitration Act*, S.A. 1991, c. A-43.1.

[26] *Arbitration Act, 1991*, S.O. 1991, c. 17.

[27] *The Arbitration Act, 1992*, S.S. 1992, c. A-24.1.

[28] *Arbitration Act*, S.N.B. 1992, c. A10.1.

[29] W.H. Hurlburt, "A Note on Escape from Arbitration Clauses: Effect of the New Arbitration Act" (1992), 30 Alta. L. Rev. 1361 at 1363.

[30] W.H. Hurlburt, "New Legislation for Domestic Arbitrations" (1992), 21 Can. Bus. L.J. 1 at 25.

playing" by parties that existed under the former system.[31] Objections to jurisdiction cannot be strategically kept in reserve until a party sees how the arbitration is going or until the party decides that it is in his or her best interest to delay or obstruct the arbitration.

4. Qualifications of Arbitrator

The qualifications of an arbitrator which are listed in the uniform model derive from common law. What is novel under the model statute is that the criteria of independence from the parties and acting impartially applies to all arbitrators. Previously, while a nominated arbitrator could not have been directly or actively involved in the subject matter of the arbitration, he or she was not prohibited from having some past or indirect relationship to the nominating party.[32]

5. Arbitrator's Expanded Powers

The uniform model now provides that arbitrators may order specific performance, injunctions and other equitable remedies, thus removing a major barrier in the choice between arbitration and litigation.[33] Moreover, arbitrators are allowed under this model to make interim orders for the detention, preservation or inspection of property. Courts retain a concurrent power to do so as well, which one commentator has called "a sensible provision, for in some circumstances only the coercive power of the court may be effective."[34]

The uniform model also allows arbitrators to rule on their own jurisdiction.

6. Enforcement of Award

The current law gives a court discretion about whether or not to enforce an arbitral award; the uniform model has an important policy change that requires courts to enforce awards upon application. This requirement applies both to local awards and to those from other provinces. Assured enforcement encourages the use of arbitration to resolve disputes.

E. RECOMMENDED REFORM FOR MANITOBA

The Commission believes that Manitobans should have full access to the advantages of arbitration discussed earlier. Such access becomes all the more important in a time of cost-consciousness for individuals, business and the public purse alike.

In addition, Manitoba (like other provinces in the mid-1980s) assisted the federal government's commitment to international arbitration by passing uniform legislation based on the UNCITRAL model.[35] Since this model and its advantages are available in this province for any international commercial arbitration that may occur here, it seems only fair to make a similar model available for domestic arbitration.

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[31] Hurlburt, *supra* n. 29, at 1369.

[32] Carson, *supra* n. 2, at 20.

[33] Carson, *supra* n. 2, at 22.

[34] W.C. Graham, "Commentary: Proposals for a New Alberta Arbitration Act" (1990), 16 Can. Bus. L.J. 185 at 192.

[35] *The International Commercial Arbitration Act*, C.C.S.M. c. C151.

We have carefully considered the statutes, reports, academic literature and case law that have emerged in the past decade from the domestic arbitration reform movement in Canada. It appears that the best and most comprehensive statutory model currently available in this area is the basic model represented by the Uniform Law Conference of Canada's *Uniform Arbitration Act*[36] and by the new provincial statutes which follow it. This model has had the benefit of input by law reform and arbitration experts across Canada and internationally, through its origin in the UNCITRAL model. Further work in this area is unlikely to improve significantly upon this model for the moment and would prove to be merely duplicative.

For these reasons, the Commission recommends that this existing model be adopted in Manitoba as a replacement for *The Arbitration Act* which currently acts only as a hindrance to arbitration. While there are no major substantive variations between the five Canadian domestic arbitration versions of the UNCITRAL model, the Uniform Law Conference of Canada's basic model was somewhat refined by the Alberta, Ontario and Saskatchewan governments before passage as legislation.[37] The Alberta statute, in particular, smoothed some rough edges in the drafting and fine-tuned some minor substantive points; some examples include:

- In a court action to remove an arbitrator on any of 5 stated grounds, the Uniform Law Conference of Canada model provides that the arbitrator is entitled to be heard only when 2 grounds are alleged: undue delay of the arbitration or commission of a corrupt or fraudulent act.[38] Alberta, on the other hand, always allows the arbitrator to be heard, no matter what the ground.[39]

- Alberta, unlike the Uniform Law Conference of Canada model, requires that an arbitrator must require witnesses to testify under oath, affirmation or declaration.[40]

- The Uniform Law Conference of Canada model provides that all appeals and applications to set aside must be brought within 30 days of the award. This limitation period is stated not to apply, however, where corruption or fraud is alleged, but no specific alternative limitation period is given.[41] Alberta specifies that, for corruption or fraud, the suit must be brought within the later of (a) 30 days of the award or (b) 30 days after the wrongdoing is discovered or ought to have been discovered.[42]

Having considered the various versions, the Commission prefers the Alberta form of the model, which is attached to this Report as Appendix A.

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[36] Uniform Law Conference of Canada, *supra* n. 24.

[37] The New Brunswick statute (not yet proclaimed) makes almost no changes to the Uniform Law Conference of Canada's model

[38] Uniform Law Conference of Canada, *supra* n. 24, at 97, s. 15(2).

[39] *Arbitration Act*, S.A. 1991, c. A-43.1, s. 15(2).

[40] *Arbitration Act*, S.A. 1991, c. A-43.1, s. 29(4).

[41] Uniform Law Conference of Canada, *supra* n. 24, at 113, s. 47.

[42] *Arbitration Act*, S.A. 1991, c. A-43.1, s. 46(2).

RECOMMENDATION

The Arbitration Act of Manitoba should be repealed and replaced by a statute based on Alberta's Arbitration Act, S.A. 1991, c. A-43.1, as set out in Appendix A.

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 23rd day of November 1994.

Clifford H.C. Edwards, President

John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner

Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

APPENDIX A

ALBERTA'S *ARBITRATION ACT*

ARBITRATION ACT

CHAPTER A-43.1

Table of Contents

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

Introductory Matters

Definitions

1(1) In this Act,

(a) "arbitration agreement" means, subject to subsections (2) and (3), an agreement or part of an agreement by which 2 or more persons agree to submit a matter in dispute to arbitration;

(b) "arbitrator" includes an umpire;

(c) "court" means,

(i) in sections 6 and 7, the Court of Queen's Bench of Alberta and the Provincial Court of Alberta, and

(ii) in all other sections, the Court of Queen's Bench of Alberta.

(2) If the parties to an arbitration agreement make a further agreement in connection with the arbitration, it is deemed to form part of the arbitration agreement.

(3) Where a matter is authorized or required under an enactment to be submitted to arbitration, a reference in this Act to an arbitration agreement is a reference to the enactment, unless the context otherwise requires.

Application of Act

2(1) This Act applies to an arbitration conducted under an arbitration agreement or authorized or required under an enactment unless

(a) the application of this Act is excluded by an agreement of the parties or by law, or

(b) Part 2 of the *International Commercial Arbitration Act* applies to the arbitration.

(2) If there is a conflict between this Act and the other enactment that authorized or required the arbitration, the other enactment prevails.

(3) This Act does not apply to an arbitration authorized or required under any of the following:

(a) *Banff Centre Act;*

(b) *Cancer Programs Act;*

(c) *Colleges Act;*

(d) *Labour Relations Code;*

(e) *Police Officers Collective Bargaining Act;*

(f) *Public Service Employee Relations Act;*

(g) *Technical Institutes Act;*

(h) *Universities Act;*

(i) any other enactment set out in the regulations.

(4) The Lieutenant Governor in Council may make regulations prescribing enactments to which the *Arbitration Act* does not apply.

Party autonomy

3 The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except sections 5(2), 19, 39, 44(2), 45, 47 and 49.

Waiver of right to object

4 A party to an arbitration who is aware of a non-compliance with a provision of this Act, except with a provision referred to in section 3, or with the arbitration agreement and who does not object to the non-compliance within the time limit provided or, if none is provided, within a reasonable time, is deemed to have waived the right to object.

Arbitration agreements

5(1) An arbitration agreement need not be in writing.

(2) An agreement requiring or having the effect of requiring that a matter in dispute be adjudicated by arbitration before it may be dealt with by a court has the same effect as an arbitration agreement.

(3) An arbitration agreement may be rescinded only in accordance with the law of contract.

Court Intervention

Court intervention limited

6 No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:

(a) to assist the arbitration process;

(b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;

(c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;

(d) to enforce awards.

Stay

7(1) If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding.

(2) The court may refuse to stay the proceeding in only the following cases:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid;

(c) the subject-matter of the dispute is not capable of being the subject of arbitration under Alberta law;

(d) the motion to stay the proceeding was brought with undue delay;

(e) the matter in dispute is a proper one for default or summary judgment.

(3) An arbitration of the matter in dispute may be commenced or continued while the motion is before the court.

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the matter in dispute shall be commenced, and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court's refusal is without effect.

(5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that

(a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced, and

(b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.

(6) There is no appeal from the court's decision under this section.

Powers of court

8(1) The court's powers with respect to the detention, preservation and inspection of property, interim injunctions and the appointment of receivers are the same in arbitrations as in court actions.

(2) On the application of the arbitral tribunal, or on a party's application with the consent of the other parties or the arbitral tribunal, the court may determine any question of law that arises during the arbitration.

(3) The court's determination of a question of law may be appealed to the Court of Appeal with leave of that Court.

(4) On the application of all the parties to more than one arbitration, the court may order, on terms that it considers just,

(a) that the arbitrations be consolidated,

(b) that the arbitrations be conducted simultaneously or consecutively, or

(c) that any of the arbitrations be stayed until any of the others are completed.

(5) When the court orders that arbitrations be consolidated, it may appoint an arbitral tribunal for the consolidated arbitration, and if all the parties agree as to the choice of the arbitral tribunal, the court shall appoint that arbitral tribunal.

(6) Subsection (4) does not prevent the parties to more than one arbitration from agreeing to consolidate the arbitrations and doing everything necessary to effect the consolidation.

Arbitral Tribunal

Number of arbitrators

9 If the arbitration agreement does not specify the number of arbitrators who are to form the arbitral tribunal, it shall be composed of one arbitrator.

Appointment of arbitral tribunal

10(1) The court may appoint the arbitral tribunal, on a party's application, if

(a) the arbitration agreement provides no procedure for appointing the arbitral tribunal, or

(b) a person with power to appoint the arbitral tribunal has not done so within the time provided in the agreement or after a party has given the person 7 days' notice to do so, whichever is later.

(2) There is no appeal from the court's appointment of the arbitral tribunal.

(3) Subsections (1) and (2) apply to the appointment of individual members of arbitral tribunals.

(4) An arbitral tribunal composed of 3 or more arbitrators shall, and an arbitral tribunal composed of 2 arbitrators may, elect a chair from among themselves.

Independence and impartiality of arbitrators

11(1) An arbitrator shall be independent of the parties and impartial as between the parties.

(2) Before accepting an appointment as arbitrator, a person shall disclose to all parties to the arbitration any circumstances of which that person is aware that may give rise to a reasonable apprehension of bias.

(3) An arbitrator who, during an arbitration, becomes aware of circumstances that may give rise to a reasonable apprehension of bias shall promptly disclose the circumstances to all the parties.

No revocation

12 A party may not revoke the appointment of an arbitrator.

Challenge

13(1) A party may challenge an arbitrator only on one of the following grounds:

(a) circumstances exist that may give rise to a reasonable apprehension of bias;

(b) the arbitrator does not possess qualifications that the parties have agreed are necessary.

(2) A party who appointed an arbitrator or participated in the arbitrator's appointment may challenge the arbitrator only on grounds of which the party was unaware at the time of the appointment.

(3) A party who wishes to challenge an arbitrator shall send the arbitral tribunal a statement of the grounds for the challenge within 15 days of becoming aware of them.

(4) The other parties may agree to remove the arbitrator who is being challenged, or the arbitrator may resign.

(5) If the arbitrator is not removed by the parties or does not resign, the arbitral tribunal, including the arbitrator who is being

challenged, shall decide the issue and shall notify the parties of its decision.

(6) Within 10 days after being notified of the arbitral tribunal's decision, a party may make an application to the court to decide the issue.

(7) While an application is pending, the arbitral tribunal, including the arbitrator who is being challenged, may continue the arbitration and make an award, unless the court orders otherwise.

Termination of arbitrator's mandate

14(1) An arbitrator's mandate terminates when

(a) the arbitrator resigns or dies,

(b) the parties agree to remove the arbitrator,

(c) 10 days elapse after all the parties are notified of the arbitral tribunal's decision to uphold a challenge of the arbitrator and remove the arbitrator, and no application is made to the court under section 13(6), or

(d) the court removes the arbitrator under section 15(1).

(2) An arbitrator's resignation or a party's agreement to terminate an arbitrator's mandate does not imply acceptance of the validity of any reason advanced for challenging or removing the arbitrator.

Removal of arbitrator by court

15(1) The court may remove an arbitrator on a party's application under section 13(6), or may do so on a party's application if the arbitrator becomes unable to perform the functions of an arbitrator, commits a corrupt or fraudulent act, delays unduly in conducting the arbitration or does not conduct the arbitration in accordance with section 19.

(2) The arbitrator is entitled to be heard by the court on an application under subsection (1).

(3) When the court removes an arbitrator, it may give directions on the conduct of the arbitration.

(4) If the court removes an arbitrator for a corrupt or fraudulent act or for undue delay, it may order that the arbitrator receive no payment for services and may order that the arbitrator compensate the parties for all or part of the costs, as determined by the court, that they incurred in connection with the arbitration before the arbitrator's removal.

(5) The arbitrator or a party may, within 30 days after receiving the court's decision, appeal an order made under subsection (4) or the refusal to make such an order to the Court of Appeal, with leave of that Court.

(6) Except as provided in subsection (5), there is no appeal from the court's decision or from its directions under this section.

Appointment of substitute arbitrator

16(1) When an arbitrator's mandate terminates, a substitute arbitrator shall be appointed, following the procedures that were used in the appointment of the arbitrator being replaced.

(2) When an arbitrator's mandate terminates, the court may, on the application of any party, give directions about the conduct of the arbitration.

(3) The court may appoint the substitute arbitrator on a party's application if

(a) the arbitration agreement provides no procedure for appointing the substitute arbitrator, or

(b) a person with power to appoint the substitute arbitrator has not done so within the time provided in the agreement or after a party has given the person 7 days' notice to do so, whichever is later.

(4) There is no appeal from the court's decision or from its directions under this section.

(5) This section does not apply if the arbitration agreement provides that the arbitration is to be conducted only by a named arbitrator.

Jurisdiction of Arbitral Tribunal

Jurisdiction, objections

17(1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

(2) The arbitral tribunal may determine any question of law that arises during the arbitration.

(3) If the arbitration agreement forms part of another agreement, it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the other agreement is found to be invalid.

(4) A party who objects to the arbitral tribunal's jurisdiction to conduct the arbitration shall do so no later than the beginning of the hearing or, if there is no hearing, no later than the first occasion on which the party submits a statement referred to in section 25 to the tribunal.

(5) A party who has appointed or participated in the appointment of an arbitrator is not prevented from objecting to the jurisdiction of the arbitral tribunal to conduct the arbitration.

(6) A party who objects that the arbitral tribunal is exceeding its jurisdiction shall do so as soon as the matter alleged to be beyond the tribunal's jurisdiction is raised during the arbitration.

(7) Notwithstanding section 4, if the arbitral tribunal considers the delay justified, a party may object after the time referred to in subsection (4) or (6), as the case may be, has passed.

(8) The arbitral tribunal may rule on an objection when it is raised or may deal with it in an award.

(9) If the arbitral tribunal rules on an objection as a preliminary question, a party may, within 30 days after receiving notice of the ruling, make an application to the court to decide the matter.

(10) There is no appeal from the court's decision on an application under subsection (9).

(11) While an application is pending, the arbitral tribunal may continue the arbitration and make an award.

Detention, preservation and inspeo-tion of pro-perty and documents

18(1) On a party's request, an arbitral tribunal may make an order for the detention, preservation or inspection of property and documents that are the subject of the arbitration or as to which a question may arise in the arbitration and may order a party to provide security in that connection.

(2) The court may enforce the order of an arbitral tribunal as if it were a similar order made by the court in an action.

Conduct of Arbitration

Equality and fairness

19(1) An arbitral tribunal shall treat the parties equally and fairly.

(2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases.

Procedure

20(1) The arbitral tribunal may determine the procedure to be followed in the arbitration.

(2) An arbitral tribunal that is composed of more than one arbitrator may delegate the determination of questions of procedure to the chair.

Evidence

21(1) The arbitral tribunal is not bound by the rules of evidence or any other law applicable to judicial proceedings and has power to determine the admissibility, relevance and weight of any evidence.

(2) The tribunal may determine the manner in which evidence is to be admitted.

Time and place of arbitration and meetings

22(1) The arbitral tribunal shall determine the time, date and place of arbitration, taking into consideration the parties' convenience and the other circumstances of the case.

(2) The arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or parties or for inspecting property or documents.

Commencement of arbitration

23(1) An arbitration may be commenced in any way recognized by law, including the following:

(a) a party to an arbitration agreement serves on the other parties notice to appoint or to participate in the appointment of an arbitrator under the agreement;

(b) if the arbitration agreement gives a person who is not a party power to appoint an arbitrator, a party serves notice to exercise that power on the person and serves a copy of the notice on the other parties;

(c) a party serves on the other parties a notice demanding arbitration under the arbitration agreement.

(2) The arbitral tribunal may exercise its powers when every member has accepted appointment.

Matters referred to arbitration

24 An arbitration commenced without identifying the matters in dispute is deemed to refer to arbitration all matters in dispute that the arbitration agreement entitles the party commencing the arbitration to refer.

Procedural directions

25(1) An arbitral tribunal may require that the parties submit their statements within a specified period of time.

(2) The statements of the parties shall indicate the facts supporting their position, the points at issue and the relief sought.

(3) The parties may submit, with their statements, the documents they consider relevant or may refer to the documents or other evidence they intend to submit.

(4) The parties may amend or supplement their statements during the arbitration, but the arbitral tribunal may disallow a change that is unduly delayed.

(5) The parties may submit their statements orally with the permission of the arbitral tribunal.

(6) The parties, and persons claiming through or under them, shall, subject to any legal objection, comply with the directions of the arbitral tribunal, including directions to

(a) submit to examination on oath or affirmation with respect to the matters in dispute, or

(b) produce records and documents that are in their possession or power.

(7) The court may enforce a direction of the arbitral tribunal as if it were a direction made by the court in an action.

Hearings and written proceedings

26(1) The arbitral tribunal may conduct the arbitration on the basis of documents or may hold hearings for the presentation of evidence and for oral argument, but the tribunal shall hold a hearing if a party requests it.

(2) The arbitral tribunal shall give the parties sufficient notice of hearings and of meetings of the tribunal for the purpose of inspecting property or documents.

(3) A party shall

(a) provide to the other parties a copy of any statement submitted to the arbitral tribunal, and

(b) make available to the other parties any other information supplied to the arbitral tribunal.

(4) The arbitral tribunal shall not rely on an expert report or other document of which the parties have not been informed.

Default

27(1) If the party commencing the arbitration does not submit a statement within the period of time specified under section 25(1), the arbitral tribunal may dismiss the claim by making an award terminating the arbitration, unless the party offers a satisfactory explanation.

(2) If a party other than the one who commenced the arbitration does not submit a statement within the period of time specified under section 25(1), the arbitral tribunal may continue the arbitration unless that party offers a satisfactory explanation, but the tribunal shall not treat the failure of that party to submit a statement as an admission of any other party's allegations.

(3) If a party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the arbitration and make an award on the evidence before it, unless the party offers a satisfactory explanation.

(4) In the case of an unreasonable delay by the party who commenced the arbitration, the arbitral tribunal may

(a) make an award terminating the arbitration, or

(b) give directions for the speedy determination of the arbitration,

and may impose conditions on its decision.

Appointment of expert

28(1) An arbitral tribunal may appoint an expert to report to it on specific issues.

(2) The expert shall be a person agreed on by the parties and, failing an agreement, shall be determined by the arbitral tribunal.

(3) The remuneration to be paid to the expert shall be paid by the parties in equal portions, subject to the direction of the arbitral tribunal.

(4) The arbitral tribunal may require the parties to give the expert any relevant information or to allow the expert to inspect property or documents.

(5) At the request of a party or of the arbitral tribunal, the expert, after making the report, shall participate in a hearing in which the parties may question the expert and present the testimony of another expert on the subject-matter of the report.

Obtaining evidence

29(1) A party may serve a person with a notice requiring the person to attend and give evidence at the arbitration at the time and place named in the notice.

(2) The notice has the same effect as a notice in a court proceeding requiring a witness to attend at a hearing or produce documents and shall be served in the same way.

(3) An arbitral tribunal may administer oaths, affirmations and declarations.

(4) An arbitral tribunal shall require witnesses to testify under oath, affirmation or declaration.

(5) On the application of a party or of the arbitral tribunal, the court may make orders and give directions with respect to the taking of evidence for an arbitration as if the arbitration were a court proceeding.

Restriction

30 No person shall be compelled to produce information, property or documents or to give evidence in an arbitration that the person could not be compelled to produce or give in a court proceeding.

Award and Termination of Arbitration

Application of law and equity

31 An arbitral tribunal shall decide a matter in dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies.

Conflict of laws

32(1) In deciding a matter in dispute, an arbitral tribunal shall apply the law of a jurisdiction designated by the parties or, if none *is designated, the law of a jurisdiction it considers appropriate in* the circumstances.

(2) A designation by the parties of the law of a jurisdiction refers to the jurisdiction's substantive law and not to its conflict of laws rules unless the parties expressly indicate that the designation includes them.

Application of arbitration agreement, contract and usages of trade

33 The arbitral tribunal shall decide the matters in dispute in accordance with the arbitration agreement and the contract, if any, under which the matters arose and shall also take into consideration any applicable usages of trade.

Decision of arbitral tribunal

34 If an arbitral tribunal is composed of more than one member, a decision of a majority of the members is a decision of the arbitral tribunal, but if there is no majority decision or unanimous decision, the decision of the chair governs.

Mediation and conciliation

35(1) The members of an arbitral tribunal may, if the parties consent, use mediation, conciliation or similar techniques during the arbitration to encourage settlement of the matters in dispute.

(2) After the members of an arbitral tribunal use a technique referred to in subsection (1), they may resume their roles as arbitrators without disqualification.

Settlement

36 If the parties settle the matters in dispute during arbitration, the arbitral tribunal shall terminate the arbitration and shall record the settlement in the form of an award.

Binding nature of award

37 An award binds the parties unless it is set aside or varied under section 44 or 45.

Form of award

38(1) An award shall be made in writing and, except in the case of an award made under section 36, shall state the reasons on which it is based.

(2) An award shall indicate the place where and the date on which it is made.

(3) An award shall be dated and signed by all the members of the arbitral tribunal, or by a majority of them if an explanation of the omission of the other signatures is included.

(4) A copy of an award shall be served on each party.

Extension of time limits

39 The court may extend the time within which the arbitral tribunal is required to make an award, even if the time has expired.

Amplification of reasons

40(1) A party may, within 30 days after receiving a copy of the award, request, in writing, that the arbitral tribunal provide a further explanation of the reasons on which the award is based.

(2) If the arbitral tribunal does not give a sufficient explanation within 15 days after receiving the request, the court, on the party's application, may order the tribunal to do so.

Interim and final awards

41(1) The arbitral tribunal may make interim awards.

(2) The arbitral tribunal may make more than one final award, disposing of one or more matters in dispute referred to arbitration in each award.

Termination of arbitration

42(1) An arbitration is terminated when

(a) the arbitral tribunal makes a final award or awards in accordance with this Act, disposing of all matters in dispute referred to arbitration,

(b) the arbitral tribunal terminates the arbitration under subsection (2) or section 27(1) or (4), or

(c) the arbitrator's mandate is terminated, if the arbitration agreement provides that the arbitration is to be conducted only by that arbitrator.

(2) An arbitral tribunal shall make an order terminating the arbitration if

(a) the party that commenced the arbitration withdraws the matters in dispute, unless the other party objects to the termination and the arbitral tribunal agrees that the other party is entitled to obtain a final settlement of the matters in dispute,

(b) the parties agree that the arbitration should be terminated, or

(c) the arbitral tribunal finds that the continuation of the arbitration has become unnecessary or impossible.

(3) An arbitration that is terminated may only be revived for the purposes of section 43, 44(4), 45(7) and (8) or 53(4).

(4) The death of a party to an arbitration does not terminate an arbitral tribunal.

(5) Subsection (4) does not affect a rule of law or an enactment under which the death of a person extinguishes a cause of action.

Correction of errors

43(1) An arbitral tribunal may, on its own initiative within 30 days after making an award or at a party's request made within 30 days after receiving the award,

(a) correct typographical errors, errors of calculation and similar errors in the award, or

(b) amend the award so as to correct an injustice caused by an oversight on the part of the arbitral tribunal.

(2) The arbitral tribunal may,

(a) on its own initiative within 30 days after making an award or such longer time as approved by the parties, or

(b) at the request of a party within 30 days after receipt of the award by that party,

make an additional award to deal with a matter in dispute that was presented in the arbitration but omitted from the earlier award.

(3) The arbitral tribunal need not hold a hearing or meeting before rejecting a request made under this section.

Remedies

Appeal of award

44(1) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.

(2) If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

(3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law which the parties expressly referred to the arbitral tribunal for decision.

(4) The court may require the arbitral tribunal to explain any matter.

(5) The court may confirm, vary or set aside the award or may remit the award to the arbitral tribunal and give directions about the conduct of the arbitration.

(6) Where the court remits the award to the arbitral tribunal in the case of an appeal on a question of law, it may also remit to the tribunal the court's opinion on the question of law.

Setting aside award

45(1) On a party's application, the court may set aside an award on any of the following grounds:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid or has ceased to exist;

(c) the award deals with a matter in dispute that the arbitration agreement does not cover or contains a decision on a matter in dispute that is beyond the scope of the agreement;

(d) the composition of the arbitral tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with the matter, was not in accordance with this Act;

(e) the subject-matter of the arbitration is not capable of being the subject of arbitration under Alberta law;

(f) the applicant was treated manifestly unfairly and unequally, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator;

(g) the procedures followed in the arbitration did not comply with this Act or the arbitration agreement;

(h) an arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias;

(i) the award was obtained by fraud.

(2) If subsection (1)(c) applies and it is reasonable to separate the decisions on matters covered by the arbitration agreement from the

impugned ones, the court shall set aside the impugned decisions and allow the others to stand.

(3) The court shall not set aside an award on grounds referred to in subsection (1)(c) if the applicant has agreed to the inclusion of the matter in dispute, waived the right to object to its inclusion or agreed that the arbitral tribunal has power to decide what matters in dispute have been referred to it.

(4) The court shall not set aside an award on grounds referred to in subsection (1)(h) if the applicant had an opportunity to challenge the arbitrator on those grounds under section 13 before the award was made and did not do so or if those grounds were the subject of an unsuccessful challenge.

(5) The court shall not set aside an award on a ground to which the applicant is deemed under section 4 to have waived the right to object.

(6) If the ground alleged for setting aside the award could have been raised as an objection to the arbitral tribunal's jurisdiction to conduct the arbitration, the court may set the award aside on that ground if it considers the applicant's failure to make an objection in accordance with section 17 justified.

(7) When the court sets aside an award, it may remove an arbitrator or the arbitral tribunal and may give directions about the conduct of the arbitration.

(8) Instead of setting aside an award, the court may remit it to the arbitral tribunal and give directions about the conduct of the arbitration.

Time limit

46(1) The following must be commenced within 30 days after the appellant or applicant receives the award, correction, explanation, change or statement of reasons on which the appeal or application is based:

(a) an appeal under section 44(1);

(b) an application for leave to appeal under section 44(2);

(c) an application to set aside an award under section 45.

(2) An application to set aside an award on the grounds that an arbitrator has committed a corrupt or fraudulent act or that the award was obtained by fraud must be commenced

(a) within the period referred to in subsection (1), or

(b) within 30 days after the applicant discovers or ought to have discovered the fraud or corrupt act

whichever is later.

1991 cA-43.1 s46;1992 c21 s4

Declaration of invalidity of arbitration

47(1) At any stage during or after an arbitration on the application of a party who has not participated in the arbitration, the court may grant a declaration that the arbitration is invalid because

(a) a party entered into the arbitration agreement while under a legal incapacity,

(b) the arbitration agreement is invalid or has ceased to exist,

(c) the subject-matter of the arbitration is not capable of being the subject of arbitration under Alberta law, or

(d) the arbitration agreement does not apply to the matter in dispute.

(2) When the court grants the declaration it may also grant an injunction prohibiting the commencement or continuation of the arbitration.

Further appeal to Court of Appeal

48 An appeal from the court's decision in an appeal of an award, an application to set aside an award or an application for a declaration of invalidity may be made to the Court of Appeal of Alberta with leave of that Court.

Enforcement of award

49(1) A person who is entitled to enforce an award made in Alberta or elsewhere in Canada may make an application to the court to that effect.

(2) The application shall be made on notice to the person against whom enforcement is sought, in accordance with the Alberta Rules of Court, and shall be supported by the original award or a certified copy of it.

(3) The court shall give a judgment enforcing an award made in Alberta unless

(a) the 30-day period for commencing an appeal or an application to set the award aside has not yet elapsed,

(b) an appeal, an application to set the award aside or an application for a declaration of invalidity is pending, or

(c) the award has been set aside or the arbitration is the subject of a declaration of invalidity.

(4) The court shall give a judgment enforcing an award made elsewhere in Canada unless

(a) the period for commencing an appeal or an application to set the award aside provided by the laws in force in the province or territory where the award was made has not yet elapsed,

(b) an appeal, an application to set the award aside or an application for a declaration of invalidity is pending in the province or territory where the award was made,

(c) the award has been set aside in the province or territory where it was made or the arbitration is the subject of a declaration of invalidity granted there, or

(d) the subject-matter of the award is not capable of being the subject of arbitration under Alberta law.

(5) If the period for commencing an appeal, an application to set the award aside or an application for a declaration of invalidity has not yet elapsed, or if such a proceeding is pending, the court may

(a) enforce the award, or

(b) order, on such conditions as the court considers just, that enforcement of the award is stayed until the period has elapsed without such a proceeding being commenced or until the pending proceeding is finally disposed of.

(6) If the court stays the enforcement of an award made in Alberta until a pending proceeding is finally disposed of, it may give directions for the speedy disposition of the proceeding.

(7) If the award gives a remedy that the court does not have jurisdiction to grant or would not grant in a proceeding based on similar circumstances, the court may

(a) grant a different remedy requested by the applicant, or

(b) in the case of an award made in Alberta, remit it to the arbitral tribunal with the court's opinion, in which case the arbitral tribunal may award a different remedy.

(8) The court has the same powers with respect to the enforcement of awards as with respect to the enforcement of its own judgments.

General

Crown bound

50 This Act binds the Crown.

Limitation periods

51(1) The law with respect to limitation periods applies to an arbitration as if the arbitration were an action and a matter in dispute in the arbitration were a cause of action.

(2) If the court sets aside an award, terminates an arbitration or declares an arbitration to be invalid, it may order that the period from the commencement of the arbitration to the date of the order shall be excluded from the computation of the time within which an action may be brought on a cause of action that was a matter in dispute in the arbitration.

(3) An application for the enforcement of an award may not be made more than

(a) 2 years after the day on which the applicant receives the award, or

(b) 2 years after all appeal periods have expired,

whichever is later.

Service of notice

52(1) A notice or other document may be served on an individual by leaving it with that individual.

(2) A notice or other document may be served on a corporation by leaving it with an officer, director or agent of the corporation, or at a place of business of the corporation with a person who appears to be in control or management of the place.

(3) A notice or other document may be served by sending it to the addressee by telephone transmission of a facsimile to the number that the addressee specified in the arbitration agreement or furnished to the arbitral tribunal.

(4) If a reasonable effort to serve a notice or other document under subsection (1) or (2) is not successful and it is not possible to serve it under subsection (3), it may be sent by prepaid registered mail to the mailing address that the addressee specified in the arbitration agreement or furnished to the arbitral tribunal or, if none was specified or furnished, to the addressee's last known place of business or residence.

(5) Unless the addressee establishes that the addressee, acting in good faith, through absence, illness or other cause beyond the addressee's control failed to receive the notice or other document until a later date, it is deemed to have been received,

(a) on the day it is given or transmitted, in the case of service under subsection (1), (2) or (3), or

(b) on the 5th day after the day of mailing, in the case of service under subsection (4).

(6) The court may make an order for substituted service or an order dispensing with service in the same manner as under the Alberta Rules of Court if the court is satisfied that it is necessary to serve the notice or other document to commence an arbitration or proceed towards the appointment of an arbitral tribunal and that it is impractical for any reason to effect prompt service under subsection (1), (2), (3) or (4).

(7) This section does not apply to the service of documents in respect of court proceedings.

Costs

53(1) An arbitral tribunal may award the costs of an arbitration.

(2) The arbitral tribunal may award all or part of the costs of an arbitration on a solicitor-and-client basis, a party-and-party basis or any other basis but if it does not specify the basis, the costs shall be determined on a party-and-party basis.

(3) The costs of an arbitration consist of the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.

(4) If the arbitral tribunal does not deal with costs in an award, a party may, within 30 days after receiving the award, request that it make a further award dealing with costs.

(5) In the absence of an award dealing with costs, each party is responsible for that party's own legal expenses and for an equal share of the fees and expenses of the arbitral tribunal and of any other expenses related to the arbitration.

(6) If a party makes an offer, in writing, to another party to settle the matter in dispute or part of it, the offer is not accepted and the arbitral tribunal's award is no more favourable to the party to which the offer was made than was the offer, the arbitral tribunal may take that fact into account in awarding costs in respect of the period from the making of the offer to the making of the award.

(7) The fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final determination of all aspects of the matters in dispute other than costs.

Interest

54(1) An arbitral tribunal has the same power with respect to interest as the court has under the *Judgment Interest Act*, but the provision for payment into court does not apply.

(2) An award is a judgment of the court for the purposes of the *Interest Act* (Canada).

Taxation of costs

55(1) The fees and expenses paid to an arbitrator shall not exceed the fair and reasonable value of the services performed and the necessary and reasonable expenses actually incurred.

(2) A party to an arbitration may apply to the clerk of the court to have an arbitrator's account for fees and expenses taxed by a taxing officer in the same manner as a charge for services of a barrister and solicitor under the Alberta Rules of Court.

(3) If the arbitral tribunal awards costs and directs that they be taxed, or awards costs without fixing the amount or indicating how it is to be ascertained, a party to the arbitration may have the costs taxed by a taxing officer in a similar manner as costs under the Alberta Rules of Court, having regard to the special characteristics of arbitrations.

(4) In taxing the part of the costs represented by the fees and expenses of the arbitral tribunal, the taxing officer shall apply the same principles as in the taxation of an account under subsection (1).

(5) Subsection (2) applies even if the account has been paid.

(6) On the application of a party to the arbitration, the court may review a taxation of costs or of an arbitrator's account for fees and expenses and may confirm the taxation, vary it, set it aside or remit it to the taxing officer with directions.

(7) On the application of an arbitrator the court may review the taxation of the arbitrator's account for fees and expenses and may confirm it, vary it, set it aside or remit it to the taxation officer with directions.

(8) An application for review may not be made after the period specified in the taxation officer's certificate has elapsed or, if no period is specified, more than 30 days after the date of the certificate, unless the court orders otherwise.

(9) When the time during which an application for review may be made has expired and no application has been made or when the court has reviewed the taxation and made a final determination, the taxing officer's certificate may be filed with the court and enforced as if it were a judgment of the court.

Transitional

56 *(1) This Act applies to arbitrations conducted under arbitration agreements made before September 1, 1991 if the arbitration is commenced on or after September 1, 1991.*

(2) Notwithstanding its repeal by section 58, the Arbitration Act (RSA 1980 cA-43) continues to apply to arbitrations that are commenced before September 1, 1991.

57 *(This section makes consequential amendments to other Acts. The amendments have been incorporated in those Acts.)*

Repeal

58 *The Arbitration Act, RSA 1980 cA-43, is repealed.*

Coming into force

59 *This Act comes into force on September 1, 1991.*

REPORT ON ARBITRATION

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

INTRODUCTION

Arbitration is a dispute resolution mechanism whereby two or more parties voluntarily agree to submit their dispute, not to the courts, but to a private impartial individual or panel of individuals whose decision is agreed to be binding on them. The Manitoba Law Reform Commission's Report on *Arbitration* recommends the adoption of a new statutory model to govern the general legal status and conduct of arbitrations in Manitoba (other than "specialized" arbitrations governed by their own unique statutes, like labour arbitrations and international commercial arbitrations).

CURRENT LAW

In 1986, Manitoba joined the other provinces in reforming the law that governs international commercial arbitrations. A uniform statutory model was enacted that thoroughly modernized this area. This reform has created a momentum for change in the area of domestic commercial arbitration law as well (that is, in arbitrations where all elements of the dispute are governed by Canadian law).

In Manitoba, domestic arbitration is currently governed by *The Arbitration Act*, which is based on an outdated 19th-century English statutory model. It has two main difficulties for users. First, it provides insufficient guidance about how an arbitration should actually be conducted, thus leaving many practical problems unsolved. Secondly, it gives to the courts discretionary powers of intervention that are much too broad. The resultant easy access to the courts by arbitrating parties defeats the very purpose of arbitration. The operation of this statute actually serves to discourage arbitration rather than to facilitate it.

THE NEED FOR REFORM

Arbitration is an increasingly popular alternative to litigation in many jurisdictions. Arbitration (coupled with limited court access) has the potential to offer a number of advantages, such as:

- lower cost to participants;
- lower cost to taxpayers (since the public judicial system is not invoked at all or more rarely);
- increased speed of proceedings;
- greater informality, accessibility and flexibility of proceedings;
- enhanced privacy;
- the ability to select a decision-maker who is specially skilled in the often esoteric matters of commercial disputes.

RECOMMENDATION FOR REFORM

Several provinces have recently reformed their domestic arbitration law (British Columbia, Quebec, Alberta, Ontario, and Saskatchewan) or are in the process of doing so (New Brunswick's statute has been passed but not yet proclaimed). From this process and from work done by the Uniform Law Conference of Canada, a standardized approach and uniform model has emerged that is designed to meet Canadian arbitration needs. The Commission recommends adopting this statutory model in Manitoba as well, since it represents the best and most comprehensive model currently available in this area.

This model's major new policy directions include:

- Restriction of arbitrating parties' access to the courts by removing or limiting the court's discretionary powers of intervention in the arbitration process.

- Provision of a sufficient procedural framework that addresses matters such as service of documents, holding of hearings, appointment of experts and other evidentiary points, termination of proceedings, setting aside an award, and obtaining costs.

- Expansion of an arbitrator's powers to include the ordering of specific performance, injunctions, and interim orders for the detention, preservation or inspection of property. These powers reduce the parties' need to go to court instead of arbitrating.

- Removal of the court's current discretion whether to enforce an arbitral award and, instead, requiring courts to enforce such awards upon application. Assured enforcement encourages the use of arbitration to resolve disputes.

RAPPORT SUR L'ARBITRAGE

SOMMAIRE

SOMMAIRE

INTRODUCTION

L'arbitrage est un mécanisme de règlement des différends. Dans le cadre de ce mécanisme, deux ou plusieurs parties acceptent volontairement et d'un commun accord de soumettre leur différend à l'examen d'une tierce personne ou d'un comité impartial indépendant et de s'en remettre à sa décision. La Commission recommande l'adoption d'un nouvelle loi régissant de façon générale l'arbitrage (sauf les cas d'arbitrage spécialisé qui sont régis par leur propre loi, comme les relations du travail et l'arbitrage commercial international).

LOI ACTUELLE

En 1986, le Manitoba s'est joint aux autres provinces pour la réforme du droit de l'arbitrage commercial international. Un modèle de loi uniforme a été adopté, ce qui a eu pour effet de moderniser du tout au tout ce domaine. Cette réforme a également créé un climat propice au changement dans le domaine du droit de l'arbitrage commercial interne (en ce qui concerne les arbitrages dont tous les éléments du différend relèvent de lois canadiennes).

Au Manitoba, l'arbitrage tombe sous le coup de la *Loi sur l'arbitrage*, laquelle se fonde sur un ancien modèle britannique du XIX^{e} siècle. Cette loi présente deux grandes difficultés pour les personnes qui l'invoquent. D'abord, elle ne comporte pas suffisamment d'indications sur la manière de procéder, laissant ainsi de nombreux problèmes pratiques en suspens. Deuxièmement, elle confère trop de pouvoirs d'intervention discrétionnaires aux tribunaux. Cette facilité d'accès aux tribunaux va à l'encontre du but même de l'arbitrage. De fait, cette loi décourage le recours à l'arbitrage plutôt que de le faciliter.

BESOIN DE RÉFORME

L'arbitrage constitue dans de nombreux ressorts une solution de rechange de plus en plus populaire aux poursuites judiciaires. L'arbitrage (jumelé à la limitation de l'accès aux tribunaux) peut offrir un certain nombre d'avantages. Par exemple, par comparaison aux poursuites judiciaires, il :

- est moins dispendieux pour les participants;
- il est moins dispendieux pour les contribuables (puisqu'il permet de ne pas recourir ou de ne recourir que très rarement au système judiciaire public);
- est plus rapide;
- permet de simplifier, de faciliter et d'assouplir les procédures;
- est plus discret;
- permet de choisir un arbitre qui est spécialisé dans les affaires souvent incompréhensibles pour les non-initiés des différends commerciaux.

RECOMMANDATION DE RÉFORME

Plusieurs provinces viennent (Colombie-Britannique, Québec, Alberta, Ontario et Saskatchewan) ou sont sur le point (Nouveau-Brunswick, dont la loi est adoptée mais non encore proclamée) de réformer leur loi sur l'arbitrage. Il est ressorti de cet exercice et du travail accompli par la Conférence sur l'uniformisation des lois du Canada une méthode et un modèle uniformes pouvant répondre aux besoins des Canadiens en matière d'arbitrage. La Commission recommande donc que l'on adopte également ce modèle de loi au Manitoba puisqu'il est le meilleur et le plus complet qui soit couramment accessible dans ce domaine.

Ce modèle :

- restreint l'accès des parties aux tribunaux en supprimant ou en limitant les pouvoirs d'intervention discrétionnaires de ces derniers;

- prévoit un cadre méthodologique pour notamment la signification des documents, la tenue des audiences, la nomination des spécialistes, les éléments de preuve, les arrêts de procédure, l'annulation des sentences arbitrales et l'attribution des frais;

- inclut parmi les pouvoirs des arbitres les exécutions en nature, les injonctions et les ordonnances provisoires visant la détention, la conservation et l'inspection des biens; ces pouvoirs réduisent la nécessité de recourir aux tribunaux;

- oblige les tribunaux, au lieu de leur laisser le choix comme c'est le cas actuellement, de faire exécuter les sentences arbitrales sur demande; le fait de garantir l'exécution des sentences arbitrales favorise le recours à l'arbitrage pour le règlement des différends.