SUBMISSIONS TO
THE STANDING COMMITTEE ON GENERAL GOVERNMENT REGARDING *BILL 27, AN ACT TO REDUCE THE REGULATORY BURDEN ON BUSINESS, TO ENACT VARIOUS NEW ACTS AND TO MAKE OTHER AMENDMENTS AND REPEALS, SCHEDULE 5 – INTERNATIONAL COMMERCIAL ARBITRATION ACT, 2016*

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February 23, 2017
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Standing Committee on General Government
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RE: Young Canadian Arbitration Practitioners' Submissions relating to Bill 27, Schedule 5 – *International Commercial Arbitration Act, 2016*

INTRODUCTION

On behalf of the Young Canadian Arbitration Practitioners ("**YCAP**"), we are pleased to offer our comments on Schedule 5 – *International Commercial Arbitration Act, 2016* ("**new Act**") of Bill 27 repealing and replacing the *International Commercial Arbitration Act*, RSO 1990, c I.9 ("**old Act**").

YCAP is supportive of the new Act as currently drafted (and the consequential amendments to other statutes) and strongly believes its passage will benefit the practice of international arbitration in Ontario. Specifically, we are supportive of the express inclusion of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] (the "**Convention**") as well as the inclusion of the amendments to the Model Law[2] (the "**Model Law**"), which: (a) includes an

[1] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Conference on International Commercial Arbitration in New York on 10 June 1958.

[2] The Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985, with amendments as adopted in 2006.

acknowledgment of the Model Law's international origin; (b) modernises and liberalises the form in which an arbitration agreement can be made; and (c) provides for the granting and enforcement of interim measures.

YCAP is encouraged by the Legislative Assembly of Ontario's interest and effort in ensuring Ontario law keeps up-to-date with international arbitration practice. To this end, YCAP also offers three additional observations arising in relation to the Act - two minor, non-substantive drafting observations and an observation about future developments. These are not intended to detract in any way from YCAP's view that the new Act should indeed pass as currently drafted, but are merely offered to provide greater clarity and/or be kept in mind for future consideration, if and when appropriate.

YCAP

YCAP is a not-for-profit organization that promotes interest in and understanding of international arbitration, particularly in Canada, among young lawyers working in private practice and with corporations and government. YCAP currently has over 150 members, including many in Ontario and abroad who act as counsel and arbitrators in and provide advice about international commercial arbitrations. We believe that YCAP is uniquely positioned to comment on the new Act because its members are key stakeholders in the international arbitration legal regime in Ontario. YCAP members also practice arbitration under numerous international arbitration regimes and can therefore offer an international perspective on Ontario law. This feature of the organization's membership is particularly relevant in light of Resolutions 40/72 and 61/33 of the United Nations General Assembly regarding "the desirability of

uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice".[3]

YCAP SUPPORTS THE NEW ACT AS CURRENTLY DRAFTED

The new Act will enhance Ontario's attractiveness as a jurisdiction of choice for international arbitration and places the province at the forefront of international arbitration practice in Canada.

Adoption of the 2006 amendments to the Model Law, including interim measures

We are supportive of the inclusion of the provisions of the Model Law adopted in 2006, including an acknowledgment of the Model Law's international origin and modernising and liberalising the form in which an arbitration agreement can be made. We are particularly supportive of the inclusion of the interim measures provisions of the 2006 amendments to the Model Law, namely, Articles 17 to Article 17J. The inclusion of these interim measures provisions gives greater clarity to the parties about the jurisdiction of the arbitral tribunal.

We are especially supportive of the inclusion of Article 17H(1), which provides that interim measures will continue to be enforceable in Ontario under the new Act. At present, Ontario,[4] British Columbia[5] and Quebec[6] are the only provinces that allow the enforcement of interim relief. Such a provision gives greater flexibility to international commercial parties in structuring

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[3] Resolutions adopted by the General Assembly of the United Nations: 40/72 *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*, 112th plenary meeting, 11 December 1985; and, 61/33 *Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York 10 June 1958*; 64th plenary meeting, 4 December 2006.

[4] *International Commercial Arbitration Act*, RSO 1990, c I.9, s 9.

[5] *International Commercial Arbitration Act*, RSBC 1996, c 233, s 2(1) "arbitral award".

[6] *Code of Civil Procedure*, CQLR c C-25.01, Article 638.

their arbitrations and increases the efficacy of international arbitrations in Ontario (as well as the ability of Ontario courts to support international arbitrations conducted abroad), thereby maintaining Ontario's position as a jurisdiction of choice for international arbitration.

Express adoption and inclusion of the Convention in the new Act

We are also supportive of the inclusion of the Convention in the new Act. The inclusion of the Convention gives practitioners both in Ontario and abroad greater clarity regarding the extent to which the Convention has been implemented in Ontario. The Legislative Assembly of Ontario had been of the view that the old Act incorporated the substance of the Convention through a combination of its main text and its schedule (appending the Model Law).[7] The text of the Convention was not expressly incorporated into Ontario law, making it potentially difficult, particularly for foreign practitioners, to determine whether the old Act contained any deviations from the Convention and if so, in what manner.

Importantly, this express inclusion also brings Ontario into uniformity with the international arbitration award enforcement regimes of the other common law provinces and territories in Canada. Alberta,[8] Manitoba,[9] New Brunswick,[10] Nova Scotia,[11] Newfoundland,[12] Prince Edward Island,[13] and the Northwest Territories and Nunavut[14] have appended the Convention to their International Commercial Arbitration Acts, while British Columbia, Saskatchewan and Yukon

[7] J. Brian Casey, Arbitration Law of Canada: Practice and Procedure (2011) at 25, 26, 438.

[8] *International Commercial Arbitration Act*, RSA 2000, c I-5.

[9] *Id.* SM 1986–87, c 32.

[10] *Id*. SNB 1986, c I-12.2.

[11] *Id.* RSNS 1989, c 234.

[12] *Id.* RSNL 1990, c I-15.

[13] *Id.* RSPEI 1988, c I-5.

[14] *Id*. RSNWT 1988, c I-6.

appended the Convention into a stand-alone piece of foreign arbitral awards legislation.[15] Quebec's *Code of Civil Procedure*, exceptionally, notes that "Consideration may be given, in interpreting the rules in this matter, to the [Convention]".[16]

ADDITIONAL OBSERVATIONS

YCAP offers three additional observations (two minor, non-substantive drafting observations and an observation about future developments) on the new Act. These are offered by way of suggestions, but are not intended to delay the new Act's passing; YCAP's position is that it would be preferable to pass the new Act in its current form rather than delay it in any way to address these observations.

1. Drafting Observation 1: Inclusion of Footnotes

We observe that the version of the Model Law attached to the new Act does not include any of the footnotes which are included in the Model Law as produced by the United Nations Commission on International Trade Law. While the entire Model Law is incorporated by reference in the new Act, if the footnotes can easily be included in the version of the Model Law attached to the new Act without delaying the new Act's passage, that would be preferable from the perspective of clarity and certainty.

In particular, "Commercial" is defined in footnote 2 of the Model Law itself, but the footnote is not included in the current Schedule setting out the Model Law.[17] This term has special

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[15] See *International Commercial Arbitration Act*, RSBC 1996, c 233 in British Columbia; *International Commercial Arbitration Act*, RSS 1988, c I-10.2 in Saskatchewan; and *International Commercial Arbitration Act*, SYT 1987, c. 14 in the Yukon; See also *Foreign Arbitral Awards Act*, RSBC 1996, c 154 in British Columbia; *Enforcement of Foreign Arbitral Awards Act*, SS 1996, c E-9.12 in Saskatchewan; and *Foreign Arbitral Awards Act*, RSYT 1986, c. 70 in the Yukon.

[16] CQLR c C-25.01, s 652.

significance: subsection 2(1) of the new Act triggers the application of the Convention in relation to "arbitral awards or arbitration agreements in respect of differences arising out of commercial legal relationships" (emphasis added). Similarly, subsection 5(3) of the new Act (which roughly corresponds to subsection 2(2) of the old Act) triggers the application of the Model Law in relation to "international commercial arbitration agreements and awards made in international commercial arbitrations" (emphasis added).

2. Drafting Observation 2: Application regarding jurisdiction

Section 11 of the new Act contemplates an application to challenge a tribunal's decision that it does not have jurisdiction over a dispute. Therefore, the heading for the section may be changed from the present "Appeals re jurisdiction" to "Application to Superior Court re jurisdiction" to avoid confusion about the procedural nature of the proceeding. The text of section 11 is clear that the type of court proceeding contemplated is a challenge to the arbitral tribunal's finding of jurisdiction, rather than an "appeal", which is a term that is not used in the Model Law. This comment is not substantive, but may assist in clarifying the meaning of this provision.

3. Comment About Future Development: Emergency arbitrator

As discussed above, it is a positive development that the new Act adopts the amendments to the Model Law which provide for the enforcement of interim relief.

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[17] Footnote 2 states: "The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road."

Often, interim measures are granted by an "emergency arbitrator." An "emergency arbitrator" is a term used in the international arbitration community to refer to an arbitrator which has been appointed prior to the formation of an arbitral tribunal in order to address an urgent claim for relief. The inclusion of "emergency arbitrator" provisions in the arbitration rules of various major international arbitral institutions[18] has increased considerably in recent years in order to allow for the resolution of urgent preliminary issues where the constitution of an arbitral tribunal can sometimes take months.

While the Model Law provides for the enforcement of interim relief granted by "the arbitral tribunal" there is no clear indication as to whether the "arbitral tribunal" includes emergency arbitrators. Singapore and Hong Kong, two leading international arbitration jurisdictions, have passed laws expressly allowing for the enforceability of pre-arbitration emergency relief.[19] In the Singaporean *International Arbitration Act*, the term "arbitral tribunal" includes "an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties".[20]

YCAP is not proposing that the new Act needs to be amended to account for this aspect in international arbitration practice. As the Legislative Assembly knows, the practice of international arbitration can change rapidly in the future and we suggest that this issue be kept in mind for future consideration, if and when appropriate.

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[18] See International Court of Arbitration, ICC Rules of Arbitration, s 29, Appendix V; International Centre for Dispute Resolution, International Arbitration Rules, s 6; London Court of International Arbitration, LCIA Arbitration Rules (2014), s 9.4 – 9.14; Singapore International Arbitration Centre, SIAC Rules 2016, s 30, Schedule 1.

[19] Hong Kong, *Arbitration Ordinance*, c 609, s 22B(1): "(1) Any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court."); See also Singapore, *International Arbitration Act*, c 143A, s 2(1).

[20] Singapore, *International Arbitration Act*, c 143A, s 2(1) " … 'arbitral tribunal' means a sole arbitrator or a panel of arbitrators or an arbitral institution, *and includes an emergency arbitrator … "* [emphasis added].

CONCLUSION

We thank you for the opportunity to make submissions to the Standing Committee on General Government on this important topic. Please do not hesitate to contact us if you have any questions or comments. These submissions were drafted on behalf of YCAP by a committee of members. The committee members are:

- **Eric Morgan** (Committee Chair, Osler, Hoskin & Harcourt LLP, Toronto)
- **John Siwiec** (President of YCAP, Perley-Robertson, Hill & McDougall LLP, Ottawa)
- **Lauren Harper** (Committee Secretary, Osler, Hoskin & Harcourt LLP, Toronto)
- **Christina L. Beharry** (Foley Hoag LLP, Washington, D.C.)
- **Michael Bookman** (Norton Rose Fulbright Canada LLP, Toronto)
- **Michael Kotrly** (Freshfields Bruckhaus Deringer LLP, London, U.K.)
- **Giacomo Marchisio** (McGill University, Montréal)
- **Vasuda Sinha** (Freshfields Bruckhaus Deringer LLP, Paris, France)