INTERNATIONAL COMMERCIAL ARBITRATION IN CANADA: FROM HOSTILITY TO WORLD LEADERSHIP TO PLAYING CATCH-UP

Valerie Hughes and Mark Jewett[*]

I. INTRODUCTION

International commercial arbitration is an important feature of the Canadian legal landscape, due in part to Canada's prominent international trading profile, [1] but also to the

[*] Valerie Hughes and Mark Jewett practice law at Bennett Jones LLP and are members of Bennett Jones' International Arbitration Practice Group. They held senior positions with the Government of Canada in the Departments of Justice, Global Affairs Canada, and Finance Canada. Mark served as General Counsel and Corporate Secretary of the Bank of Canada and Valerie served as Director of the Legal Affairs Division and the Appellate Body Secretariat of the World Trade Organization. Their curricula vitae are available at www.bennettjones.com. The authors appreciate the insights and guidance offered in the preparation and development of this article by Vasilis Pappas, partner and head of Bennett Jones' International Arbitration Practice Group, and Sabrina Bandali, partner in Bennett Jones' International Trade and Investment Practice Group. The authors are also grateful to the many experts who generously provided their views and ideas about international commercial arbitration and Canada's place in that world. They include Georges Affaki, Ian Binnie, Sir William Blair, Manon Dostie, Gerald Ghikas, John Gregory, Joshua Karton, Barry Leon, Mark Luz, Donald McRae, Kathryn Sabo, Kimberly Stewart, Jae Sung Lee, Konrad von Finckenstein, and Janet Walker. We are also grateful to Dylan Yegendorf, Articling Student, Bennett Jones LLP, for his research assistance.

[1] Canada ranks 12th in merchandise world trade for exports and 13th for imports. For commercial services, the numbers are 18th and 14th, respectively. See member information on Canada at World Trade Organization, "Canada and the WTO" (last visited 6 October 2021), online: *World Trade Organization* <www.wto.org/english/thewto_e/countries_e/canada_e.htm>. The United States remains our leading export market, followed by China, the United Kingdom, Japan, and Mexico. In terms of imports, after the United States and China, Mexico, Germany, and Japan top the list: see World Integrated Trade

legislative and judicial encouragement of arbitration in this country. Canada has been described as a "world leader in arbitration law" with a "thriving community of dedicated practitioners, scholars, and arbitrators." [2] Canadian court decisions number amongst the highest in the United Nations database of arbitration caselaw.[3] Moreover, Canada is home to many of the world's leading arbitrators – Henri Alvarez, Ian Binnie, L. Yves Fortier, David Haigh, and Marc Lalonde, to name only a few.

Thirty-five years ago, the picture was entirely different. While many venues across the world had earned reputations as leading seats for international commercial arbitration, Canada struggled with two fundamental obstacles: it was operating—labouring, rather—under a long-outdated 19th century arbitration statute of UK origin which was, unlike its parent, largely unamended, as well as a judiciary that appeared hostile to arbitration, to the point of holding arbitration clauses to be contrary to public policy. All this changed abruptly in 1986.

In 2021, Canada reached the 35th anniversary of its entry into the modern era of international commercial arbitration. In August 1986, the *Commercial Arbitration Act* [4] entered into force, together with the *United Nations Foreign Arbitral Awards Convention Act*.[5] The *Commercial Arbitration Act* incorporated the Model Law on International Commercial Arbitration

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Solution, "Canada Trade" (last visited 29 August 2021), online: *World Integrated Trade Solution* <wits.worldbank.org/countrysnapshot/en/CAN>.

[2] *Uber Technologies Inc v Heller,* 2020 SCC 16 at para 208, Côté J, dissenting but not on this point, citing Janet Walker, "Canada's Place in the World of International Arbitration" (2019) 1 Can J Comm Arb 1 [*Uber*].

[3] See United Nations Commission on International Trade Law, "Case Law on UNCITRAL Texts (CLOUT)", online: *United Nations Commission on International Trade Law* <uncitral.un.org/en/case_law>.

[4] RSC 1985, c 17 (2nd Supp).

[5] RSC 1985, c 16 (2nd Supp).

("Model Law") approved in June 1985 by the United Nations Commission on International Trade Law ("UNCITRAL"),[6] a then state-of-the-art code that represented a consensus view of the international community on arbitral rules. The latter statute implemented for Canada the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention), which requires State parties to recognize and enforce foreign arbitral awards except in limited circumstances, bringing Canada into line with other developed countries that had long since become parties to the Convention.

In a cooperative effort, as commendable as it was unusual, all provincial and territorial governments also adopted similar commercial arbitration legislation at about the same time. As a result, similar rules, based on the UNCITRAL Model Law, were to be applicable across Canada. The federal *Commercial Arbitration Act* would apply to arbitrations where the federal government was a party or where jurisdiction was otherwise federal. Provincial and territorial statutes would govern other arbitrations seated in Canada.

Canada was the first country to implement the Model Law, but it was very late in adopting the New York Convention, the 70th country to do so. This was due primarily to Canada's status as a federal State and the lack of an adequate federal State clause in the Convention, which meant that all jurisdictions—federal, provincial and territorial—had to act unanimously in adopting implementing legislation. This proved elusive not only in the case of the New York Convention, but also more generally with international treaties in Canada.[7]

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[6] United Nations Commission on International Trade Law, a legal body of the United Nations system specializing in commercial law and headquartered in Vienna, Austria.

[7] For an additional explanation of the constitutional aspects that complicate the implementation of treaties in Canada, see Marcus L Jewett, "Canada: Legislation to Implement the United Nations Convention on the Recognition

The Note annexed to this article was written in 1987 by one of the authors of this article,[8] who headed Canada's delegations to UNCITRAL when the Model Law was adopted and was closely involved in securing the adoption of implementing legislation in Canada. It explains why and how this "remarkable joint legislative exercise" came about.[9] As noted above, provincial arbitration statutes were stuck in the 19th century, following for the most part the United Kingdom's *Arbitration Act* as it stood when enacted in 1889, [10] and were much in need of modernization. Indeed, "[f]ew persons would rationally choose to arbitrate an international commercial matter in Canada if it were not party to the New York Convention … and if there were no satisfactory legislation to facilitate the conduct of arbitrations."[11]

Now at a 35-year remove, the authors have thought it timely to look back and consider the impact across Canada of these legislative events. How did the international commercial arbitration landscape in Canada change after 1986? What does it look like now? And what could be next for Canada in terms of international commercial arbitration?

First, we touch briefly on the purpose and main features of the UNCITRAL Model Law and explain its implementation in Canada. Next, we review the attitude of Canadian courts towards arbitration, both pre-1986 and thereafter, up to the present day, demonstrating its evolution. Finally, we consider

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and Enforcement of Foreign Arbitral Awards and Legislation on International Commercial Arbitration" (1987) 26:3 ILM 714, included as an appendix to this article [Appendix].

[8] Mr. Jewett was Senior General Counsel of the Constitutional and International Law Section of the Department of Justice Canada from 1981 to 1986.

[9] See Appendix, *supra* note 7 at 714.

[10] 1889 (UK), 52 & 53 Vict, c 49.

[11] See Appendix, *supra* note 7 at 716.

Canada's current position in international commercial arbitration more broadly and what the future may hold. We conclude with a few recommendations on how to better position Canada as a venue of choice for international commercial arbitration.

II. THE UNCITRAL MODEL LAW 1985

The Model Law was adopted on June 21, 1985 at the 18th session of UNCITRAL. At the time, arbitration laws in many countries were out-of-date or otherwise ill-suited to international arbitration, usually having been drafted primarily to govern domestic commercial and non-commercial arbitrations. There was considerable diversity in arbitration laws across the globe, meaning that parties would often need to obtain legal advice on applicable law prior to selecting a venue for arbitration. The Model Law was developed to address these weaknesses and disparities. It covers all stages of the arbitral process, from the arbitration agreement to the recognition and enforcement of the arbitral award.[12]

On December 11, 1985, the United Nations General Assembly recommended that all States consider adopting the Model Law. UN Resolution 40/72 sets out the key reasons for doing so:

- "*Recognizing* the value of arbitration as a method of settling disputes arising in international commercial relations,

- *Convinced* that that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations, …

[12] UN, *UNCITRAL Model Law on International Commercial Arbitration: 1985, with amendments as adopted in 2006* (New York: UN, 2008) at 24-25 [*UNCITRAL Model Law*].

- *Convinced* that the Model Law, together with the [New York Convention] … significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations, …

- *Recommends* that all States give due consideration to the Model Law … in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice."[13]

Rather than adopt a convention or other similar instrument to be adopted by UNCITRAL members in order to achieve its goals of harmonization and modernization, UNCITRAL chose to adopt a model law.[14] A Model Law, where the context permits, offers more flexibility because states can implement it domestically as is, or adapt it as required. UNCITRAL nevertheless encouraged states to keep changes to a minimum when incorporating the Model Law into their legal systems to increase harmonization. As Yves Fortier has explained, the Model Law was intended to "foster predictability in the resolution of international commercial disputes and to ensure consistency between jurisdictions".[15] Many jurisdictions have

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[13] *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law,* UNGAOR, 40th Sess, 112th Plen Mtg, UN Doc A/40/PV.112 (1985) at 308.

[14] UNCITRAL has adopted 13 model laws over the past 30 years covering a broad range of subjects including, in addition to commercial arbitration, international commercial mediation, international commercial conciliation, public procurement, electronic signatures, electronic commerce, cross-border insolvency, and secured transactions. UNCITRAL has also adopted 12 international conventions addressing a variety of subjects including transparency in treaty-based investor-State arbitration, international settlement agreements resulting from mediation, contracts for the international sale of goods, liability of operators of transport terminals in international trade, and carriage of goods by sea.

[15] L Yves Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: Beware, My Lord, of Jealousy" (2001) 80:1/2, Can Bar Rev 143 at 144.

enacted arbitration legislation based on the Model Law: 85 states to date, and 119 jurisdictions including sub-national jurisdictions like the Canadian provinces and territories.[16]

The Model Law addresses all aspects of the arbitration proceedings including the arbitration agreement, composition of the arbitral tribunal, jurisdiction, and recognition and enforcement of awards. We draw attention mainly to four provisions that inform our analysis below.

The first provision is Article 5, dealing with the extent of court intervention in arbitration. Article 5 provides: "In matters governed by this Law, no court shall intervene except where so provided in this Law." Turning again to the explanation of the Model Law offered by Yves Fortier, he observed that it created "a sphere within which arbitrators rather than judges are paramount".[17]

Article 8 governs arbitration agreements and substantive claims before a court. This provision arises in the context of applications to stay court proceedings brought by signatories of arbitration agreements. It provides that, if a court becomes seized of a matter that is the subject of an arbitration agreement, it must refer the parties to arbitration unless the arbitration agreement is null and void, inoperative, or incapable of being performed. While the issue is pending before a court, any arbitral tribunal may hear the case and issue an award. Setting aside arbitration awards is dealt with in Article 34(2) of the

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[16] As discussed below, UNCITRAL adopted an updated version of the Model Law in 2006. The number of adoptions reflect jurisdictions that have adopted either the 1985 Model Law or the updated 2006 version. For a list of these jurisdictions, see United Nations Commission on International Trade Law, "Status: UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments as adopted in 2006" (last visited 8 October 2021), online: *United Nations Commission on International Trade Law* <uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> [UNCITRAL, "Status"].

[17] Fortier, *supra* note 15 at 144.

Model Law. The grounds for setting aside an award are limited, referring to situations such as incapacity, due process, jurisdiction of the tribunal, and conflict with public policy.

Article 34 also imposes a three-month limitation period for bringing an application to set aside an award.

Finally, Article 35 addresses recognition and enforcement of arbitral awards. It states that an arbitral award "shall be recognized as binding" and that "upon application in writing to the competent court, shall be enforced" subject to specific conditions equivalent to those listed in Article 34(2)(a) and 34(2)(b), above.

As discussed below, these provisions would prove to have profound significance for the Canadian judiciary and its approach to international commercial arbitration following the adoption of the Model Law.

III. IMPLEMENTATION OF THE UNCITRAL MODEL LAW IN CANADA

Canada was the first country to adopt legislation based on the Model Law. It did so in 1986. Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec, Northwest Territories, and Yukon also did so that year. Ontario followed in 1987, Saskatchewan in 1988, and Nunavut in 1999. Other early jurisdictions were California (1988), Connecticut (1989), and Texas (1989). The most recent is Uzbekistan (2021).[18]

The legislation enacted by all Canadian jurisdictions was based for the most part on a uniform act developed by the Uniform Law Conference of Canada ("ULCC"), a national organization comprised of delegates from the federal,

[18] See UNCITRAL, "Status", *supra* note 16.

provincial, and territorial governments, as well as law reform agencies and the private sector, that promotes and recommends uniform legislation across Canadian jurisdictions. [19] The uniform act followed the Model Law closely, with the result that legislation was largely similar across Canada. There were some differences. For example, Quebec did not develop specific legislation and instead implemented the Model Law through amendments to the *Civil Code of Quebec* and the *Code of Civil Procedure*. British Columbia, Saskatchewan, the Yukon, and the federal Parliament enacted separate legislation for implementing rules on international commercial arbitration and for the recognition and enforcement of foreign arbitral awards. Other jurisdictions enacted a single statute covering both subjects. Some provinces chose to adjust the wording of some provisions: Ontario's statute provided that a person of any nationality may be an arbitrator, while Alberta's followed the Model Law, which stated that no person shall be precluded by reason of nationality from acting as an arbitrator, unless otherwise agreed by the parties.[20]

Why was Canada first? One reason is that few countries had international arbitration regimes so far underdeveloped as Canada's. As noted above, Canada's regime had its roots in the United Kingdom *Arbitration Act of 1889* and while the United

[19] For further information about the ULCC, see <ulcc-chlc.ca>. ULCC members benefitted greatly from the assistance provided by Gerold Herrmann, then Senior Legal Officer with the International Trade Law Branch, Office of Legal Affairs, United Nations, and later Secretary of UNCITRAL, who was the leading authority on the Model Law at the time. Herrmann travelled to Canada to meet with officials and to offer assistance on how best to implement the provisions of the Model Law.

[20] Thomas P. O'Leary, Michael D. Schafler & Rachel A. Howie, "Canada" in James H. Carter, ed, *The International Arbitration Review*, 4th ed (London, UK: Law Business Research Ltd, 2013) 115 at 117-119.

Kingdom and other countries had updated their laws, [21] Canadian jurisdictions had not. It was ripe for change.[22]

Several circumstances coalesced to create the necessary environment to secure the political and legal policy support for modernizing Canada's international commercial arbitration regime, as well as to finally accede to the New York Convention. Then British Columbia Attorney General, Brian Smith, had actively promoted updating Canada's arbitration legislation, recognizing that it was essential to attract arbitration business to the province. He wrote repeatedly to the then federal Minister of Justice, John Crosbie, and to his provincial counterparts to secure support. British Columbia passed implementing legislation and announced the opening of a commercial arbitration centre in Vancouver on May 12, 1986.[23] The other provinces and the two territories agreed to pass the necessary legislation, and Quebec also announced plans to open an arbitration centre.[24]

On May 7, 1986, just days prior to the May 12th opening of the British Columbia International Commercial Arbitration Centre, Justice Minister Crosbie introduced in the House of Commons legislation to implement the New York Convention, as well as to enact the Model Law as it applied to commercial arbitration with respect to areas of federal jurisdiction. The Official Opposition Liberals and the New Democratic Party ("NDP") had been briefed by officials and agreed to expedited

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[21] The *Arbitration Act 1950* (UK), 14 Geo VI, c 27 consolidated and amended arbitration law in England and Wales. This was largely superseded by the *Arbitration Act 1996* (UK), c 23.

[22] See Sigvard Hakan Ludwig Jarvin, "Canada's Determined Move Towards International Commercial Arbitration" (1986) 3:3 J Int'l Arb 111 at 112.

[23] *International Commercial Arbitration Act,* SBC 1986, c 14, assented to on June 17, 1986.

[24] The idea of establishing an international arbitration centre in Quebec was raised during the Quebec provincial election in 1985, with both parties making it part of their platform. See Jarvin, *supra* note 22 at 112.

passage of the legislation (i.e., there was no referral to legislative committees and no private sector witnesses were called to testify). The legislation implementing the Model Law as well as the legislation implementing the New York Convention were passed the same day with unanimous consent.[25]

In supporting passage of the bills, Liberal Opposition Member of Parliament ("MP") Robert Kaplan drew on his legal experience in supporting the motion to adopt the legislation. In parliamentary debate, he observed that "[t]hose of us who were involved in commercial litigation in private life know how expensive and time-consuming it can be" and referred to private arbitration tribunals as the method to achieve "less formal and less costly ways of resolving commercial disputes." [26] Svend Robinson, an NDP MP, from BC, concurred that there was "no question that arbitration is a much more effective and less costly way of resolving commercial disputes than litigation". [27] Robinson found it particularly useful that the legislation would expressly grant federal government departments and Crown corporations the authority to enter into arbitration agreements. He also expressed hope that establishment of the British Columbia arbitration centre would attract "significant professional and service work" and result in more economic activity at a time of very high levels of unemployment.[28]

Passing this legislation engendered considerable optimism about the implications for Canada and for Canadian businesses, and conformed with the view that this legislative move was long overdue, particularly to implement the New York Convention. MP Kaplan commented that "[w]hile Canada sat back, this system [for enforcement of arbitration awards under the New

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[25] *House of Common Debates*, 33-1, No 9 (7 May 1986) at 13062-13063 [*House of Common Debates*, 33-1]. Canada acceded to the New York Convention on May 12, 1986.

[26] *Ibid* at 13061.

[27] *Ibid.*

[28] *Ibid.*

York Convention] developed in many other countries."[29] MP Robinson observed that Canada "is the last industrialized nation to accede" to the New York Convention[30] and thought that accession would improve "our trade relationships, particularly in the Pacific Rim".[31] Indeed, in introducing the legislation, Minister Crosbie said British Columbia hoped its commercial arbitration centre would "be the leading place for commercial arbitration in the Pacific Rim"[32] and predicted that passing legislation implementing the New York Convention would be a "great boost to those who engage in international trade and export trade".[33]

This optimism about enhanced international trade opportunities appeared at the time to be well-founded. The introduction of long-overdue modern commercial arbitration legislation dovetailed with Canada's international trade ambitions at the time. The negotiations on the Canada-United States Free Trade Agreement (CUSFTA) had been launched in 1986; the CUSFTA was agreed in 1987 and came into force in 1989.[34] The Uruguay Round of multilateral trade negotiations was also launched in 1986. It led in 1995 to the creation of the World Trade Organization, with Canada as one of the 123 founding members. These trade liberalization agreements had a profound impact on international trade volumes and values across the globe, and Canada's import/export volumes increased exponentially. Under the circumstances, it was fortuitous to have updated legislation governing international commercial arbitration given the inevitable disputes that arise

[29] *House of Common Debates*, 33-1, *supra* note 25 at 13061.

[30] *Ibid* at 13062.

[31] *Ibid* at 13061.

[32] *Ibid* at 13060.

[33] *Ibid.*

[34] The CUSFTA was superseded by the North American Free Trade Agreement (NAFTA) in 1994, which in turn was replaced by the Canada-United States-Mexico Agreement (CUSMA) in 2020.

between international commercial partners, and the need to resolve those disputes expeditiously and at a reasonable cost.

Did the adoption of the Model Law noticeably increase the number of international commercial arbitrations in Canada? That is difficult to discern or affirm. Experts have differing views. One of Canada's leading arbitration experts wrote in 1995, almost ten years following the adoption of the legislation, that "international commercial arbitration remains an unusual occurrence in Canada".[35] More recently, in 2020, a leading expert wrote of "how far the international arbitration community in Canada has come", but also noted that "the challenge remains to establish a sufficient foundation in the field of international arbitration to encourage commercial parties from around the world to look regularly to professionals in Canada for the many services they can provide."[36] Another Canadian leader in the field referred recently to the "maturation of the Canadian arbitration community" and considered that "Canadians need no longer leave home to build a practice and find success in international arbitration."[37] This is certainly encouraging. Nevertheless, we were unable to uncover comprehensive statistics on how many, and where, international commercial arbitrations take place and have taken place in Canada annually. Data have not been collected in any organized way, nor made readily available from any centralized source.

While it is widely acknowledged that confidentiality can be important to parties involved in commercial arbitrations, and

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[35] David R Haigh et al, "International Commercial Arbitration and the Canadian Experience" (1995) 34:1 Alta L Rev 137 at 139.

[36] Janet Walker, "Canada's Place in the World of International Arbitration" (2019) 1 Can J Comm Arb 1 at 7, 11.

[37] Beryl Meng & Joshua Karton, "Major Milestones in Canadian Arbitration Law: Highlights from the Canadian Journal of Commercial Arbitration's Launch" (2 July 2020), online (blog): *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2020/7/page/3/> (quoting Louise Barrington).

that arbitration centres rightly wish to shield confidential business information from competitors, it would be helpful in assessing future needs to have collected in a central database anonymized information on matters such as number of arbitrations hosted at each of Canada's centres, origins of the parties, names and nationalities of the arbitrators, arbitration rules used, use of virtual, in-person and mixed proceedings, language of proceedings, and any other elements that do not harm legitimate commercial interests. This information would be highly relevant when promoting Canada as supporting a thriving commercial arbitration practice, and encouraging Canada to be considered a venue of choice for international commercial arbitrations.

IV. LOOKING BACK: CANADIAN COURTS' ATTITUDE TO INTERNATIONAL COMMERCIAL ARBITRATION

It is often said that prior to the adoption of legislation based on the Model Law, Canadian courts were hostile to arbitration and assiduously guarded their dispute settlement role and perceived superiority of results. The courts were "very jealous of their jurisdiction" and did not look "with favour upon efforts of the parties to oust it by agreement",[38] the view apparently being that only the courts were capable of meting out justice. Therefore any agreement to sidestep them was regularly rejected as contrary to public policy.[39] Judges repeatedly emphasized that "[t]he right to apply to the Courts for relief is one of the cornerstones of our legal system" and "[i]ts importance cannot be exaggerated nor can any threat to its existence be tolerated."[40] As Justices LeBel and Deschamps expressed it in *Seidel v TELUS Communications Inc*, "the courts

[38] *Re Rootes Motors (Canada) Ltd v William Halliday Contracting Co,* [1952] 4 DLR 300 at 304 (Ont HCJ).

[39] *Seidel v TELUS Communications Inc*, 2011 SCC 15 at para 90 [*Seidel*].

[40] *Vinette Construction Ltée v Dobrinsky*, [1962] BR 62 at 68-69 [*Vinette Construction Ltée*].

originally displayed overt hostility to arbitration, effectively treating it as a second-class method of dispute resolution."[41]

1. Prior to Implementation of the Model Law: Overt Hostility

Some writers have claimed that the purportedly hostile judicial attitude to arbitration is a myth.[42] But its validity has been affirmed in numerous court decisions and is aptly illustrated in the Supreme Court of Canada's 1964 decision in *National Gypsum Co Inc v Northern Sales Ltd*, where the court denied an application for a stay of court proceedings.[43] The respondent had sued the appellant for breach of contract for failing to comply with an undertaking that its ship travel to Montreal to load a cargo of wheat for carriage to Italy. The appellant requested a stay of proceedings by virtue of the charterparty that included the following arbitration clause:

> Should any dispute arise between owners and Charterers, the matter in dispute shall be referred to three persons in New York …; their decision … shall be final … . The Arbitrators shall be commercial men.[44]

The Supreme Court rejected the application and refused to order the stay. It ruled that the object of the arbitration clause "is not to modify the rights of the parties under the charterparty but to enforce them and how a right might be enforced is a matter of procedure … governed by the *lex fori* … [the Superior Court of the Province of Quebec]."[45] The Supreme Court determined that under the *Code of Civil Procedure,* an arbitration clause, "even if valid, is ineffective to preclude the

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[41] *Seidel, supra* note 39 at para 89, LeBel and Deschamps JJ dissenting but not on this point.

[42] See Fortier, *supra* note 15 at 145.

[43] [1964] SCR 144 [*National Gypsum Co*].

[44] *Ibid* at 147.

[45] *Ibid* at 149-150.

institution of this action before the Court in the territorial jurisdiction of which the whole alleged cause of action [had] arisen" and therefore the court below, "being properly seized with this action, its jurisdiction to try the merits of the case [could not] be interfered with by the arbitration clause …".[46] Although the Supreme Court acknowledged that it may be "desirable" in private international law to validate arbitration clauses, and observed that this had been effected in France through the *Code du Commerce*, it asserted that in Quebec the legislature had not taken that step and "so far as it expressed any policy in the matter, the legislature does not appear to favour the validity of such clause."[47] The Court concluded that the clause was "invalid as being against public policy".[48]

Provincial courts were no less disapproving. In 1918, in *Brand v National Life Assurance Co*, the Manitoba Court of King's Bench maintained that:

> [f]rom the earliest times both common law and equity courts have recognized and given effect to the principle that parties cannot, by contract, oust the courts of their jurisdiction, and that a provision to refer any dispute which might arise, not to the ordinary tribunals, but to some forum of their own selection, could not be pleaded in bar to an action upon the contract ….[49]

A few years later, the Saskatchewan Court of Appeal, in *Altwasser v Home Insurance Co of New York*, conceded that persons who enter into an arbitration agreement should be bound by its terms, but observed that courts "do not lose sight of the principle that the jurisdiction of the Courts is not to be

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[46] *National Gypsum Co, supra* note 43 at 150.

[47] *Ibid* at 151.

[48] *Ibid*.

[49] *Brand v National Life Assurance Co*, (1918) 44 DLR 412 at 414.

ousted by agreement between the parties" and opined that "in cases where it is thought better that the matters at issue should be decided by the Courts rather than by arbitration, the [court] action is allowed to proceed and a stay of proceedings is refused."[50]

Even much later, in 1959, in *Vancouver v Brandram-Henderson of BC Ltd*, Smith JA of the British Columbia Court of Appeal was derisive of arbitration as a method of dispute resolution stating that "[o]ne cannot but wonder about the efficacy of arbitration as a means of settling disputes of this kind" and complained that "instead of affording a quick, easy and cheap method of settlement provides one longer, more difficult and more expensive".[51]

As late as 1962, in *Vinette Construction Ltée v Dubrinsky,* the Quebec Court of Appeal considered arbitration clauses a threat to the legal system that must not be "tolerated" and warned against giving them effect, claiming that "[i]f this be allowed to happen those who accept the clause today will have it imposed on them tomorrow."[52]

An outlier in this otherwise consistent anti-arbitration approach appears to be the 1983 decision of the Supreme Court of Canada in *Zodiak International Productions Inc v Polish People's Republic*.[53] That case concerned a contract concluded in Montreal regarding the distribution of Polish films in Canada. The arbitration clause stipulated that "[a]ny controversy or claim arising out of or relating to this Agreement, or any breach thereof, shall be settled by arbitration … in Poland under the

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[50] *Altwasser v Home Insurance Co of New York*, [1933] 2 WWR 46 at 50.

[51] *Vancouver v Brandram-Henderson of BC Ltd*, [1959] 18 DLR (2d) 700 at 705 (BCCA), Smith J dissenting from the majority who dismissed the motion to set aside the award made by the arbitrators.

[52] *Vinette Construction Ltée*, *supra* note 40 at 68.

[53] *Zodiak International Productions Inc v Polish People's Republic,* [1983] 1 SCR 529 [*Zodiak International Productions Inc*].

Rules of the Arbitration Court at the Polish Chamber of Foreign Trade in Warsaw." [54] The appellant claimed a breach of the exclusivity clause in the contract and pursued arbitration in Poland. The appellant lost but the respondent's counterclaim succeeded. The appellant then commenced court proceedings in Canada for the same cause of action. The Supreme Court of Canada held that the undertaking to arbitrate sufficed to bar the appellant's action, agreeing with the Court of Appeal and reversing the lower court's ruling that the arbitration clause did not oust the court's jurisdiction. Justice Chouinard, writing for the Court, contrasted the 1897 Quebec *Code of Civil Procedure*, which said nothing about undertakings to arbitrate, with the 1966 *Code*, which stated (article 951) that undertakings to arbitrate must be in writing and noted that "[t]he prevailing opinion since the coming into effect of the new *Code of Civil Procedure* is that the adoption of art. 951 in its present form sufficed to render the complete undertaking to arbitrate valid."[55] This was in contrast to the situation prevailing under the old *Code* under which such clauses were considered contrary to public policy. Chouinard J observed that "[t]he present situation is accordingly quite different from that prevailing when *Vinette Construction* … and *National Gypsum* …. were rendered, decisions which some have suggested have become obsolete." [56] Chouinard J also recalled that in 1964, shortly after the decision in *National Gypsum*, the Commissioners responsible for drafting a new *Code of Civil Procedure* submitted the following together with their revised Code:

> The Commissioners felt obliged to complete and modernize the present provisions of the *Code of Civil Procedure* concerning arbitration, because of the increasingly important role which this

[54] *Zodiak International Productions Inc*, *supra* note 53 at 531.

[55] *Ibid* at 538.

[56] *Ibid*.

> method of settling disputes plays in the present law, an importance which is even likely to increase with the growth of the economy, particularly if the clause containing an agreement to arbitrate is recognized.[57]

The long-standing anti-arbitration approach in Canada—*Zodiak International* aside—had far-reaching effects. As Professor John Brierly observed in 1974, Canadian business interests and Canadian governments "appear[ed] to have little interest in the subject of international trade arbitration".[58] The high degree of court intervention and control over the arbitration process led to delays and associated higher costs: arbitration was merely one step in an inevitable path to the courts. In addition, the problem with enforcing arbitral awards created an environment that inhibited rather than fostered resort to arbitration as a means of resolving international commercial disputes. The Supreme Court of Canada recognized this state of affairs in 1988 in *Sport Maska Inc v Zittrer*, stating that the uncertainty about the validity of agreements to arbitrate had inhibited the legal community's interest in arbitration and undermined its growth.[59]

2. Post-Implementation of the Model Law: A Dramatic Reversal

Despite this history of discouragement, there was a "dramatic reversal" in judicial attitudes following the implementation of the Model Law and accession to and implementation of the New York Convention.[60] The default view

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[57] *Zodiak International Productions Inc*, *supra* note 53 at 536-537.

[58] John EC Brierly, "International Trade Arbitration: The Canadian Viewpoint" in Ronald Macdonald, Gerald Morris & Douglas Johnston, ed, *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) at 826.

[59] [1988] 1 SCR 564 at 598.

[60] *Uber*, *supra* note 2 at para 200, Côté J, dissenting but not on this point.

changed from "doubt to deference"[61] and courts assumed the role of supporting the arbitration process rather than interfering with it. Largely because of the early implementation of the Model Law by Canada and its provinces and territories, Canadian courts became world leaders in interpreting provisions of the Model Law.[62]

Most of these rulings have concerned applications for a stay of court proceedings brought by applicants seeking to enforce arbitration agreements. The wide discretion exercised by courts under the old arbitration law was severely curtailed under the legislation incorporating the Model Law. As explained above, Article 8(1) of the Model Law requires ("shall") the court to refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. In addition to requests to stay proceedings, courts often receive applications to set aside arbitral awards. The specific grounds for doing so are found in Article 34 of the Model Law, also described above.

The Supreme Court of Canada's first opinion in a case dealing with the new federal Canadian arbitration legislation was *Burlington Northern Railroad Company v Canadian National Railway Company* decided in 1997.[63] The Court was unequivocal in ruling that a court is bound to stay proceedings and refer the parties to arbitration when there is an arbitration agreement between them. The case concerned a dispute over whether Canadian National Railway (CNR) was obliged under its agreement with Burlington Northern Railway (BNR) to pay a proportion of a sum paid by BNR to the City of Vancouver. The contract contained an arbitration clause stating that "(i)f at any time any question shall arise touching the construction of this

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[61] Fortier, *supra* note 15 at 143.

[62] Canadian court decisions are featured regularly in UNCITRAL's CLOUT database. See note 3.

[63] [1997] 1 SCR 5 [*Burlington Northern Railroad Company*].

contract … such question shall be submitted" to arbitration. BNR brought an action against CNR for non-payment of the disputed sum. CNR sought a stay of proceedings under Article 8(1) of the Model Law as implemented in the *Commercial Arbitration Act*. BNR claimed the arbitration agreement did not apply because Parliament had established the National Transportation Authority as the dispute resolution mechanism for such disputes, and that this displaced the arbitration agreement.

The Supreme Court ruled that the court action had to be stayed. It did not provide its own reasons for judgement, relying on the reasons given by Justice Cumming, at the British Columbia Court of Appeal.[64] Cumming JA found that "[w]here the conditions prescribed by Article 8 [of the Commercial Arbitration Code] have been met, the *Code* is imperative in requiring that the matter be referred to arbitration…".[65]

In subsequent cases, the Supreme Court of Canada referred to the legislative context when considering the ouster through private agreement of a domestic court's jurisdiction. It pointed to Parliament's enactment of the *Commercial Arbitration Code* as demonstrating recognition by the legislative authorities of the legitimacy and importance of arbitration.[66] It continued to emphasize the importance of respecting parties' intentions[67] and spoke of the "primacy of the autonomy of the parties", which goes "hand in hand with the legislature's tendency toward recognizing the existence and legitimacy of the private justice system …".[68]

The Federal Court of Canada has also considered the application of the Model Law in several maritime disputes. In an early case under the new regime (1989), the Federal Court Trial

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[64] *Burlington Northern Railroad Company, supra* note 63 at 5.

[65] [1995] BCWLD 1569, 7 BCLR (3d) 80 at para 57.

[66] *Desputeaux v Éditions Chouette (1987) inc*, [2003] 1 SCR 178 at 207.

[67] *GreCon Dimter inc v JR Normand*, [2005] 2 SCR 401 at 420.

[68] *Ibid* at 422.

Division relied on its discretionary power under section 50(1) of the Federal Court Act to stay proceedings rather than expressly relying on Article 8 of the Model Law, which also requires the granting of a stay.[69] However, three years later, the same court emphasized the duty to stay proceedings under Article 8 of the Model Law.[70] In 1994, when the Federal Court of Appeal addressed for the first time whether a court has discretion to stay proceedings, it ruled that "once a reference to arbitration has been made, there is no residual discretion in the court to refuse to stay all proceedings between the parties …".[71] The court also observed that "the international community has arrived at a consensus that compliance with commercial arbitration agreements is to be enforced by the courts" and that "Canada and its provinces have given that consensus the force of domestic law."[72]

Post-1986 provincial court decisions across Canada have gone in a similar vein. Ontario provides an early example. In *Boart Sweden AB v NYA Stromnes AB*, decided in 1988, the High Court of Justice dealt with an application for a stay of proceedings where only some of the issues in dispute were addressed in the arbitration agreement.[73] The court considered whether, as a matter of public policy and to avoid multiplicity of proceedings, all matters in dispute should be dealt with in a single proceeding in the Ontario courts instead of deferring to the arbitral process in respect of part of the action. Justice Campbell saw "no discretion at all in art. 8"[74] of the Model Law and referred to the "change in the law of international

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[69] *Navionics Inc v Flota Maritima Mexicana SA et al,* (1989) 26 FTR 148.

[70] *Miramichi, Pulp & Paper Inc et al v Canadian Pacific Bulk Ship Services Ltd et al,* (1992) 58 FTR 81.

[71] *Nanisivik Mines Ltd v FCRS Shipping Ltd*, [1994] 2 FC 662 at 675.

[72] *Ibid* at 670-671.

[73] [1988] OJ No 2839, 14 ACWS (3d) 348 [*Boart Sweden AB*].

[74] *Ibid* at para 4.

arbitration which, with the advent of art. 8 of the Model Law and the removal of the earlier wide ambit of discretion, gives the Courts a clear direction to defer to the arbitrators."[75] He also referred to "the clear policy of deference" in the Model Law.[76] Addressing the arguments based in public policy, he referred to the "very strong public policy of this jurisdiction that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the courts, the parties should be held to their contract".[77]

British Columbia's first case under its international commercial arbitration legislation, *Quintette Coal Ltd v Nippon Steel Corporation*,[78] was decided by the BC Supreme Court in 1990. The applicant sought to set aside portions of an arbitral award as outside the arbitrators' jurisdiction. The Chief Justice began his reasons for judgment by quoting from the preamble of the BC legislation, which refers to the inhospitable legal environment for international commercial arbitrations that existed in British Columbia prior to the legislation coming into effect, and to the Model Law as reflecting a consensus of views on judicial intervention in such arbitrations.[79] The court

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[75] *Boart Sweden AB, supra* note 73 at para 13.

[76] *Ibid* at para 14.

[77] *Ibid* at para 10.

[78] 47 BCLR (2d) 201, 1990 CanLII 304 (BCSC) [*Quintette Coal Ltd* BCSC].

[79] The preamble states as follows:

> WHEREAS British Columbia, and in particular the City of Vancouver, is becoming an international financial and commercial centre;
>
> AND WHEREAS disputes in international commercial agreements are often resolved by means of arbitration;
>
> AND WHEREAS *British Columbia has not previously enjoyed a hospitable legal environment for international commercial arbitrations*;
>
> AND WHEREAS there are divergent views in the international commercial and legal communities respecting

declined to set aside the arbitral award, referring to a New Zealand court decision—reflecting case law in various jurisdictions—as demonstrating a "world-wide trend toward restricting judicial control over international commercial arbitration awards". [80] Although the Chief Justice did not consider that the arbitrators had erred in interpreting the commercial contract at issue, he wrote that, even if they had, this would constitute a "mere error in interpretation" and would not "provide a ground" under the legislation for setting aside the award.[81]

The BC Court of Appeal upheld the lower court's decision. Acknowledging that it was the first case under the BC *International Commercial Arbitration Act*, Gibbs JA wrote that it was "important to parties to future such arbitrations … that the court express its views on the degree of deference to be accorded the decision of the arbitrators."[82] He found persuasive the reasons for judgment in the foreign courts cited by the lower court and considered that the "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes," referred to by Mr Justice Blackmun of the United States Supreme Court in

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> the conduct of, and the degree and nature of judicial intervention in, international commercial arbitrations;
>
> AND WHEREAS the United Nations Commission on International Trade Law has adopted the UNCITRAL Model Arbitration Law which *reflects a consensus of views on the conduct of, and degree and nature of judicial intervention in, international commercial arbitrations*;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows: .... (italics added): *International Commercial Arbitration Act*, *supra* note 23.

[80] *Quintette Coal Ltd* BCSC, *supra* note 78 at 5.

[81] *Ibid* at 13.

[82] 50 BCLR (2d) 207, 1991 CanLII 5708 (BCCA) at para 32 [*Quintette Coal Ltd* BCCA].

Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc,[83] were "as compelling" in British Columbia as they were in the United States or elsewhere.[84] Gibbs JA concluded that it was "meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia."[85]

In 1991, the New Brunswick Court of Queen's Bench applied the New York Convention as implemented in New Brunswick[86] in *MA Industries, Inc v Maritime Battery Ltd*.[87] The respondent, Maritime Battery Ltd, objected to the enforcement of an arbitral award on two grounds: (i) that the arbitration agreement was governed by the laws of the state of Georgia (in the United States) and therefore, in order to avail itself of the Convention in New Brunswick, it was necessary for the applicant to demonstrate that the State of Georgia was bound to apply the New York Convention; and (ii) that the arbitrator did not take the oath prescribed by section 10 of the New Brunswick *Arbitration Act*. Justice Stevenson rejected both arguments. He noted that although a State adopting the New York Convention may declare that it will only apply the Convention to the recognition and enforcement of awards made in the territory of another contracting State (Article I (3)), New Brunswick had not so declared. Regarding the taking of the oath, Stevenson J found that the requirement to take the oath applied only to arbitrations in New Brunswick and noted that "[i]f the respondent's argument were to prevail it would mean that an arbitrator would have to comply with the procedural

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[83] 473 US 614 (1985).

[84] *Quintette Coal Ltd* BCCA, *supra* note 82 at para 32.

[85] *Ibid*.

[86] *United Nations Foreign Arbitral Awards Convention Act*, SNB 1986, c I-12.2 (current version is RSNB 2011, c 176).

[87] [1991] NBJ No 717, 118 NBR (2d) 127 [*MA Industries*].

requirements of every jurisdiction to which the parties might eventually look for enforcement."[88]

In *Kaverit Steel and Crane Ltd v Kone Corporation* (1992),[89] the Alberta Court of Appeal observed that it was "common ground that the evident purpose of Alberta's acceptance of the Convention is to promote international trade and commerce by the certainty that comes from a scheme of international arbitration." [90] The Court was firm in granting a stay of proceedings despite objections relating to overlapping litigation with other litigants not party to the arbitration agreement. Justice Kerans ruled that the *International Commercial Arbitration Act* "directed" him to hold the parties to their arbitration bargain.[91] He disagreed with the lower court, which had ruled that the arbitration provision was inoperative—one of the grounds under Article 8 of the Model Law for refusing to grant a stay. The lower court had reasoned that because litigants in the court action who were not party to the arbitration agreement had raised legitimate causes of action connected to the main issue of breach of contract, all matters should be tried in the same proceeding. Kerans JA concluded that the agreement to arbitrate should be honoured "whether or not the plaintiff displayed great imagination in the pleadings"[92] and that "the statute commands that what may go to arbitration shall go".[93]

One final example of the "dramatic reversal" in judicial attitudes to arbitration as a means of dispute resolution post-1986 is *BMV Investments Limited v Saskferco Products Inc*,

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[88] *MA Industries, supra* note 87 at para 16.

[89] 1992 ABCA 7.

[90] *Ibid* at para 49 (underlining in original).

[91] *Ibid* at para 47.

[92] *Ibid* at para 46.

[93] *Ibid* at para 8.

decided by the Saskatchewan Court of Appeal in 1994.[94] In Saskatchewan's first application for a stay of proceedings under the province's *International Commercial Arbitration Act*, the lower court had concluded that the arbitration agreement at issue in the court proceedings was inconsistent with the *Builders Lien Act* ("BLA") of Saskatchewan and was therefore void, meaning that a stay of proceedings was not required under Article 8 of the Model Law. The Court of Appeal reversed, determining that the BLA "[did] not occupy the field … in such a way and to such a degree as to exclude an arbitration"[95] and therefore, there was no inconsistency between the arbitration agreement and the BLA. Nor was the court persuaded that a stay should be denied because parts of the court action were not subject to the arbitration agreement. In coming to its decision, the court observed that the "status of international commercial arbitration in Canada remain[ed] ill-defined"[96] and it looked to court decisions in England, France, and the United States to determine how the law was evolving. The court also acknowledged that "[w]hile new in Saskatchewan, international commercial arbitration is an important and growing area of the law" and noted the "desire for greater certainty and for the participation of specialized professionals in the decision-making in the resolution of disputes …".[97]

V. CANADIAN COURTS' CURRENT ATTITUDE TO INTERNATIONAL COMMERCIAL ARBITRATION: SOME NUANCES

The previous section demonstrated that, following the enactment of modern arbitration laws across Canada in 1986, there was a marked change in Canadian courts' attitude to arbitration as a means of dispute resolution. From the late 1980s, the courts began to show much greater respect for arbitration when chosen by parties as the method for resolving

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[94] [1994] SJ No 629, 1994 CanLII 4557 (SKCA) [*BMV Investments*]

[95] *BMV Investments, supra* note 94 at 16.

[96] *Ibid* at 7.

[97] *Ibid*.

their international commercial disputes, readily granting stays of court proceedings in the face of operable arbitration clauses as well as enforcing foreign arbitral awards.

Nevertheless, more recent Supreme Court decisions appear to have nuanced the established rule of systematic referral to arbitration when there is an arbitration clause. These decisions are discussed below. Although none was decided under a provincial/territorial or federal *International Commercial Arbitration Act*—all were based on domestic arbitration legislation—there is no reason to think the findings would have been different had the court been examining legislation addressing international commercial arbitration.

1. *The Test Established in* Dell*: When Should a Court Depart from Systematic Referral to Arbitration?*

The first of these decisions is *Dell Computer Corp v Union des consommateurs*, decided by the Supreme Court of Canada in 2007.[98] The Union des consommateurs sought authorization from the courts to institute a class action against Dell Computer with respect to Dell's refusal to honour the sale of computers at an incorrectly posted price. Dell applied to have the matter referred to arbitration pursuant to an arbitration clause. The trial judge denied Dell's request, basing her ruling on article 3149 of the *Civil Code of Quebec*,[99] which prohibits waiving the jurisdiction of Quebec authorities. The Court of Appeal dismissed Dell's appeal on different grounds, finding that the arbitration clause was external to the contract. The Supreme Court allowed the appeal, dismissing the authorization to institute a class action and stating that the claim should have been referred to arbitration. It found that the prohibition in article 3149 of the *Civil Code*, which appears in Title Three of the *Code* entitled "International Jurisdiction of Quebec Authorities", in turn found in Book Ten of the *Code*, entitled "Private

[98] 2007 SCC 34 [*Dell Computer Corp*].

[99] SQ 1991, c 64.

International Law", applies only to situations with "a relevant foreign element that justifies resorting to the rules of Quebec private international law."[100] For the court, an arbitration that contains no foreign element "in the true sense of the word" is a domestic arbitration to which article 3149 does not apply.[101] The fact that the arbitration was to be governed by the rules of an arbitration organization based in the United States (the National Arbitration Forum) was not a relevant "foreign element" for purposes of the application of Quebec private international law.[102] The Court also rejected the argument that the arbitration clause was external to the contract.

The Court's decision in *Dell* is especially important because it set forth what became the legal test for determining when a court should depart from the general rule that a challenge to an arbitrator's jurisdiction must first be resolved by the arbitrator (referred to as the competence-competence principle). *Dell* made clear that a court should depart from the rule of systematic referral to arbitration *only if the challenge to the arbitrator's jurisdiction is based solely on a question of law or, if based on a question of mixed fact and law, the court must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record*. The court justified this exception to the general rule of referral (sometimes referred to as the "superficial review of the record" or the "*prima facie*" test), explaining that an arbitrator's decision on his or her jurisdiction can be reviewed by a court so this approach could avoid duplicative proceedings. However, it accepted that a court could refer the matter to arbitration in any

[100] *Dell Computer Corp, supra* note 98 at 820.

[101] *Ibid* at 838.

[102] *Ibid* at 839.

event should it consider that the challenge to jurisdiction is merely a delaying tactic.[103]

2. *The Rule in* Seidel*: Is the Arbitration Clause subject to a Legislative Override?*

Seidel v TELUS Communications Inc. concerned an application by Seidel to certify a class action regarding TELUS's calculation of airtime and billing for cellphone services.[104] TELUS sought a stay of proceedings pursuant to British Columbia's *Commercial Arbitration Act* based on an arbitration clause found in the standard form contract for cellular telephone services. The trial court denied TELUS's application but was reversed by the BC Court of Appeal, stating that it was for the arbitrator to determine which claims were subject to arbitration and which were to go before a court. The Supreme Court of Canada allowed the appeal in part, lifting the stay of proceedings for certain claims. Justice Binnie, writing for the majority, acknowledged that absent legislative intervention, "the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause."[105] However, the court was of the view that the *Business Practices and Consumer Protection Act* (BPCPA)[106] of British Columbia "manifest[ed] a legislative intent to intervene in the marketplace to relieve consumers of their contractual commitment to 'private and

[103] *Dell Computer Corp, supra* note 98 at 848-849. Quebec's *Consumer Protection Act* now includes a provision that prohibits any stipulation that obliges a consumer to refer a dispute to arbitration. However, it did not apply to this case because the facts triggering the application of the arbitration agreement occurred before the provision came into force.

[104] *Seidel, supra* note 39.

[105] *Ibid* at para 2.

[106] SBC 2004, c 2.

confidential' mediation/arbitration."[107] The arbitration clause purported to take away Seidel's rights conferred under section 172 of the BPCPA to bring a cause of action and to seek certification of the claims as a class action. The court determined that the arbitration clause was subject to a legislative override and was invalid with respect to those rights, but not with respect to Seidel's other claims that did not fall within section 172.

Justice Binnie rejected the "attempt [by dissenting Justices LeBel and Deschamps] to cast the appeal in terms of whether or not arbitrators should be seen as 'second-class adjudicators' … and paint those with whom they disagree as exhibiting an 'undercurrent of hostility towards arbitration' …".[108] He wrote that "the Court's job is neither to promote nor detract from private and confidential arbitration. The Court's job is to give effect to the intent of the legislature as manifested in the provisions of its statutes."[109] Justice Binnie further asserted that the competence-competence principle had not been violated because this was a case of statutory interpretation and therefore a pure question of law, properly entertained by the Supreme Court of British Columbia in the first instance, in line with the rule set forth in *Dell*.[110]

The subsequent case of *TELUS Communications Inc v Wellman* raised similar issues.[111] Wellman sought to pursue a class action against TELUS related to billing and calculation of airtime under mobile phone service contracts containing an

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[107] *Seidel, supra* note 39 at para 2. Section 3 of the *Business Practices and Consumer Protection Act* provides as follows: "Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act." The Court observed that arbitration clauses in consumer contracts had been subject to varying limitations in Alberta (in 2000), Ontario (in 2002), and Quebec (in 2006).

[108] *Seidel, supra* note 39 at para 3.

[109] *Ibid*.

[110] *Ibid at* para 30.

[111] 2019 SCC 19 [*TELUS Communications Inc*].

arbitration clause. The class consisted of consumers and non-consumers. Ontario's *Consumer Protection Act*[112] rendered the arbitration clause inapplicable to consumers but did not cover the business consumers. The motions judge dismissed TELUS's motion for a stay of proceedings with respect to the business consumers' complaints, reasoning that she had discretion under section 7(5) of the Ontario *Arbitration Act*[113] to refuse a stay where it would not be reasonable to separate the matters dealt with in the arbitration agreement from the other matters at issue. The Ontario Court of Appeal dismissed TELUS's appeal, but the Supreme Court of Canada allowed it and stayed the business consumers' claims against TELUS. Following *Seidel*, the court interpreted the relevant legislation and found no "legislative override" that would allow the business consumers to resile from their arbitration agreement.[114] Justice Moldaver, writing for the majority, recognized that the *Arbitration Act* "signals that courts are generally to take a 'hands off' approach to matters governed by the *Arbitration Act*".[115] He further recalled that the *Arbitration Act* is informed by several principles, including that the parties to a valid arbitration agreement should abide by those agreements. He said that the case was "not about debating the merits and demerits of enforcing arbitration clauses contained in standard from contracts" but rather was "about the proper interpretation of s.

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[112] *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A.

[113] *Arbitration Act, 1991*, SO 1991, c 17, s 7(5) provides that: "The court may stay the proceeding 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." [Ontario *Arbitration Act*].

[114] *TELUS Communications Inc, supra* note 111 at para 8, citing *Seidel, supra* note 39 at para 40.

[115] *Ibid* at para 56.

7(5) of the *Arbitration Act*".[116] He observed that the policy arguments advanced by Wellman, various interveners, and dissenting Justices Abella and Karakatsanis (including the promotion of access to justice) could not "be permitted to distort the actual words of the statute … so as to make [section 7(5)] say something it does not", especially as the legislature had already addressed policy concerns by shielding consumers from enforcement of certain provisions of arbitration agreements.[117] He also noted that "in the years since the *Arbitration Act* was passed, the jurisprudence—both from this Court and from the courts of Ontario—has consistently reaffirmed that courts must show due respect for arbitration agreements and arbitration more broadly, particularly in the commercial setting."[118]

3. *The* Uber *Decision: The Court Expands the Test in Dell for Departing from Systematic Referral to Arbitration*

The Supreme Court of Canada's most recent decision on enforcement of arbitration clauses, the 2020 decision in *Uber Technologies Inc v Heller*, was said to "threaten to roll back the tide of history and Canadian jurisprudence to the days when judges were overtly hostile to arbitration" and to "call into question [the SCC's] commitment to encouraging the use of arbitration and to the modern 'hands-off' approach to arbitration …".[119] In that case, Heller, who provided food delivery services in Toronto using Uber's software applications, brought a class action against Uber alleging violations of Ontario employment standards legislation. Uber sought to stay the proceeding in favour of arbitration, relying on the arbitration clause in its agreement with Heller (a contract of adhesion). The arbitration clause stipulates that any dispute must be submitted first to mediation proceedings under the International Chamber

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[116] *Ibid* at para 84.

[117] *TELUS Communications Inc, supra* note 111 at para 79.

[118] *Ibid* at para 54.

[119] *Uber, supra* note 2 at para 209, Côté J, dissenting opinion.

of Commerce Mediation Rules and, if the dispute is not resolved within 60 days after a request for mediation, the dispute shall be resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce. The place of arbitration is stipulated as Amsterdam, The Netherlands. Although the cost of such proceedings is not stated in the arbitration clause, the ICC Rules provide that an upfront administration fee of $14,500 would apply. Heller earned approximately $400-$600 per week.

The motions judge stayed the proceeding in favour of arbitration, relying on the competence-competence principle, but the Ontario Court of Appeal allowed Heller's appeal, finding the arbitration clause to be unconscionable due to the "inequality of bargaining power" and the "improvident cost of arbitration".[120] The Supreme Court of Canada agreed with the Court of Appeal, stating that it was "a classic case of unconscionability" because the arbitration agreement "makes it impossible for one party to arbitrate".[121] The court ruled that it was not required to stay the court proceedings because the arbitration clause was unconscionable and therefore invalid [122] —a ground for refusal to stay proceedings under Ontario's *Arbitration Act*.[123]

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[120] *Uber, supra* note 2 at para 3.

[121] *Ibid* at para 4.

[122] *Ibid* at para 98.

[123] Ontario *Arbitration Act, supra* note 113. The Supreme Court determined that the Ontario *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sch 5 did not apply because the nature of the dispute – whether Heller is or is not an employee of Uber – is fundamentally about labour and employment, not about a commercial matter. It observed that an employment dispute is "not the type of dispute that the ICCA is intended to govern" at para 26. Under the circumstances, it ruled that the Ontario *Arbitration Act* governed the dispute and it relied on section 7(2)2 of that Act, which gives a court discretion to refuse to grant a stay if the arbitration agreement is "invalid" at para 30.

The Supreme Court distinguished *Dell* (which established the "superficial review of the record" test for departing from the general rule of referral to arbitration, discussed above), stating that *Dell* assumes that if the court does not decide an issue, then the arbitrator will. The court explained that the facts were different in *Uber*, which raised problems of access to justice due to the prohibitively high ICC administration fee. Under these circumstances, the court held, a court may depart from the general rule of arbitral referral and decide on the challenge to arbitral jurisdiction itself and, in doing so, may thoroughly analyze the record:[124]

> The fees impose a brick wall between Mr. Heller and the resolution of any of the claims he has levelled against Uber. An arbitrator cannot decide the merits of Mr. Heller's contention without those—possibly unconscionable—fees first being paid. Ultimately, this would mean that the question of whether Mr. Heller is an employee may never be decided. The way to cut this Gordian Knot is for the court to decide the question of unconscionability.[125]

Finally, the court observed that "[r]espect for arbitration is based on it being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all."[126]

In his concurring judgment, Justice Brown agreed that the arbitration clause was unenforceable and that referral to arbitration was not required in this case, but he did not rely on the principle of unconscionability. Justice Brown saw it as an access to justice and public policy issue because the arbitration

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[124] *Uber, supra* note 2 at paras 37 and 46.

[125] *Ibid* at para 47.

[126] *Ibid* at para 97.

agreement "effectively bars" advancing claims against Uber.[127] He did not consider that considerations of public policy and access to justice amounted to an expansion of the grounds for judicial intervention in arbitration proceedings, stating that "[i]n these exceptional circumstances, a central premise of curial respect for arbitration agreements—that they furnish an accessible method of achieving dispute resolution according to law—falls away."[128] He also considered that "[t]he legislature could not have intended that, by enacting the *Arbitration Act*, arbitration clauses whose effect *precludes* access to justice would be untouchable" and concluded that it "cannot be right" that "a measure intended to enhance access to justice is now to be used as a tool for cutting off access to justice."[129]

In her dissent, Justice Côté argued that policy considerations related to access to justice "cannot be used to make the *Arbitration Act* say something it does not say"[130] and took issue with what she perceived to be the court establishing policies where the legislature had declined or omitted to do so.[131] For Justice Côté, "[w]hether the unconscionability doctrine renders the Arbitration Clause unenforceable is thus a question of mixed law and fact that requires more than a superficial review of the documentary evidence. The parties should therefore be referred to arbitration."[132]

These recent SCC decisions demonstrate that, although systematic referral to arbitration is the norm in Canada and that those who enter into arbitration agreements generally will be held to them by the courts, this rule is not without limits. If the

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[127] *Ibid* at para 102.

[128] *Uber, supra* note 2 at para 102.

[129] *Ibid* at para 119.

[130] *Ibid* at para 242.

[131] *Ibid* at para 268.

[132] *Ibid* at para 289.

arbitration clause seeks to deprive a plaintiff of a right plainly conferred by law, then that individual will not be held to its commitment to resolve disputes with respect to that right through private arbitration. Nor will an individual be held to a commitment to arbitrate when the arbitration clause is found to be unconscionable and therefore invalid, such as when the terms of the arbitration clause have the effect of foreclosing any possibility of arbitration.

VI. CANADA: NOT YET A VENUE OF CHOICE FOR INTERNATIONAL COMMERCIAL ARBITRATION

As mentioned above, one of the expectations when adopting the Model Law and implementing the New York Convention in Canada was that these actions would contribute to boosting Canada's reputation as a leading jurisdiction in international commercial arbitration. The British Columbia International Commercial Arbitration Centre was established in May 1986, just days after Parliament adopted legislation to implement the Model Law and the New York Convention, to serve as a facilitator for domestic and international arbitrations. The Centre secured funding from the Province of British Columbia as well as the Federal Government. It was hoped that the Centre would attract business from the Pacific Rim and beyond. This did not come to pass. This may be due, in part, to the significant competition posed by existing centres in Australia, China, Hong Kong, India, and Japan, and by those that were established soon after, in Bahrain, Singapore, and Vietnam.[133] When public financial support was discontinued in 1996, the British Columbia Centre added other alternate dispute resolution mechanisms to attract additional users and, consistent with a trend that had already developed at the Centre, turned its focus

[133] Ljiljana Biukovic, *Court Intervention in Arbitral Proceedings in Countries Adopting the UNCITRAL Model Law on International Commercial Arbitration: An Impact of Legal Culture on Reception (Case Studies of Canada, Hong Kong and Russia)* (PhD Dissertation, University of British Columbia, 2000) at 204.

to domestic arbitration.[134] In September 2020, the Centre's name was changed to the Vancouver International Arbitration Centre (VanIAC). The term "commercial" was dropped.

An arbitration centre was also established in Quebec City in 1986—the Canadian Commercial Arbitration Centre—but it, too, failed to attract significant international arbitration activity.[135] There are now several arbitration centres and chambers across Canada, with the focus generally on domestic rather than international commercial arbitrations.[136] Although COVID-19 may have served as a means to increase client lists for those adept at offering arbitration assistance through virtual platforms,[137] Canada has yet to establish itself as a venue of choice for international commercial arbitration.

A 2021 international arbitration survey identified the top five preferred arbitration seats as (in order of preference) London, Singapore, Hong Kong, Paris, and Geneva.[138] Other

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[134] *Ibid* at 203. Biukovic indicates that for the period 1986 to 1994, the Centre was involved in 28 international and 60 domestic arbitrations. The search engine Jus Mundi (jusmundi.com) lists only three reported international commercial arbitrations that took place at the Arbitration Centre in Vancouver: in 2004 (involving Canadian and US parties), in 2010 (involving Canadian and United Arab Emirates parties), and 2018 (involving two parties from the United States who agreed to arbitration in Canada).

[135] The Centre administered 134 arbitrations from 1988 to 1997, but the data do not distinguish between international and domestic arbitrations. *Ibid* at 203-204. The search engine Jus Mundi lists only one reported international commercial arbitration administered by the Centre, which took place in 1990.

[136] See Walker, *supra* note 36 at 6-7.

[137] For example, we understand this to be the case for Arbitration Place. "Welcome to Arbitration", online: *Arbitration Place* <www.https://www.arbitrationplace.com/>.

[138] Maria Fanou, "2021 International Arbitration Survey, Adapting arbitration to a changing world, School of International Arbitration" (2021) at 6–35, online (pdf): *Queen Mary University of London*

favourites include Beijing, New York, Shanghai, Stockholm, Dubai, Zurich, Vienna, Washington D.C., Miami, Shenzen, Sao Paolo, Frankfurt, and The Hague.[139] The top five arbitral institutions identified in the survey were (in order of preference) the International Chamber of Commerce, Singapore International Arbitration Centre, Hong Kong International Arbitration Centre, London Court of International Arbitration, and China International Economic and Trade Arbitration Commission.[140] Canada is not mentioned.

It is likely that the top ten venues and the favoured arbitral institutions will remain at the top for some time, given their established reputations. Nevertheless, the 2021 Survey pointed out that more than 90 different seats were mentioned in response to the question on seat preference[141] and concluded that this "shows that although the most popular seats enjoyed the lion's share of the votes, there is still significant scope for seats outside the top ranks to attract users."[142] Of course, it also shows that there is significant competition. Nevertheless, the 2021 survey also observed that "[s]everal seats outside the global top ten did make it to the top ten in the regions in which they are located" and opined that "[a]lthough it seems that the 'global powerhouse' seats will continue to be popular, there are many regional seats which are growing in reputation and

<www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> (The survey, in which more than 1,200 respondents participated, was conducted by Dr Maria Fanou, White & Case LLP post-doctoral research fellow at the School of International Arbitration, together with SIA's deputy director, Norah Gallagher. It consisted of an online questionnaire of 31 questions as well as video or telephone interviews. Interviewees were based in 39 countries and 53 cities across all continents except Antarctica. Seven percent of respondents were from North America, 24 percent from Europe, and 43 percent from Asia-Pacific).

[139] *Ibid* at 7.

[140] *Ibid* at 10.

[141] A list of the 90 seats was not provided.

[142] Fanou, *supra* note 138 at 8.

popularity."[143] The survey noted in particular the significant gains made by Singapore and Hong Kong as compared with previous surveys and concluded that "[t]he growth in popularity of seats in this region year-on-year may reflect an increasing willingness by parties with commercial interests linked to that locale to also resolve disputes 'locally'."[144]

VII. THREE SUGGESTIONS FOR POSITIONING CANADA AS A VENUE OF CHOICE FOR INTERNATIONAL COMMERCIAL ARBITRATION

There are many reasons to suggest that Canadian cities like Toronto, Montreal, and Vancouver should already be venues of choice for international commercial arbitration. First, many Canadian cities offer safe, well-organized, well-serviced, and visitor-friendly venues that are relatively inexpensive compared to London, Geneva, New York, Hong Kong, and Singapore, and they are readily accessible from international airports all over the world. Second, Canada is viewed very positively around the world for governance, immigration, and investment, for its quality of life, welcoming people, commitment to social justice, for not being corrupt, and for being open for business.[145] Third, Canadian venues can provide professional administrative, technical, logistical and other services to arbitrators in English and French and many Canadian lawyers practising in international commercial

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[143] *Ibid* at 7. For the Caribbean/Latin America region, the top two venues are Paris and New York but Beijing, Sao Paolo, Singapore, Miami, Lima, and Madrid made the top ten for that region.

[144] Fanou, *supra* note 138 at 7 (footnote omitted).

[145] The 2020 Anholt – Ipsos Nation Brands Index measured 50 nations via a survey conducted online in 20 countries during the period July - August 2020, see "Germany Retains Top "Nation Brand" Ranking, the UK and Canada Round Out the Top Three" (27 October 2020), online: *Ipsos* <www.ipsos.com/en-ca/news-polls/Germany-Retains-Top-Nation-Brand-Ranking-the-United-Kingdom-emerges-ahead-of-Canada-to-Round-Out-the-Top-Three-US-and-China-Experience-Significant-Decline>. See also "2021 Best Countries Report", online: *U.S. News & World Report* <www.usnews.com/news/best-countries>.

arbitration are trained in both the Common and Civil law traditions. Finally, Canada is among the most multicultural of countries and has a reputation as being very welcoming to those from abroad.[146]

Despite these attributes, Canadian cities have not attracted the international commercial arbitration traffic hoped for when Canada modernized its arbitration laws in 1986. The reasons are no doubt varied and ever-changing. While it is unrealistic to think Canadian cities will soon find a place among the top ten long-entrenched dominant venues, it is not unreasonable to think that at least one or two Canadian venues could increase their attractiveness significantly, provided certain circumstances were aligned and efforts were coordinated. We set forth below three suggestions that might assist in achieving this goal.

1. *Persuade the Canadian Government and Remaining Provinces and Territories to Adopt the 2006 Revisions to the UNCITRAL Model Law*

In 2006, UNCITRAL adopted revised articles of the Model Law to take account of evolving commercial practice and technological developments. For example, the modernized provisions address the form of an arbitration agreement, noting that the requirement that an arbitration agreement be in writing "is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference" and providing a definition for "electronic communication".[147] The revisions also include details regarding

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[146] A Gallup poll released in September 2020 puts Canada at the top as the most welcoming country in the world for immigrants. Iceland, New Zealand, Australia, Sierra Leone, and the United States round out the top six. The index is based on questions posed by Gallup in 140 countries in 2016 and 2017 and updated in 2019: see Neli Espinova, Julie Ray, & Dato Tsabutashvili, "Canada No. 1 for Migrants, U.S. in Sixth Place" (23 September 2020), online: *Gallup* <news.gallup.com/poll/320669/Canada-migrants-sixth-place.aspx>.

[147] *UNCITRAL Model Law, supra* note 12 at art 7(4), Option I.

the granting and enforcement of interim measures, in recognition of their increasing use in the practice of international commercial arbitration.[148]

In adopting the revised articles, the United Nations General Assembly recognized "the need for provisions in the Model Law to conform to current practices in international trade and modern means of contracting" and considered that the revised articles "reflecting those current practices will significantly enhance the operation of the Model Law". [149] Over thirty jurisdictions around the world have now implemented legislation based on the updated Model Law.[150]

Although Canada and all its provinces and territories were early adopters of the 1986 UNCITRAL Model Law, so far only Quebec, Ontario, and British Columbia have adopted modernized international commercial arbitration legislation reflecting the revised articles. Quebec incorporated the substance of the 2006 Model Law into the arbitration chapter of its new *Code of Civil Procedure*, which came into effect on January 1, 2016.[151] Ontario adopted legislation in 2017[152] and

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[148] *UNCITRAL Model Law, supra* note 12 at arts 17H, 17I, 17J.

[149] *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*, UNGA, 61st Sess, Supp No 49, UN Doc A/RES/61/33 (2006).

[150] UNCITRAL, "Status", *supra* note 16.

[151] Sheldon Gordon, "International Commercial Arbitration Harmony", *Lexpert Magazine* 19:1 (16 October 2017) 50 at 54, online: <www.lexpert.ca/archive/international-commercial-arbitration-harmony/351543>.

[152] *International Commercial Arbitration Act,* 2017, SO 2017, c 2, Sched 5. Much credit goes to John Gregory, former General Counsel in the Justice Policy Development Branch of the Ministry of the Attorney General in Ontario, for his tireless work in pushing through legislation in Ontario.

British Columbia did so in 2018.[153] The Alberta Law Reform Institute recommended in 2019 that Alberta modernize its international commercial arbitration legislation, but the province has yet to do so.[154] The Department of Justice has no current plans to implement the modernized articles in federal legislation, apparently preferring to wait until all provinces and territories have passed implementing legislation before taking legislative action.

It is difficult to understand why the remaining Canadian jurisdictions are lagging behind. The private sector recognized a decade ago that Canada and its provinces and territories should update their international commercial arbitration legislation, observing that this was "an important part of the infrastructure required to promote the use and development of arbitration in Canada and the choice of Canada as a seat of arbitration".[155] Several Canadian arbitral institutions asked the Uniform Law Conference of Canada (ULCC) to develop a modernized uniform international commercial arbitration act

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[153] *International Commercial Arbitration Act*, RSBC 1996, c 233.

[154] In recommending that new legislation be adopted, the Alberta Law Reform Institute stated that the Alberta Act "has fallen behind the advances that are being made internationally and in other provinces" and noted that by updating its legislation, Alberta "will catch up to those jurisdictions that have already implemented the changes." It also observed that "[u]niformity of international commercial arbitration is important to ensure consistency for foreign users … [and] will also ensure that Canada can remain competitive as a host jurisdiction for these types of arbitrations", Alberta Law Reform Institute, "Uniform International Commercial Arbitration: Final Report 114" (March 2019) at v, online (pdf): *Alberta Law Reform Institute* <www.alri.ualberta.ca/wp-content/uploads/2020/03/FR114.pdf>.

[155] Uniform Law Conference of Canada Working Group on Arbitration Legislation, "Discussion Paper: Towards a New Uniform *International Commercial Arbitration Act*" (January 2013) at 8, online (pdf): <wcart.files.wordpress.com/2014/05/2013-ulcc-discussion-paper-towards-a-new-uniform-international-commercial-a.pdf> [ULCC Discussion Paper].

that could be adopted by Canadian jurisdictions.[156] In 2014, the ULCC Working Group on Arbitration Legislation[157] completed English and French drafts of a New Uniform International Commercial Arbitration Act for consideration by Canadian jurisdictions. These drafts informed the updated Ontario and British Columbia legislation but have yet to inspire further legislation.

In addition to developing the new uniform legislation, the Working Group made several observations in its Reports about the impact of not updating Canadian arbitration legislation for Canadian businesses and Canadian arbitration practice. The Working Group noted that "Canada has been perceived as a leader in the area of international commercial arbitration law, jurisprudence, and practice, largely due to the solid legislative foundation … which has stimulated arbitration-related activity in Canada, facilitated cross-border business by Canadian enterprises, and generally enhanced Canada's reputation," [158] but noted that Canadian arbitration legislation had not kept pace with arbitration law and practice elsewhere.[159] It referred to "a general evolution in the level of sophistication of

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[156] As mentioned above, the ULCC developed the uniform act that served as a template for the implementation in Canada of the 1986 *UNCITRAL Model Law*, *supra* notes 19-20 and accompanying text.

[157] The Working Group was chaired by Gerald Ghikas and included 12 members from Alberta. British Columbia, Ontario, Quebec, and the federal Department of Justice. They were assisted by a 26-member Advisory Board with members from Alberta, British Columbia, Nova Scotia, Ontario, Quebec, France, and Switzerland.

[158] Uniform Law Conference of Canada Working Group on Arbitration Legislation, "International Commercial Arbitration: Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation" (March 2014) at 1, online (pdf): <www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/International-Commercial-Arbitration-Final-Report-and-Commentary.pdf> [ULCC Final Report].

[159] ULCC Discussion Paper, *supra* note 155 ("[t]here have been significant changes in international arbitration law and practice since the Canadian legislative framework was established" at 7).

arbitration legislation in other countries that compete with Canada for international arbitration business",[160] and stated that those jurisdictions "have modernized their arbitration legislation to reflect the evolution of arbitral practice and user expectations and to support their position as forward-thinking, arbitration-friendly jurisdictions."[161] The Working Group also reported that the private sector had pointed to "potentially problematic differences that have developed over the last 25 years among legislation in various Canadian jurisdictions" and concluded that it was "important to Canada's continued success in presenting itself to foreign users that as far as possible the provinces and territories implement international arbitration legislation that is uniform in both form and substance" because "a diversity of approaches among jurisdictions within Canada may deter foreign users".[162]

The ULCC has made a compelling case for updating the legislative framework governing international commercial arbitration across the Canada, both in terms of the legal and jurisprudential benefits but also, as the private sector has urged, because it will better position Canadian venues to attract international commercial arbitration business.[163] Hosting

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[160] ULCC Final Report, *supra* note 158 at 2.

[161] ULCC Discussion Paper, *supra* note 155 at 8.

[162] ULCC Final Report, *supra* note 158 at 2.

[163] When Ontario updated its legislation, arbitration practitioners R. Aaron Rubinoff and John Siwiec wrote that "[t]he adoption of the New ICAA brings Ontario further into step with advancements in international arbitration globally. The legislative amendments are positive and should make Ontario an even more attractive location for international arbitrations in the future.": see R Aaron Rubinoff & John Siwiec, "Bill 27 expected to become law," *The Lawyer's Daily*: LexisNexis Canada Inc (30 March 2017), online: <www.thelawyersdaily.ca/articles/3185/bill-27-expected-to-become-law>. Similarly, when British Columbia updated its legislation, arbitration practitioner Elizabeth Montpetit wrote that "British Columbia has aligned itself with modern national and international standards, thereby increasing its appeal and status as an arbitration-friendly jurisdiction.": see Elizabeth Monpetit, "British Columbia Amends and Modernizes International

international commercial arbitrations can be economically attractive for Canadian venues, and major cities in Canada would surely welcome this type of interest, especially following the economic downturns caused by COVID-19 lockdowns and restrictions.[164]

What is also clear from the federal and provincial governments' track record thus far is that they will not initiate such action on their own. They must be persuaded of the value and the need to do so. If arbitration practitioners and institutions aspire to enhance Canada's position as a venue for international commercial arbitration, they will need an action plan that can persuade governments to act. Such a plan would identify an overall strategy and timeline, identify relevant public officials to approach and how, and tailor messaging supported by relevant facts and appropriate data. To avoid multiple activities that may diffuse resources, starting with the federal government may be a good first step. Federal government adoption of updated legislation governing international commercial arbitration could provide leadership and spur other provinces, such as Alberta, which has an existing Law Reform Institute recommendation, to take similar action and not be left behind. Collaboration among arbitral institutions, bar associations, and business associations in this endeavour would significantly enhance the likelihood of success. There are organizations such as the Toronto Commercial Arbitration

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Commercial Arbitration Act", online: *ADR Institute of Canada* <adric.ca/british-columbia-amends-and-modernizes-international-commercial-arbitration-act/>.

[164] In 2012, the economic consulting firm Charles River Associates was commissioned to study the economic impact of arbitration in Toronto. It estimated that the approximately 425 arbitrations (international and domestic) that occurred annually in Toronto at that time contributed some $256.3 million to the economy of the City of Toronto in 2012, growing to $273.3 million in 2013. See "Arbitration in Toronto: An Economic Study" (2012) at 27, online (pdf): *Charles River Associates* <media.crai.com/wp-content/uploads/2020/09/16164749/Arbitration-in-Toronto-An-Economic-Study.pdf>.

Society ("TCAS") and the Western Canada Commercial Arbitration Society ("WCCAS") that seem well placed to take this on. Indeed, the TCAS recently published an extensive set of proposals for reform and modernization of Ontario's arbitration legislation and developed a single draft Act to replace the current *Commercial Arbitration Act* and the *International Commercial Arbitration Act*, consistent with its proposal to merge the domestic and international acts for commercial arbitrations.[165]

Firms with public policy practice groups composed of individuals with significant experience at senior levels of government could provide strategic advice on how best to work with government officials to achieve defined goals. Many such firms include individuals with significant experience as senior government officials, who understand how government works and how decision-making takes place.

2. Tap Government Experts and Canadian Arbitration Practitioners Abroad to Promote Canadian Venues

The Trade Commissioner Service at Global Affairs Canada helps Canadian businesses sell their services outside Canada by providing strategic advice on international business development and market intelligence. [166] It also provides funding for certain activities. The network of more than 1000 trade commissioners, located in over 160 cities around the world and with offices across Canada, have expertise in organizing delegations of foreign visitors to Canada as well as participation of Canadian entrepreneurs and businesses at trade shows and similar events abroad. This service could be tapped to assist with marketing Canadian cities as venues for

[165] See "Toronto Commercial Arbitration Society Arbitration Act Reform Committee, Final Report", February 12, 2021 online: <torontocommercialarbitrationsociety.com/arbitration-act-reform-committee/>.

[166] For more information about the Trade Commissioner Service, visit <tradecommissioner.gc.ca>.

hosting arbitrations. Trade commissioners could be requested to facilitate meetings with arbitration institutions to discuss the potential for collaboration, identify ways to showcase Canadian expertise and capacity to support arbitration involving foreign participants, and assist in making connections with foreign businesses active in Canada who want to understand how out-of-court dispute resolution works in Canada. Trade commissioners can also assist chambers of commerce and business councils to create marketing tools tailored to specific markets.

Individual Canadian institutions have already developed arrangements with institutions abroad[167] and some arbitration institutions from abroad have established centres in Canada.[168] These developments are important and more such activity is encouraged, such as with the Permanent Court of Arbitration in The Hague or the International Centre for the Settlement of Investment Disputes in Washington D.C. While individual arbitration institutions, bar associations, or business groups should continue carrying out their individualized marketing strategies at home and abroad, they could also act in concert with the experts in Canada's Trade Commissioner Service, as part of a broader Canadian partnership or coalition. The Canadian arbitration community should seek to take advantage of this valuable government resource.

Another valuable and untapped resource is the considerable cadre of Canadian international commercial arbitration practitioners located in law firms across the world, including in Paris, London, New York, Geneva, Hong Kong, Moscow, and

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[167] For example, Arbitration Place has signed Memoranda of Understanding with the International Chamber of Commerce (in 2013), the Beijing Arbitration Commission (in June 2019), and the Singapore International Arbitration Center (in April 2021). More information about Arbitration Place can be found at <www.arbitrationplace.com>.

[168] For example, the China International Economic and Trade Arbitration Commission ("CIETAC") established a centre in Vancouver in 2018.

Singapore. Obtaining their advice on how to enhance Canada as a venue of choice for international commercial arbitration would not only be highly instructive but could also encourage one or more of these law firms to think of Canadian venues when advising their arbitration clients or arbitrator colleagues about reliable venues. A survey of these practitioners would be a low-cost way of obtaining useful input and guidance, and may provide some publicity for Canadian institutions and practitioners as an added benefit.

3. Focused Marketing of and Identifiable Canadian Brand

As noted, the 2021 International Arbitration Survey reported that more than 90 venues were mentioned in responses to the question about seat preference, and that the same few places (London, Singapore, Hong Kong, Paris and Geneva) continue to occupy the top spots year after year. Canadian venues cannot expect to challenge that dominance in the near future. However, there is no reason (other than abundant competition) for Canadian venues not to attract more arbitration business than they do. Indeed, one centre, Arbitration Place in Toronto, has already made considerable progress in securing an international reputation.[169] Further progress could be usefully made by focusing marketing efforts in certain jurisdictions, at least initially. For example, the fact that Canada's chief trading partner is the United States means that Canadian businesses are more likely to be engaging in commercial transactions involving US companies. It may be useful to target marketing efforts to business and bar associations in US jurisdictions.

Moreover, efforts to have Canadian venues chosen more often might be enhanced through the development and marketing of an identifiable Canadian brand. We do not presume here to suggest precisely what that brand should be,

[169] See Walker, *supra* note 36 ("Arbitration Place … is ranked among the leading ten hearing centres in the world, hosting many large international commercial and investment treaty arbitrations …" at 6).

but it should logically contain elements aimed at ensuring that Canadian venues stand out as different from—and better than—those in the US and Latin America.

The following elements might be considered:

- accessibility: freedom from unreasonable constraints on entry and exit for parties, witnesses, and counsel;
- safety: of participants, documents, and information, including robust cybersecurity protections;
- proven expertise in administrative/logistical support for virtual and in-person hearings, with state-of-the-art IT support for sharing and encryption of data;
- expertise in Civil and Common Law traditions;
- support for arbitration from the judiciary, without undue interference in the arbitral process;
- government policies that align with efforts to achieve gender and racial diversity on arbitration panels.

VIII. CONCLUSION

Thirty-five years ago, Canada ushered in a modern era of international commercial arbitration, moving overnight from a regime governed by outdated and inapt 19th century legislation to a state-of-the art commercial arbitration code that had been developed by and was acceptable to the international legal and commercial community. Canada and its provinces and territories were the first jurisdictions in the world to enact legislation incorporating the UNCITRAL Model Law on International Commercial Arbitration. At the same time, Canadian jurisdictions implemented the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, albeit 25 years late, ensuring the recognition by Canadian courts of foreign arbitral awards except in very limited circumstances.

These legislative changes sparked a marked change in Canadian courts' attitude to arbitration as an alternative form of dispute resolution. Prior to 1986, ouster of the courts' jurisdiction in favour of an arbitration clause was looked upon with hostility and even considered contrary to public policy. Following implementation of the Model Law, the courts actively supported the arbitration process rather than interfering with it. This attitude prevails across Canada today, albeit with nuances, some of them specific to Canada and some more broadly recognized. Thus, those who include arbitration clauses in their commercial contracts can be confident that Canadian courts will require them to honour their commitment to refer their disputes to arbitration, and will provide support to ensure the effectiveness of the arbitral process they have chosen. The Supreme Court of Canada decisions during the last 15 years, which reveals that systematic referral to arbitration will not necessarily occur in specific circumstances (namely, where there is a legislative override, the arbitration clause is unconscionable, or when the challenge to arbitration is a matter of pure law or mixed law and fact that can be determined with only a superficial examination of the record), does not in our view signal a dangerous waning of Canadian courts' support for arbitration. On the contrary, the Supreme Court has arguably strengthened the legitimacy of arbitration clauses in Canada in that its limited judicial oversight has ensured against a blind application of arbitration clauses in any and all circumstances, even when it would be manifestly wrong to do so.

In contrast to the developments in the case law, commercial arbitration legislation in Canada generally has not kept pace with evolving practice. Despite displaying leadership in implementing the 1985 UNCITRAL Model Law, most Canadian jurisdictions have fallen far behind the international community in failing to update their legislation to reflect the Model Law's 2006 amendments, which incorporate modernized arbitration practices including electronic communications and the granting and enforcement of interim measures. Quebec, Ontario, and British Columbia, constituting 75% of the population of Canada, have updated their legislation; meanwhile, the federal

government, the other provinces, and the Territories have not displayed any intention of doing so. This apparent lack of interest is puzzling, especially from the federal government, whose leadership was lauded when Canada's international arbitration regime was modernized in 1986. Lack of interest from other provinces and the territories is perhaps less surprising, given that cooperative legislative exercises in the field of international private law have been few and far between, and almost non-existent where unanimity is required.

The private sector has emphasized the importance of having up-to-date legislation in place across Canada, both to promote the use and development of international commercial arbitration within Canada and to enhance opportunities for Canadian venues to serve as hosts for international commercial arbitrations. Their voices, if heard, have fallen on barren ground. In our view, the chances of success in persuading governments of the value—and indeed the need—to act could be significantly enhanced by a planned, targeted, and collaborative approach on the part of arbitral institutions, bar associations, and business associations. Fortunately, the detailed legal work has already been done: the ULCC has undertaken the policy research and development and has crafted a model law that can be easily implemented across the country, outside Quebec, which is already onside through amendments to its Code of Civil Procedure. In addition, the TCAS recently developed draft legislation to modernize Ontario's arbitration legislation.

Finally, although Canadian cities may never displace the top choices of London, Singapore, Hong Kong, Paris, and Geneva, we recommend tapping the resources available in Canada's Trade Commissioner Service as well as the Canadian expatriate arbitration community to market Canadian venues as ideal hosts for international commercial arbitrations. It should not be a tough sell: Canadian venues offer safe, open, well-serviced, and relatively inexpensive alternatives to the "top five".

Canada has made remarkable strides in international commercial arbitration during the last 35 years. The courts have developed a solid body of law supporting international commercial arbitration. There is an ever-expanding community of leading practitioners and academics. Canada is home to several of the world's leading international commercial arbitrators. Under the circumstances, simply maintaining the status quo and leaving the legislative landscape in patchwork form is a spectacularly unambitious, even negligent, approach. The better course, in our view, would be for Canada's arbitration community to take advantage of the talent, expertise, and resources available and engage in efforts to promote Canada as an arbitration-friendly jurisdiction and an ideal venue to host international commercial arbitrations.

CANADA: LEGISLATION TO IMPLEMENT THE UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AND LEGISLATION ON INTERNATIONAL COMMERCIAL ARBITRATION*

(1958 New York Convention)

[Assented to June 17, 1986; entered in force August 10, 1986]
+Cite as 26 I.L.M. 714 (1987)+

Introductory Note
by
Marcus L. Jewett

In a remarkable joint legislative exercise, the Parliament of Canada and all provincial and territorial governments in Canada have recently enacted a substantial volume of legislation relating to international commercial arbitration. Nearly all jurisdictions have enacted a Uniform Act prepared by the Uniform Law Conference of Canada (U.L.C.) which incorporates the Model Law on International Commercial Arbitration approved by the United Nations Commission on International Trade Law (UNCITRAL) in June 1985 [24 I.L.M. 1302 (1985)]. These are the first enactments of the UNCITRAL Model Law, a modern arbitral code representing a consensus of views from the international community, particularly on limiting the role of courts to matters of jurisdiction and procedural fairness.

Either through enacting this Uniform Act, or in adopting earlier U.L.C. legislation, all jurisdictions in Canada have also now legislated to implement the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention), T.I.A.S. No. 6997 [7 I.L.M. 1042 (1968)]. In so doing, Canada became the 70th country and the last, or nearly last, industrialized country to do so.

Why was Canada so early to enact modern legislation for internatinal commercial arbitration and so slow to implement the New York Convention? As to the speed with which the UNCITRAL Model Law was adopted, constitutional aspects were not significant, and the timing coincided with the legislative implementation of the New York Convention. As to that Convention, on the other hand, apart from speculation about traditional hostility of the courts to arbitration and its consequent state of disuse in the domestic law of the provinces (none of which had progressed beyond the unamended English Arbitration Act of 1889), the principal reason for inaction may be traced to Canada's status as a federal State, with a constitutional structure that does not expressly provide which level of government may implement treaties. Uncertainty flowing from this, and the lack of an adequate federal State clause in the New York Convention and other older international private law

*[The Introductory Note was prepared for International Legal Materials by Marcus L. Jewett, Q.C., Debevoise & Plimpton, New York, formerly General Counsel, Constitutional & International Law, Department of Justice, Canada.

[The legislation is reproduced from The Canada Gazette, Vol. 9, No. 4, Part III (September 19, 1986), Statutes of Canada, 1986, c.21, United Nations Foreign Arbitral Awards Convention Act, and c.22, Commercial Arbitration Act, pp. 811-35.]

conventions, impelled the enactment of legislation by all levels of government to ensure effective implementation. For a discussion, see generally Leal, Federal State Clauses and the Conventions of the Hague Conference on Private International Law, 8 Dalhousie L.J. 257 (1984), and Burmester, Federal State Clauses: An Australian Perspective, 34 Int'l & Comp. L.Q. 522 (1985). The practical problems in obtaining such unanimity of action are illustrated in the fact that only once previously had Canada implemented a private convention calling for such unanimous legislative action, the 1949 Geneva Convention on Road Traffic, T.I.A.S. No. 2487, which did not come into force for Canada until 1966.

Canada's constitutional position may be summarily stated. The opinion of the Privy Council in the Labour Conventions Case, [1937] A.C. 326, has been regarded as deciding that the competence to implement treaties is not assigned to either federal or provincial governments, but depends on the classification of the subject without regard to the fact that an international obligation is being implemented. The power to implement treaties given to the federal government under s. 133 of the British North America Act, 1867 (now the Constitution Act, 1867) was found not to have survived the attainment of independence by Canada in the period following the end of the First World War. Since the abolition of appeals to the Privy Council in 1949 this view has been much criticized but no subsequent judicial pronouncement by the Supreme Court of Canada has expressly overruled it. See Hogg, Constitutional Law of Canada (2nd ed. 1985), pp. 250-256. In the United States, compare Missouri v. Holland, 252 U.S. 416 (1920), and the Bricker Amendment, discussed in L. Henkin, Foreign Affairs and the Constitution (1972), ch.5, and in Australia, compare the Franklin Dam case, Commonwealth v. Tasmania (1983), 46 A.L.R. 625.

Under the Labour Conventions Case, then, Canada is left in an anomalous and uniquely difficult position with respect to implementing international conventions in the private law area, where legislative jurisdiction ordinarily falls to the provinces. Since the 1970's, however, the ratification by Canada of international instruments has been substantially aided by the use of a federal State clause, the "territorial units" clause, enabling a federal State like Canada to ratify conventions on a province-by-province basis. Such a clause is now included in all conventions approved under the auspices of the principal non-regional organizations active in international private law - UNCITRAL, the Hague Conference on Private International Law and Unidroit (the International Institute for the Unification of Private Law). In 1983, using this federal State clause, Canada became the third State to ratify the Hague Conference Convention on the Civil Aspects of Child Abduction, [19 I.L.M. 1501 (1980)]. Beginning with 5 provinces, all 10 provinces have now enacted enabling legislation. A federal State clause is also sought in bilateral agreements: see the Canada-U.K. Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters (1984), implemented by 1984 Can. Stat., ch.32, in force Jan. 1, 1987.

The arbitration legislation enacted in Canada in 1986 flows from a 1984 federal government initiative, taken in recognition of the importance of the New York Convention in facilitating dispute settlement in international commercial transactions. The process was subsequently aided very substantially by the British Columbia Government's decision to establish an International Commercial Arbitration Centre in Vancouver. Few persons would rationally choose to arbitrate an international commercial matter in Canada if it were not party to the New York Convention, an important aid in enforcing any awards rendered, and if there were no satisfactory legislation to facilitate the conduct of arbitrations. With the cooperation of the Uniform Law Conference, Uniform Acts to implement the New York Convention and the UNCITRAL Model Law were prepared and approved. Canada's ratification was deposited on May 12, 1986, to coincide with the opening of the British Columbia Centre.

All the Canadian legislation is patterned on the UNCITRAL Model Law, with the federal legislation and the U.L.C. Uniform Act following it most closely. There are a few significant additions. The Uniform Act and the British Columbia Act provide for consolidation of proceedings, wider discretion of arbitrators as to choice of substantive law, conciliation and mediation. Quebec's legislation follows the Model Law in spirit (and largely in substance), and applies to domestic as well as international arbitration. The federal Act incorporates the Model Law but deletes the definition of "international" since it is not confined in its scope to international arbitration.

The citations to the provincial Model Law legislation are as follows: British Columbia, 1986 B.C. Stat., ch.14; Alberta, 1986 Alta. Stat., ch.I-6.6; Manitoba, 1986 Man. Stat., ch.32; Ontario, Bill 139 (1st Reading, 21 Oct. 1986, not yet enacted); Quebec, 1986 Que. Stat., ch.73; New Brunswick, 1986 N.B. Stat., ch.I-12.2; Nova Scotia, 1986 N.S. Stat., ch.12; Prince Edward Island, 1986 P.E.I. Stat., ch.14; Newfoundland, 1986 Nfld. Stat., ch.45; Northwest Territories, 1986(1) N.W.T. Ord., ch.6. The two remaining jurisdictions are Saskatchewan and the Yukon Territory, which have enacted legislation to give effect to the New York Convention (1986 Sask. Stat., ch.E-911 and 1986 Yuk. Ord., ch.4, respectively), and are now considering legislation adopting the UNCITRAL Model Law. See also 2 H. Smit & V. Techota, World Arbitration Reporter 1143 (1986).

Two features of the Canadian legislation may be noted, one concerning the Reciprocity Declaration permitted by the New York Convention, the other being the interpretation clause in the Commercial Arbitration Act.

Reciprocity

Article 1, para. 3 of the New York Convention permits any State on the basis of reciprocity to "declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State." Although many

States, including the United States, have made the Reciprocity Declaration, Canada (with the present exception of Saskatchewan) does not so limit the application of the Convention. Although it might, on first impression, seem unfair to permit enforcement of an arbitral award in Canada against a Canadian in circumstances in which the Canadian would not have recourse to similar rules to facilitate enforcement of an award against another party in another State, a reciprocity declaration does not in fact ensure protection from such a disadvantage. This is because under the Convention the only criterion for granting reciprocity is that the award was made in a Contracting State. The place where the award is made is not necessarily the same as - and in international commercial arbitration usually is not - the place where the parties to the arbitration carry on business or have assets. In any event, since most arbitrations occur in Contracting States to the New York Convention, the scope of the reciprocity protection is consequently very narrow in practice.

Considerations of sovereignty, while relevant to the recognition of judicial decisions - as evidenced in international enforcement treaties about family law matters, civil and commercial judgments, and elsewhere - were found not to be significant in the context of international commercial arbitration, essentially a private matter between private parties and operating on consent. Concerns about fair procedure or the substance of the award are met by Article V of the Convention (also in Article 36 of the Model Law), which provides that recognition or enforcement of awards may be refused for a number of reasons, including that the award was unfairly procured or that recognition or enforcement of the award would be contrary to public policy.

Interpretation Clause

Although the Model Law is not a treaty, it does have an international character. Section 4 of the Commercial Arbitration Act is intended to emphasize that fact and promote a uniform interpretation of this international legal text. Subsection 4(1) is taken from the Vienna Convention on the Law of Treaties, [8 I.L.M. 679 (1969)]. Subsection 4(2) expressly authorizes reference to the two principal documents in the travaux preparatoires of the UNCITRAL Model Law. Reference to such reports, which are published in the Canada Gazette so as to be widely available, is innovative in Canadian legislation. Canadian courts, in conformity with British common law tradition, have only rarely referred to reports in interpreting legislation. Such reports are not binding but simply assist in interpretation. For a similar approach, see section 3 of the British Civil Jurisdiction and Judgments Act 1982, ch.27, which implements the Brussels Convention (Convention of September 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commerical Matters) [8 I.L.M. 229 (1969)].