

**Uniform Law
Conference of Canada**

***Uniform
Arbitration
Act***

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Uniform Arbitration Act

Commentaries

General

The Uniform Arbitration Act has been prepared in accordance with the policy decisions made at the annual meeting of the Uniform Law Conference in Yellowknife in 1989. The commentary for individual sections will refer where appropriate to the propositions contained in the report of the Alberta Commissioners to the 1989 Conference on Domestic Arbitrations.

The present draft of the Uniform Arbitration Act complies with Proposition 2 in the report of the Alberta Commissioners, in that it has used as a model the UNCITRAL Model Law on international commercial arbitration. Its principles have been modified only slightly to apply to domestic arbitrations. Its terminology has been somewhat domesticated and expanded for the assistance of Canadian users. The most notable change is that the numbering of the sections does not follow strictly the numbering of the articles of the Model Law, though the sequence is largely the same. The drafters felt that the need to amplify and in a few cases rearrange the rather Spartan terms of the Model Law outweighed the desire for consistent numbering. Despite this change, the organisation and the principles of the Uniform Arbitration Act are recognizably those of the Model Law.

The guiding principles are these:

- (1) people who enter into valid arbitration agreements should be held to those agreements;
- (2) the parties should have broad freedom to design the arbitral process as they see fit;
- (3) that process should nevertheless be fair to both parties; and
- (4) the award resulting from the arbitration should be readily enforceable, subject only to review for a specific list of fatal flaws of form or procedure.

The Act attempts to minimize the opportunities to delay the arbitration, either by refusing to participate or by seeking the intervention of the courts. The courts do have their place in arbitration under the Uniform Act, however. They can keep proceedings moving in the face of resistance, they can protect the position of parties during proceedings, they can help ensure that the arbitral award applies with the law, and they can lend their weight to the enforcement of the award.

Introductory Matters

Definitions

1 In this Act,

“**arbitration agreement**” means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them; (“convention d’arbitrage”)

“**arbitrator**” includes an umpire; (“arbitre”)

“**court**”, except in sections 6 and 7, means the (*appropriate court*) (“tribunal judiciaire”)

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Commentary: The definition of “**arbitration agreement**” includes an agreement to arbitrate a dispute already in existence or a dispute that may arise in the future. The agreement may be free standing or it may be part of any other kind of agreement between the parties.

The definition of “**arbitrator**” includes an umpire, in order that any agreements now in existence that provide for umpires may come within the new Act, without making special provisions for a procedure which is very rarely followed.

Each jurisdiction will fill in the name of a court of unlimited trial jurisdiction. (Proposition 1(4)).

Application of Act

2(1) This Act applies to an arbitration conducted under an arbitration agreement unless,

- (a) the application of this Act is excluded by the agreement or by law; or
- (b) Part II of the *Uniform International Commercial Arbitration Act* applies to the arbitration.

(2) This Act applies with necessary modifications to an arbitration conducted in accordance with another Act, unless that Act provides otherwise; however, in the event of conflict between this Act and the other Act or regulations made under the other Act, the other Act or the regulations prevail.

Commentary: The Act will apply unless the parties contract out of the whole statutory regime, or unless some other statute applies to it (Proposition 3). The Act does not contain a transition provision as such, as there is no existing Uniform Act on the subject. Each enacting jurisdiction should provide whether the Act will apply to arbitrations under agreements made before it comes into force (though not to an arbitration proceeding that has already been begun under the previous statute.) This is consistent with the principle that the new Act will be beneficial even to people who did not contemplate it when they made their agreements.

Contracting out

3 The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except the following:

- (a) subsection 5(4) (“*Scott v. Avery*” clauses);
- (b) section 19 (equality and fairness);
- (c) section 39 (extension of time limits);
- (d) subsection 45(1) (appeal on question of law);
- (e) section 46 (setting aside award);
- (f) section 48 (declaration of invalidity of arbitration);
- (g) section 50 (enforcement of award).

Commentary: The parties to an arbitration agreement are permitted to design their own process, subject to a few specific limits (Proposition 1(1)). The exceptions are generally self-explanatory. The exception for section 5(4) is intended to ensure that arbitration containing a *Scott v. Avery* clause falls under the new Act. The exception for section 39, which ensures that courts can dispense with time limits agreed by the parties, prevents an otherwise valid arbitration from being lost on a technicality, if the court is persuaded that such a loss would be unjust.

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Because this section contains a general permission to vary or exclude any other provisions of the Act, the rest of the Act does not expressly give this permission. An agreement that is inconsistent with the Act takes precedence to the extent of the inconsistency, except for the excluded sections. It is not necessary to exclude the Act expressly to vary it. Parties to arbitration agreements and their advisors must keep this in mind in drafting the agreements.

The alternatives are to insert “unless the parties agree otherwise” in all the other sections or to include those words in some sections, leaving the parties and the courts to wonder what their omission might mean with respect to the other non-obligatory sections.

Waiver of right to object

4 A party who participates in an arbitration despite being aware of non-compliance with a provision of this Act, except one mentioned in section 3, or with the arbitration agreement, and 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.

Commentary: This section could lose a party its right to object to something if the objection were not raised promptly. A requirement to object promptly will curb game-playing and the holding back of objections for tactical reasons. (Proposition 7)

Arbitration agreements

5(1) An arbitration agreement may be an independent agreement or part of another agreement.

(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) An arbitration agreement need not be in writing.

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

(5) An arbitration agreement may be revoked only in accordance with the ordinary rules of contract law.

Commentary: The arbitration agreement may be free-standing or contained in another agreement. Agreements as to procedure in an arbitration or other interim or collateral agreements are deemed to form part of the arbitration agreement, so that they are all covered by the statute.

An arbitration agreement may be oral or in writing. (Proposition 5) Parties to oral agreements may have difficulties in proving the scope of their agreement, but that is a problem within the control of the parties. Oral agreements to extend the scope of an arbitration or to deal with a procedural question may be more common than those to submit a dispute to arbitration in the first place.

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Subsection (4) deems clauses known as *Scott v. Avery* clauses to be arbitration agreements generally subject to this Act. As noted earlier, section 3 prohibits the parties from opting out of this provision.

Court Intervention

Court intervention limited

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

- (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.

Commentary: Court supervision is necessary to ensure justice and fairness. Rather than conferring broad discretion on the court, however, the *Uniform Arbitration Act* prescribes the kinds of circumstances in which court intervention is necessary and confers upon the court the powers needed to intervene effectively in those circumstances. (Proposition 1(3)). *Amended in 1995.*

Stay

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

(2) However, the court may refuse to stay the proceeding in any of the following cases:

- (a) a party entered into the arbitration agreement while under a legal capacity;
- (b) the arbitration agreement is invalid;
- (c) the subject-matter of the dispute is not capable of being the subject of arbitration under the law of (enacting jurisdiction) even if the parties expressly agree to submit the dispute to arbitration;
- (d) the motion was brought with undue delay;
- (e) the matter is a proper one for default or summary judgment.

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

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

- (a) no arbitration of the dispute shall be commenced; and

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- (b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.
- (5) The court may stay the proceedings with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
 - (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
 - (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.
- (6) There is no appeal from the court's decision.

Commentary: If a party to an arbitration agreement brings an action in a court about a matter which is agreed to be submitted to arbitration, the court in which the action is brought must stay the action, except in specific listed circumstances which render the arbitration void. The application for a stay must be brought in a timely way. If the court would grant a summary or default judgment, it may do so rather than referring the parties to a pointless arbitration. The arbitration may be carried on while the application to the court is pending, but if the court continues with the litigation, the arbitration has no effect. There is no appeal from the order of the court staying an action or refusing the stay. (Proposition 11). *Paragraph 7(2)(c) was amended in 1995.*

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) The arbitral tribunal may determine any question of law that arises during the arbitration; the court may do so on the application of the arbitral tribunal, or on a party's application if the other parties or the arbitral tribunal consent.
- (3) The court's determination of a question of law may be appealed to the (*appellate court*), with leave of that court.
- (4) On the application of all the parties to more than one arbitration the court may order, on such terms as are 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; if all the parties agree as to the choice of arbitral tribunal, the court shall appoint it.

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(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.

Commentary: The court is expressly given the power to protect the rights of the parties during an arbitration, in the same way as it could do during a court action. (Proposition 1(2)).

The arbitral tribunal is expressly given the power to determine a question of law. The power of the tribunal under existing law is sometimes questioned. The tribunal or all the parties may refer a question of law to the court at any time during the arbitration. However, one party alone cannot require the court to deal with questions of law, or to compel the arbitrator to state a case for determination by the court. In this way the possibility of delay is reduced without sacrificing the principle of legality. (Proposition 13).

Consolidation of a related string of arbitrations is likely to be efficient. Providing express powers for the court to assist in this process may be useful to the parties. (Proposition 12(8)).

Composition of 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.

Commentary: Self-explanatory (Proposition 9(2)).

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 after a party has given the person seven days' notice to do so.

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

(3) Subsections (1) and (2) apply, with necessary modifications, to the appointment of individual members of arbitral tribunals that are composed of more than one arbitrator.

(4) If the arbitral tribunal is composed of three or more arbitrators, they shall elect a chair from among themselves; if it is composed of two arbitrators, they may do so.

Commentary: This section ensures that an arbitration can begin in a timely way, even if the parties have not provided a method for appointment or if one or more parties is not cooperating. (Proposition 9(3)).

Some provisions of the *Uniform Arbitration Act* give powers to the chair of the arbitral tribunal, notably on procedural matters. Subsection 10(4) therefore provides for the election of a chair.

Duty of arbitrator

11(1) An arbitrator shall be independent of the parties and shall act impartially.

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(2) Before accepting an appointment as arbitrator, a person shall disclose to all parties to the arbitration any circumstances of which he or she 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 them to all the parties.

Commentary: An arbitrator must be independent and impartial. This distinguishes an arbitrator under this Act from one appointed, for example, under certain labour relations and statutes. ((Proposition 15) The Yellowknife meeting decided to spell out the duty of impartiality.) The primary burden is on the arbitrator to disclose any circumstances likely to give rise to a reasonable apprehension of bias. (Proposition 16(1)).

No revocation

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

Commentary: A party may not interfere with the course of an arbitration by withdrawing support of its own arbitrator. Once the arbitrator is appointed, he or she is in place unless there is a resignation or successful challenge. (Proposition 16(3)).

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 his or her appointment may challenge the arbitrator only for 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 fifteen days of becoming aware of them.
- (4) The other parties may agree to remove the challenged arbitrator, or the arbitrator may resign.
- (5) If the challenged arbitrator is not removed by the parties and does not resign, the arbitral tribunal, including the challenged arbitrator, shall decide the issue and shall notify the parties of its decision.
- (6) Within ten days of being notified of the arbitral tribunal's decision, a party may make an application to the court to decide the issue and, in the case of the challenging party, to remove the arbitrator.
- (7) While an application is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration and make an award, unless the court orders otherwise.

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Commentary: The grounds for challenge are intended to be limited. The party may not challenge an arbitrator for grounds known to that party at the time of the appointment. (Proposition 16(1)).

The procedure for challenge goes through the arbitral tribunal to the court. There are strict time limits for bringing a challenge. The arbitration may continue pending the challenge, though at the risk of its becoming a nullity if the court found an arbitrator without jurisdiction. (Proposition 16(2)).

Termination of arbitrator's mandate

14(1) An arbitrator's mandate terminates when,

- (a) the arbitrator resigns or dies;
- (b) the parties agree to terminate it;
- (c) the arbitral tribunal upholds a challenge to the arbitrator, ten days elapse after all the parties are notified of the decision and no application is made to the court; or
- (d) the court removes the arbitrator under subsection 15(1).

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

Commentary: Self-explanatory (Proposition 16(3)).

Removal of arbitrator by court

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

(2) The arbitrator is entitled to be heard by the court if the application is based on an allegation that he or she committed a corrupt or fraudulent act or delayed unduly in conducting the arbitration.

(3) When the court removes an arbitrator, it may give directions about 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 his or her services and may order that he or she compensate the parties for all or part of the costs, as determined by the court, that they incurred in connection with the arbitration before his or her removal.

(5) The arbitrator or a party may, within thirty days after receiving the court's decision, appeal an order made under subsection (4) or the refusal to make such an ~~order to the~~ *(appellate court)*, 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.

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Commentary: The court may remove an arbitrator for the stated grounds. The court may also penalize an arbitrator in costs and in loss of fees if the arbitrator is removed for corrupt or fraudulent acts or for undue delay. The arbitrator is entitled to be heard in a proceeding where such a penalty is a possibility. The penalty provision is subject to appeal, but the removal is not. (Proposition 16(4), as amended by discussion).

Appointment of substitute arbitrator

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

(2) When the arbitrator's mandate terminates, the court may, on a party's application, 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 after a party has given the person seven days' notice to do so.

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

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

Commentary: A substitute arbitrator is named, either by the parties or by the court, according to the procedure set out for appointing the original arbitrator. However, if the arbitration agreement can be read as conditional on the participation of a particular named arbitrator, then no substitute arbitrator can be named by the court. Since the parties may vary subsection 15(5), they could agree to appoint a substitute arbitrator regardless of the original agreement and carry on under that agreement. (Proposition 9(3)).

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) 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 main agreement is found to be invalid.

(3) A party who has an objection to the arbitral tribunal's jurisdiction to conduct the arbitration shall make the objection 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 to the tribunal.

(4) The fact that a party has appointed or participated in the appointment of an arbitrator does not prevent the party from making an objection to jurisdiction.

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- (5) A party who has an objection that the arbitral tribunal is exceeding its authority shall make the objection as soon as the matter alleged to be beyond the tribunal's authority is raised during the arbitration.
- (6) Despite section 4, if the arbitral tribunal considers the delay justified, a party may make an objection after the time limit referred to in subsection (3) or (5), as the case may be, has expired.
- (7) The arbitral tribunal may rule on an objection as a preliminary question or may deal with it in an award.
- (8) If the arbitral tribunal rules on an objection as a preliminary question, a party may, within thirty days after receiving notice of the ruling, make an application to the court to decide the matter.
- (9) There is no appeal from the court's decision.
- (10) While an application is pending, the arbitral tribunal may continue the arbitration and make an award.

Commentary: Disputes to jurisdiction are to be made in the first instance to the arbitral tribunal and if its resolution of the question is not satisfactory, then to the court. The arbitration agreement is separate from a contract of which it may be a part for this purpose, so that the submission to arbitration may be valid even if the contract itself is not. Objections to general jurisdiction must be made by the beginning of the hearing, while objections to the exercise of authority during the arbitration must be brought as soon as practicable. However, the tribunal may waive these time limits. An appeal to the court respecting jurisdiction does not prevent the arbitration from continuing. (Proposition 10. It was agreed at Yellowknife to remove the discretion of the court as to whether the arbitration could continue).

Detention, preservation and inspection of property 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 direction of an arbitral tribunal as if it were a similar direction made by the court in an action.

Commentary: This section gives the tribunal similar powers to the court to protect the interests of the parties before the award. (Proposition 12(5)).

Conduct of Arbitration

Equality and fairness

- 19(1)** In an arbitration, the parties shall be treated equally and fairly.
- (2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases.

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Commentary: This is the basic rule about procedure and it cannot be waived by the parties. This language, together with the grounds for setting aside contained in section 46, take the place of any express reference to “natural justice”. The terms in the statute are considered more readily understandable, particularly non-lawyers. (Proposition 12(2)).

Procedure

20(1) The arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act.

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

Commentary: In the absence of provisions by the parties, the arbitral tribunal determines the procedure. (Proposition 12(4)). The right of the arbitrators to delegate questions of procedure to the chair is found in the Model Law, article 29.

Evidence

21(1) In an arbitration, the arbitrator shall admit all evidence that would be admissible in a court and may admit other evidence that he or she considers relevant to the issues in dispute.

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

Commentary: All evidence admissible in a court is admissible in an arbitration. In addition, other relevant evidence is admissible. (Proposition 14(6)). The Yellowknife meeting referred with approval to the language of section 6(2) of the British Columbia Commercial Arbitration Act, which is substantially followed here.

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.

Commentary: In the absence of an agreement of the parties, the arbitral tribunal determines the time, date and place of arbitration, having regard to the circumstances. (Proposition 14(2)). The arbitral tribunal may also wish to meet for its own purposes, other than for a hearing. Subsection (2) allows this. It is based on article 20(2) of the Model Law.

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;

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

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

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

Commentary: This section sets out some methods in which an arbitration may be begun. This date is important with respect to a number of time limits in the Act. The methods of service are described more fully in section 53. (Proposition 12(1)). The provision of subsection (2) is based on Proposition 9(1).

Matters referred to arbitration

24 A notice that commences an arbitration without identifying the dispute is deemed to refer to arbitration all disputes that the arbitration agreement entitles the party giving the notice to refer.

Commentary: The purpose of this is self-explanatory. It is taken from ALRI section 22(2).

Procedural directions

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

(2) The parties' statements shall indicate the facts supporting their positions, 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; however, the arbitral tribunal may disallow a change that is unduly delayed.

(5) With the arbitral tribunal's permission, the parties may submit their statements orally.

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

(a) submit to examination on oath or affirmation with respect to the dispute;

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

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

Commentary: This section deals with pleadings and the compulsion of evidence. It reflects Proposition 12(6) and Proposition 14(3).

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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; however, 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 inspection of property or documents.

(3) A party who submits a statement to the arbitral tribunal or supplies the tribunal with any other information shall also communicate it to the other parties.

(4) The arbitral tribunal shall communicate to the parties any expert reports or other documents on which it may rely in making a decision.

Commentary: A hearing is not necessary unless a party requests one. The proceedings are however to be fair, in ways spelled out in the section. (Propositions 14(1), 12(3)).

Default

27(1) If the party who commenced the arbitration does not submit a statement within the period of time specified under subsection 25(1), the arbitral tribunal may, unless the party offers a satisfactory explanation, make an award dismissing the claim.

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

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

(4) In the case of delay by the party who commenced the arbitration, the arbitral tribunal may make an award dismissing the claim or give directions for the speedy determination of the arbitration and may impose conditions on its decision.

(5) If the arbitration was commenced jointly by all the parties, subsections (2) and (3) apply, with necessary modifications, but subsections (1) and (4) do not.

Commentary: The arbitral tribunal may dismiss a claim that is not pursued, strike out a defence that is not maintained and continue the arbitration in the absence of a party without reasonable excuse. (Proposition 12(6)).

Appointment of expert

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

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

(3) At the request of a party or of the arbitral tribunal, the expert shall, after making the report, 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.

Commentary: Self-explanatory. (Proposition 14(4)).

*Arbitration***Obtaining evidence**

29(1) A party may serve a person with a notice requiring him or her 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 has power to administer an oath or affirmation and power to require a witness to testify under oath or affirmation.

(4) 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 it were a court proceeding.

Commentary: Notices to people requiring them to attend and give evidence are served personally, in the same way as an in-court proceeding. The arbitral tribunal may administer an oath or an affirmation. (Proposition 14(4)).

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.

Commentary: No evidence is compellable in an arbitration that is not compellable at a trial. A similar provision is found in the common law provinces' arbitrations Acts. The present section is a combination of ALRI sections 26(3) and 27(4).

Awards and Termination of Arbitration**Application of law and equity**

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

Commentary: The arbitral tribunal is required to apply the law, which extends to rules of equity and specified equitable remedies. The parties can opt out of this, to permit the arbitration to be decided on the basis of what is fair in the circumstances. (Proposition 17(1)).

Conflict of laws

32(1) In deciding a dispute, an arbitral tribunal shall apply the rules of law designated by the parties or, if none are designated, the rules of law 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.

Commentary: If the parties do not designate rules of law, then the tribunal must apply the rules it considers appropriate. (Proposition 17(1)).

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Application of arbitration agreement, contract and usages of trade

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

Commentary: The arbitral award is an interpretation of the agreement and the contract, unless the parties agree otherwise, and the usages of the trade surrounding such agreements and contracts must be taken into account. (Proposition 17(1)).

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 the arbitral tribunal's decision; however, if there is no majority decision or unanimous decision, the chair's decision governs.

Commentary: A majority of the tribunal may decide, and if there is, for example, a three-way split, the chair decides (Proposition 19(2)).

Mediation and conciliation

35 *(Each jurisdiction should choose Option A or Option B.)*

Option A

The members of an arbitral tribunal may, if the parties consent, use mediation, conciliation and similar techniques during the arbitration to encourage settlement of the dispute and may afterwards resume their roles as arbitrators without disqualification.

Option B

The members of an arbitral tribunal shall not use mediation, conciliation or similar techniques during the arbitration.

Commentary: Enacting jurisdictions may choose either to allow the arbitrators to practise mediation and conciliation or to forbid them from doing so. The Uniform International Commercial Arbitration Act allows the arbitrators to engage in mediation on the consent of the parties.

The present statute provides for a single consent at the beginning of mediation, without a separate consent when the arbitrator goes back to arbitrating, the mediation presumably having failed. The reason for eliminating the double consent found in the international statute was to prevent a party from subverting an arbitration in bad faith at the end of mediation, by refusing consent to return to arbitration.

The reason for forbidding a change of role is that a mediator or conciliator may learn things from one party in confidence that he or she may not disclose to the other parties. Knowing this information might be perceived to prevent a judicial disposition of the case on the merits if the person then returns to arbitration.

Settlement

36 If the parties settle the dispute during arbitration, the arbitral tribunal shall terminate the arbitration and, if a party so requests, may record the settlement in the form of an award.

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Commentary: The parties may settle the dispute and have the settlement incorporated into an award unless the tribunal objects, for example on the ground that the proposed settlement is illegal. (Proposition 17(5)).

Binding nature of award

37 An award binds the parties, unless it is set aside or varied under section 45 or 46 (appeal, setting aside award).

Commentary: Self-explanatory. (Proposition 17(4)).

Form of award

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

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

(3) The award shall be dated and shall be 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 the award shall be delivered to each party.

Commentary: Self-explanatory. (Proposition 17(6)). The proposals adopted at Yellowknife did not require the place of the award to be shown, though the Model Law does so. Since the present Act provides for interprovincial enforcement while the proposals originally did not, a reference to place has been added.

Reasons help the sense of fairness, and in many cases they can be easily given. The parties may waive this provision if they find the obligation onerous. (Proposition 19(7)).

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.

Commentary: Self-explanatory. This is not waivable, so the court may be able to save any arbitration. The Act provides other remedies for undue delay on the part of the arbitrator. (Proposition 17(8)).

Explanation

40(1) A party may, within thirty days after receiving an award, request that the arbitral tribunal explain any matter.

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

Commentary: Self-explanatory. (Proposition 17(7)). The Act provides that a party may request an explanation of any matter, including better reasons, before going to court for an order to that effect.

Interim awards

41 The arbitral tribunal may make one or more interim awards.

Commentary: Self-explanatory. (Proposition 17(3)). The Yellowknife meeting agreed that the tribunal could make more than one interim award if it desired.

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More than one final award

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

Commentary: The arbitral tribunal may finally dispose of issues one by one rather than all at the same time. (Proposition 17(3)).

Termination of arbitration

43(1) An arbitration is terminated when,

- (a) the arbitral tribunal makes a final award in accordance with this Act, disposing of all matters referred to arbitration;
- (b) the arbitral tribunal terminates the arbitration under subsection (2), (3), 27(1) (claimant's failure to submit statement) or 27(4) (delay); or
- (c) an arbitrator's mandate is terminated, if the arbitration agreement provides that the arbitration shall be conducted only by that arbitrator.

(2) An arbitral tribunal shall make an order terminating the arbitration if the claimant withdraws the claim, unless the respondent objects to the termination and the arbitral tribunal agrees that the respondent is entitled to obtain a final settlement of the dispute.

(3) An arbitral tribunal shall make an order terminating arbitration if,

- (a) the parties agree that the arbitration should be terminated; or
- (b) the arbitral tribunal finds that continuation of the arbitration has become unnecessary or impossible.

(4) The arbitration may be revived for the purposes of section 44 (corrections) or subsection 45(5) (appeal), 46(7), 46(8) (setting aside award) or 54(3) (costs).

(5) A party's death terminates the arbitration only with respect to claims that are extinguished as a result of the death.

Commentary: This section sets out the cases in which an arbitration terminates. The most obvious one is a final award disposing of all the matters referred to arbitration. The section also covers termination in the discretion of the arbitrator, such as for delay. Termination in some cases will be compulsory: when the only possible arbitrator is removed, when the claimant withdraws the claim (in most cases), when the parties agree to terminate the proceeding, or when the continuation of the arbitration has become impossible. However, the arbitration may be reopened for the purposes mentioned in the section. (Proposition 17(9), (10), (12)). The Alberta proposals do not specifically refer to reviving a terminated arbitration for corrections, but this is a logical place to refer to all the possibilities that a final determination will be reopened.

44(1) An arbitral tribunal may, on its own initiative within thirty days after making an award or at a party's request made within thirty days after receiving the award,

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

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- (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, on its own initiative at any time or at a party's request made within thirty days after receiving the award, make an additional award to deal with a claim 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.

Commentary: The open-endedness which a power of correction for oversight will produce should be weighed against the possibility of injustice which may occur in the absence of such a power. The Act minimizes this indeterminacy by requiring an application for correction of the oversight to be made within 30 days. However, the tribunal is not so limited in issuing supplementary awards of its own initiative. Further, the tribunal may decide not to hold a hearing before rejecting a request to make a correction, since the tribunal should know whether it made an oversight or not, without holding a hearing to find out. (Proposition 17(12)).

Remedies

Appeal

- 45(1) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, a question of fact or a question of mixed fact and law.
- (2) Subject to subsection (3), if the arbitration agreement does not provide that the parties may appeal an award to a 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) A party may not appeal 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, with the court's opinion on the question of law, in the case of an appeal on a question of law, and give directions about the conduct of the arbitration.

Commentary: An appeal is made to the court of general jurisdiction of the enacting jurisdiction. Appeals on questions of law may be brought if the parties agree or if the court gives leave to appeal. Except where the appeal is brought on consent of the parties, the court must be satisfied that the importance of arbitration to the parties justifies the intervention of the court and that the determination of the point of law is likely to affect significantly the rights of one or all of the parties (Proposition 19(4)).

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The parties may also agree to provide an appeal on a question of fact or a question of mixed fact at law but in the absence of agreement no such appeal lies. The right of appeal on a question of law, subject to leave, may not be waived by the parties. (Proposition 19(1)), and Section 3 of this Act. *Subsections (1), (2) and (3) were amended in 1995.*

Setting aside award

46(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 dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement;
 - (d) the composition of the tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with this Act;
 - (e) the subject-matter of the dispute is not capable of being the subject of arbitration under (*enacting jurisdiction*) law;
 - (f) the applicant was not treated equally and fairly, 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;
 - (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 clause (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 clause (1)(c) if the party has agreed to the inclusion of the dispute or matter, waived the right to object to its inclusion or agreed that the arbitral tribunal has power to decide what disputes have been referred to it.
- (4) The court shall not set aside an award on grounds referred to in clause (1)(h) if the party 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.

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(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 or as an objection that the arbitral tribunal was exceeding its authority, 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 the arbitral tribunal or an arbitrator 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.

Commentary: The Act sets out all the grounds for what is in effect a judicial review of the application, to replace the present vague term "misconduct". The list of grounds is intended to give those involved in arbitration advance notice of things to be avoided. The grounds, stated broadly, include a fundamental flaw in the arbitration or in the composition of the tribunal and a fundamental departure from equal treatment or fair opportunity to put or meet a case.

The rights to have an award set aside are limited. If the party seeking to set the award aside has waived the objection under the provisions of the Act, or has raised a challenge earlier on the same ground and has failed, or has had the opportunity to raise the point and has not done so, then the award shall not be set aside. (Proposition 19(3)).

The Act specifies the power of the court when an award is set aside and allows the court to remit the award to the tribunal rather than setting it aside. (Proposition 19(5)).

Time limit

47(1) An appeal of an award or an application to set aside an award shall be commenced within thirty days after the appellant or applicant receives the award, correction, explanation, change or statement of reasons on which the appeal or application is based.

(2) Subsection (1) does not apply if the appellant or applicant alleges corruption or fraud.

Commentary: An appeal or an application to set aside must be brought within 30 days after receiving notice of the award, unless the appellant or applicant alleges corruption or fraud. This is intended to reduce uncertainty and permit speedy enforcement of the award. (ALRI Section 34(9)).

Declaration of invalidity of arbitration

48(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 dispute is not capable of being the subject of arbitration under (*enacting jurisdiction*) law; or

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

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

Commentary: A party who does not participate in the arbitration may seek a declaration from the court that the arbitration is invalid through a defect in the agreement or the subject matter. As the parties might have this option at common law, it seemed worthwhile to spell it out and limit it. Arbitrators cannot have ultimate authority to decide where the boundary is between an arbitration which has been agreed to and a legal nullity. Ultimate court intervention is necessary to keep arbitrations within arbitration agreements. This section would allow a person to have the court make this decision without having to participate in the arbitration that the person claims is void. (Proposition 19(2)).

Further appeal

49 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 (*appellate court*), with leave of that court.

Commentary: An appeal may be carried further, and the result of an application to set aside may be appealed, if the court of appeal gives leave. The parties are free to exclude this provision. (ALRI 34(10)).

Enforcement of award

50(1) A person who is entitled to enforcement of an award made in (*enacting jurisdiction*) 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 rules of court, and shall be supported by the original award or a certified copy.

(3) The court shall give a judgment enforcing an award made in (*enacting jurisdiction*) unless,

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

(b) there is a pending appeal, application to set the award aside or application for a declaration of invalidity; 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 of the province or territory where the award was made has not yet elapsed;

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- (b) there is a pending appeal, application to set the award aside or application for a declaration of invalidity 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 (*enacting jurisdiction*) law.
- (5) If the period for commencing an appeal, application to set the award aside or 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 are 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 (*enacting jurisdiction*) 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 (*enacting jurisdiction*), 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.

Commentary: This section provides for enforcement of awards made within the jurisdiction or elsewhere in Canada. It is made on notice served according to the rules of court. The basic rule is that judgment will be given unless the award may still be appealed or set aside where it was made, or there is a pending appeal, application to set aside or application for declaration of invalidity. Where the award has in fact been set aside, reversed on appeal or declared a nullity, enforcement will of course not be given.

These rules apply to awards made within or outside the jurisdiction. For awards made outside the jurisdiction, a court within the jurisdiction may also refuse to enforce if the subject matter of the award is not capable of being the subject of arbitration under the enforcing jurisdiction's law. Very few subjects are not capable of being the subject of arbitration under Canadian law.

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This means that the award cannot be resisted on any ground outside the jurisdiction where it was made. This is different from the Model Law rules which permit a party to resist enforcement where enforcement is sought on the same grounds as the party could have used to set the award aside in the jurisdiction where the award was made. The principle behind the present section is that the losing party should have only one opportunity to attack the award, and the best place to exercise that opportunity is in the jurisdiction where it was made.

Even if the jurisdiction where the award was made does not yet have the Uniform Arbitration Act, its processes should be deemed to be just, because it is a Canadian jurisdiction.

Another consequence of this structure is that the party who has notice of an award must act within 30 days to appeal it, or to apply to set it aside, or to have it declared invalid if the party has not participated. The losing party cannot sit back and wait for an application to enforce. If the award is not attacked for 30 days after it is made, then its enforcement will in effect be automatic in every jurisdiction in the country (that adopts the Uniform Arbitration Act.)

This structure builds on what was discussed at Yellowknife but treat it in more detail.

If the award gives a remedy that the court does not have the jurisdiction to grant or would not grant in a proceeding based on similar circumstances, the court may grant a different remedy or remit the matter to the arbitral tribunal for a different remedy. This contemplates an award that the court would not enforce, though there might be no legal objection if the parties simply complied with the agreement. This point was discussed and agreed at Yellowknife.

The rest of the section is self-explanatory.

General

Crown bound

51 This Act binds the Crown.

Section 51: Self-explanatory. (Proposition (4)). The language does not restrict the Act to the Crown in right of the enacting jurisdiction, though this would in most cases be the constitutional effect. One purpose in leaving the language open is to permit an argument to be made concerning arbitrations involving Crown agents or Crown corporations from another jurisdiction.

Limitation periods

52(1) The law with respect to limitation periods applies to an arbitration as if the arbitration were an action and a claim made in the arbitration were a cause of action.

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(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 claim in the arbitration.

(3) An application for enforcement of an award may not be made more than two years after the day on which the applicant receives the award.

Commentary: The Act makes clear for the first time that limitation periods apply to claims in arbitration as if the arbitration were an action. (Proposition 8(1)). In order to encourage people to arbitrate their claims, subsection 2 provides that if a court sets aside an award or otherwise ends an arbitration, it may exclude the period spent in arbitration from the computation of the limitation period. This prevents the parties from being prejudiced in their ultimate right to bring an action by having gone to arbitration first. (Proposition 8(2)). In any event, the other party to litigation is not prejudiced by the lapse of time spent on arbitration. The remedy is discretionary, so the respondent would have a chance to persuade the court that it would be unfair to allow the extra time.

A party winning an arbitration must apply to enforce an award within two years from receiving the award. This is intended to encourage the parties to exercise their rights within a reasonable time, once they are made definite by the award. (Proposition 8(3)).

The drafters of this Act and their correspondents in Alberta and British Columbia felt that these provisions should be in the Uniform Arbitration Act rather than in the Uniform Limitation Act.

Service of notice

53(1) A notice or other document may be served on an individual by leaving it with him or her.

(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 has 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.

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- (a) on the day it is given or transmitted, in the case of Service under subsection (1), (2) or (3);
 - (b) on the fifth 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 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.

Commentary: The service provisions are intended to have the same effect as service under the rules of court. The enacting jurisdiction should consider whether it is content with this formulation. The rules of court are, however, extended by section 53(3), which allow an originating notice to be served by facsimile transmission, if the parties have acquiesced by providing a facsimile number in the arbitration agreement, or have otherwise made it available in the context of the arbitration. The parties to an arbitration, because of the agreement, have a pre-existing relationship which justifies this method of service even at the outset while the parties to a lawsuit may have no such existing connection.

Costs

- 54(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 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 thirty days of 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 the 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 to another party to settle the dispute or part of the dispute, the offer is not accepted and the arbitral tribunal's award is no more favourable to the second-named party than was the offer, the arbitral tribunal may take the 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 dispute other than costs.

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Commentary: The tribunal may award costs, which consist of legal fees, the fees and expenses of the tribunal, and any other expenses. In the absence of an award dealing with costs, each party is responsible for the party's own legal expenses and for an equal share of the fees and expenses of the arbitral tribunal. The arbitral tribunal may take into account any offer to settle, in a fashion similar to that provided under the rules of court of some jurisdictions. (Proposition 17(13)).

Arbitrator's fees and expenses

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

Commentary: This is a "default" rule on arbitrators' fees and expenses, which the parties may override by specific provisions for fees. It sets a standard that can be applied by a taxing officer in the appropriate case. (ALRI s.37(1)).

Taxation of costs, fees and expenses

56(1) A party to an arbitration may have an arbitrator's account for fees and expenses taxed by a taxing officer in the same manner as a solicitor's bill under (*appropriate statute*).

(2) If an 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 the same manner as costs under the rules of court.

(3) In assessing 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).

(4) Subsection (1) applies even if the account has been paid.

(5) 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.

(6) On the application of an arbitrator, the court may review a taxation of his or her 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) The application for review may not be made after the period specified in the taxing officer's certificate has elapsed or, if no period is specified, more than thirty days after the date of the certificate, unless the court orders otherwise.

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

Commentary: The taxation of fees is carried out in the same way as the taxation of costs in a court action, with the difference that the part of the costs represented by the fees and expenses of the arbitral tribunal are taxed like a solicitor's bill rather than as legal costs in litigation.

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The court may review the taxation of an account and may vary it, set it aside or remit it if it chooses not to confirm the taxation. A certificate of taxation may be enforced as if it were a judgment of the court, once it is final or approved on appeal. (ALRI s.37).

The intention of sections 54 through 56 is that each jurisdiction should amend its statutes or rules with the following effect:

- (a) arbitrators may award costs;
- (b) arbitrators may determine the basis of costs, whether party-party, solicitor and client, or other;
- (c) in default of such determination, costs are to be awarded as party-party costs;
- (d) the party in whose favour they are awarded may have them taxed in the same way as costs in an action.

Interest

57 *(Each jurisdiction should give arbitral tribunals power to order the payment of “pre-award” interest in the same manner as courts may order pre-judgment interest, and should provide that awards bear interest in the same manner as judgments.)*

Commentary: Proposition 17(13), adopted at Yellowknife, provided that an arbitral tribunal may award interest, including prejudgment interest. Since the methods used to effect this end vary considerably across Canada, the Uniform Act makes reference to the principle rather than attempting to prescribe specific language.

