DOMESTIC COMMERCIAL ARBITRATION REFORM IN CANADA: LESSONS FROM DOWN UNDER

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I. DOMESTIC ARBITRATION IN CANADA AT A CROSSROADS

Canada is a country of extraordinary potential in the field of commercial dispute resolution. Its increasingly multicultural and multilingual legal profession and judiciary are among the most highly qualified and respected in the world. Yet, for such a strong legal community, its development of the field of commercial arbitration began relatively late in comparison with the major centres in Europe and the United States. With fewer entrenched practices and conventions, the Canadian arbitration community is freer to adopt state-of-the-art legislation and soft law in the field and perhaps even to lead the way with new innovations. There is room to grow in the collective knowledge and experience of the field.

In 1986, Canada was the first jurisdiction to adopt the 1985 UNCITRAL Model Law on International Commercial Arbitration and, as one province after another enacted implementing statutes over the next few years, the Model Law replaced the antiquated legislation derived from the English Acts. With this new standardized legislation, Canadian practitioners in the field of international commercial dispute resolution gained familiarity with the legislation that has been adopted in many of the countries in which they might find their arbitrations seated. In learning to practice international commercial arbitration in Canada, they were learning the legal *lingua franca* of arbitration.

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Unlike some other countries, the Canadian provinces did not, at that time, make the Model Law applicable to domestic arbitration, nor did they revise their domestic legislation, which governed both commercial and non-commercial arbitration. However, as the experience of arbitration has increased, so has the recognition that commercial arbitration in Canada has much more in common with international commercial arbitration than it does with domestic arbitration of non-commercial disputes such as labour and family disputes. Legislative reform initiatives to establish specialized regimes based on the Model Law for commercial matters are now underway in Ontario[1] and such regimes are in place elsewhere in Canada.[2] This article considers the experience in Australia with reforming its domestic commercial arbitration law; and it suggests ways that Canada might learn from the experience of a similar legal community.

II. ADOPTING THE MODEL LAW IN AUSTRALIA FOR DOMESTIC COMMERCIAL DISPUTES

The Model Law was adopted in 2010 as the framework for domestic commercial arbitration across Australia.[3] This was the culmination of decades of legislative reform in which each new Act had been based largely on developments in the English legislation.[4] For example, the NSW 1902 *Arbitration Act* and those of other states and territories were based on the UK

[1] See Toronto Commercial Arbitration Society, "Arbitration Act Reform Committee Report" (12 February 2021), online (pdf): *Toronto Commercial Arbitration Society* <https://torontocommercialarbitrationsociety.com/wp-content/uploads/2021/03/AARC-Final-Report-12-Feb-21.pdf>.

[2] See *Arbitration Act,* SBC 2020, c 2.

[3] See *Commercial Arbitration Bill 2010* (Cth), 61/2010.

[4] See Hilary Astor & Christine Chinkin, *Dispute Resolution in Australia*, 2nd ed (Sydney, Australia: LexisNexis Butterworths, 2002) at 11 (tracing the history of arbitration in Australia to Indigenous dispute resolution practices).

Arbitration Act 1889,[5] and they remained largely unamended for nearly a century.[6] Reforms that were enacted during this time also followed developments in the English arbitration legislation.

Throughout the 20th century, arbitral practice in Australia varied from jurisdiction to jurisdiction, with each state and territory having its own, separate Act. This lack of uniformity prompted a series of reforms that ultimately led to the enactment of uniform statutes in several States between 1984 and 1990.[7] While this legislation was itself ultimately superseded, it confirmed Australia's commitment to legislating for commercial arbitration separately from arbitration in non-commercial fields such as labour law. It also confirmed the commitment to a unified statute applicable throughout Australia.

Despite these achievements, it gradually became clear that these uniform statutes needed further reform. Although the Acts sought to promote "economy, celerity and finality",[8] the provisions of the legislative regime enabled undue judicial intervention and departed from international best practice in

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[5] *Arbitration Act 1958* (Vic); *Arbitration Act 1935* (SA); *Arbitration Act 1892* (Tas); *Arbitration Act 1970* (WA). Queensland retained the *Interdict Act 1867* (Qld), modelled on England's 1698 legislation (as amended by the 1833 and 1854 legislation until enacting the *Arbitration Act 1973* (Qld), adopting the *Arbitration Act 1950* (UK).

[6] See Austl, Commonwealth, Law Reform Commission of the Australian Capital Territory, *Report on the Law Relating to Commercial Arbitration*, Parl Paper No 23 (1974) at 2.

[7] *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1990* (Qld); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1986* (ACT).

[8] *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* (1972) 127 CLR 253 at 257 per Barwick CJ.

various ways.[9] The Standing Committee of Attorneys-General (SCAG) determined that a new domestic arbitration Act should strike out on a fresh course, departing from the previous practice of following the English legislation.[10]

Unlike Canada, law reform in Australian benefits from the work of the SCAG, which is comprised of the Attorneys-General from the Australian Government, all states and territories, and the New Zealand Minister for Justice. Although it has a similar function to a law reform commission, it is embedded in government, giving it the benefit of more direct engagement with the legislative process and agenda. Pursuant to recommendations of the SCAG, in 2010, the Australian States, began adopting a uniform Commercial Arbitration Act based on the 2006 version of the UNCITRAL Model Law.[11]

III. ADAPTING THE MODEL LAW FOR DOMESTIC COMMERCIAL ARBITRATION

Of particular interest for law reform initiatives in Canada are the ways Australia adapted the Model Law to regulate domestic commercial arbitrations.

1. Necessary adaptations and supplementary provisions

Several adaptations were needed to meet the logistical requirements of domestic arbitration. For example, definitions

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[9] See Hon J Spigelman AC, "Opening of Law Term Dinner 2009" (2 February 2009), online (pdf): The Law Society of NSW <http://classic.austlii.edu.au/au/journals/NSWBarAssocNews/2009/16.pdf>.

[10] See Parliament of Australia, "Standing Committee of Attorneys-General Communique (7 May 2010), online (pdf): <https://perma.cc/6UDU-9JWE>.

[11] *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2017* (ACT) (collectively "CAAs").

were provided to clarify relevant provisions of the operation of the Model Law in the domestic context.[12] Further, the provision in the Model Law for identifying which court at the seat is competent to perform the functions designated by the Model Law was completed to designate Australia's counterparts to the provincial superior courts in Canada, and to permit the parties to agree that a lower court may also have jurisdiction.[13] The legislation also removes the nationality requirement for arbitrators appointed by the court. While many tribunals are constituted by the parties in accordance with the arbitration agreement, when there is need to resort to an appointing authority, the question of an arbitrator's qualifications becomes relevant.

In international arbitrations, the nationality of arbitrators—especially sole and presiding arbitrators who have not been appointed by the parties—may be of significance. Arbitrators of a nationality other than the parties' may be less familiar with the governing law, the language of the proceedings, and the way contracts are typically interpreted or performed in the parties' home countries. These factors may be seen as affecting the understanding an arbitrator may have for the parties' positions. Where an arbitrator shares the nationality of one party and not the other, this may seem to create a risk that the parties will not be treated with equality. Accordingly, in addition to other concerns about the arbitrators' qualifications, the Model Law provides that "in the case of a sole or third arbitrator, [the appointing authority] shall take into account as well the advisability of appointing an arbitrator of a nationality other

[12] CAAs, *supra* note 11. The CAAs amend the definition for 'arbitration' and introduce definitions for the following terms not defined in the Model Law: 'arbitration agreement,' 'confidential information,' 'Disclose,' 'domestic commercial arbitration,' 'exercise,' 'function,' 'interim measure,' 'party,' and, 'the Court.'

[13] See *Commercial Arbitration Act 2010*, 2010/61, s 6 [*Commercial Arbitration Act*].

than those of the parties."[14] No such concern is likely to arise in a domestic case and, accordingly, a provision for the nationality of the sole or third arbitrator appointed by the court was omitted.

The legislation also contains a number of provisions for court support of arbitration, such as those for applications to issue subpoenas,[15] and those for a court to make orders requiring a defaulting party to attend in court, to produce relevant documents, or otherwise to comply with the tribunal's orders.[16] The legislation also supplements the Model Law with provisions relating to consolidation,[17] arb-med,[18] and costs and interest.[19]

2. The standard of fairness

A critical mandatory, or "non-derogable," feature of the Model Law is the requirement that the parties must be treated with equality and that each party must be given a full opportunity to present its case. It is important to have a standard of fairness (or due process) in a procedure that encourages party autonomy and enhance efficiency. However, the experience in many countries with the "full opportunity" standard shows that it may be set too high, in that it can become a basis for parties to resist appropriate measures to advance the arbitration in cost-effective manner.

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[14] *UNCITRAL Model Law on International Commercial Arbitration*, UNCITRAL, Annex 1, UN Doc A/40/17 (1985), with amendments as adopted in 2006 (7 July 2006), art 11(5) [*Model Law*].

[15] *Commercial Arbitration Act*, *supra* note 13 at s 27A.

[16] *Ibid* at s 27B.

[17] *Ibid* at s 27C.

[18] *Ibid* at s 27D.

[19] *Ibid* at s 33B—F.

Accordingly, the drafters of the Australian legislation adopted the approach taken in the English *Arbitration Act* of requiring that the parties be given a *reasonable* opportunity to present their cases. Although the change from "full" to "reasonable" opportunity might appear to depart from that in the Model Law, it reflects the sense of the official Analytical Commentary on the Model Law, which observes that the provision "does not entitle a party to obstruct the proceedings by dilatory tactics and, for example, present any objections, amendments, or evidence only on the eve of the award."[20] The "reasonable opportunity" standard also reflects the interpretation given to the "full opportunity" standard in many jurisdictions.[21] In this way, this adjustment to the text of the Model Law is probably better understood as a clarification rather than an amendment.

3. Default number of arbitrators

A further provision dictated by the domestic arbitration context—one that represents a genuine departure from the Model Law—is the provision for the default number of arbitrators.

Most arbitral tribunals consist of one or three arbitrators. The cost and administrative burden of conducting an arbitration with a tribunal of three arbitrators is greater than with a tribunal of one, but parties may prefer a three-member tribunal for a variety of reasons. In principle, it is assumed that, subject to the parties choosing otherwise for their own particular reasons, a tribunal of three is preferable in contracts likely to give rise to larger and more complex arbitrations, while a sole

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[20] *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration,* 18th sess, UN Doc A/CN.9/264 (3-21 Jun 1985) Art 18, para 8.

[21] Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (February 1996) paras 164—165; See also *Corporacion Transnacional de Inversiones, SA de CV et al v STET International,* SpA (2000), 49 OR (3d) 414, [2000] OJ No 3408 (Ont CA).

arbitrator is preferable in contracts likely to give rise to smaller and more straightforward arbitrations.

Where the parties have not agreed on the number of arbitrators, the question must be resolved before a tribunal can be constituted. The Model Law addresses this impediment by providing for a default number of three arbitrators.[22] In international arbitrations, with the greater likelihood of a need to interpret and apply multiple laws and standards, a three-person tribunal is suitable as a default. In addition, international arbitrations often involve parties, witnesses, experts and counsel from different language and legal traditions, making it helpful to have some tribunal members who are familiar with these languages and legal systems. This is particularly true where a relevant language or legal system is different from that of the designated seat or language of the arbitration.

These considerations arise less often in domestic arbitrations. Accordingly, where the size and complexity of a domestic arbitration do not otherwise warrant the constitution of a three-person tribunal, a sole arbitrator is likely to be more suitable. Therefore, the CAAs provide that unless the parties agree otherwise, the number of arbitrators is to be one.[23] This approach has also been taken in Singapore[24] and England.[25]

4. The duties of the Tribunal and the parties

Litigation lawyers in North America and elsewhere in the common law world will be familiar with provisions in civil procedure rules that guide the interpretation and application of the rules. For example, in the Ontario *Rules of Civil Procedure*,

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[22] *Model Law, supra* note 14 at art 10.

[23] *Commercial Arbitration Act*, supra note 13 at s 10.

[24] *Arbitration Act* Cap 10, 2002 Ed (Singapore), s 12(2).

[25] *Arbitration Act 1996* (UK), s 15(3).

Rule 1.04(1) provides that "[T]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits"; and Rule 1.04(1.1) adds that "[i]n applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding."[26] Although these rules are rarely invoked in litigation, provisions for interpretive guidance, such as these, can encourage an appropriate interpretation and application of the rules by the parties, and they can empower the tribunal to act decisively in furtherance of the objectives identified.

Beyond the interpretive guidance found in Art 2A of the Model Law, which is discussed below, there is no provision comparable to Rule 1.04(1.1) in the Model Law for the conduct of the arbitration. Provisions such as this are usually found in institutional rules and soft law instruments. For example, the LCIA Rules[27] provide

> 14.1 Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include:
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> (i) a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s); and
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> (ii) **a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient**

[26] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 1.04(1).

[27] London Court of International Arbitration, *Arbitration Rules*, effective 1 October 2020, r 14.

> **and expeditious means for the final resolution of the parties' dispute.**
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> 14.2 ***The Arbitral Tribunal shall have the widest discretion to discharge these general duties***, subject to the mandatory provisions of any applicable law or any rules of law the Arbitral Tribunal may decide to be applicable; and at all times ***the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duty***.
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> … (emphasis added)

Like the LCIA Rules, which often apply in cases involving counsel practising in the same jurisdiction, the CAAs frequently operate in ad hoc matters involving counsel accustomed to the same local rules, who may tend to default to the less efficient local court practices. Accordingly, there was thought to be a need for the legislation to empower tribunals to encourage the parties to proceed with greater expedition. Stipulating the adoption of efficient procedures as a duty of the tribunal that the parties must support can have a subtle but profound effect on the arbitral process. It encourages all the participants in the arbitration to adhere to practices that support efficiency in the arbitral process.

Accordingly, the drafters of the CAAs included a provision identifying a paramount object and setting out the role of the tribunal in achieving that object:

> 1C (1) The paramount object of this Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.

> (2) This Act aims to achieve its paramount object by:
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> (a) enabling parties to agree about how their commercial disputes are to be resolved (subject to subsection (3) and such safeguards as are necessary in the public interest), and
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> (b) providing arbitration procedures that enable commercial disputes to be resolved in a cost-effective manner, informally and quickly.[28]
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> (3) This Act must be interpreted, and the functions of an arbitral tribunal must be exercised, so that (as far as practicable) the paramount object of this Act is achieved.

As in the LCIA Rules, the approach in the CAAs is further supported by a provision imposing analogous duties upon the parties:

> 24B (1) The parties must do all things necessary for the proper and expeditious conduct of the arbitral proceedings.
>
> (2) Without limitation, the parties must:
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> (a) comply without undue delay with any order or direction of the arbitral tribunal with respect to any procedural, evidentiary or other matter, and
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> (b) take without undue delay any necessary steps to obtain a decision (if required) of the Court with respect to any

[28] *Commercial Arbitration Act*, *supra* note 13 at s 1C.

> function conferred on the Court under section 6.
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> (3) A party must not willfully do or cause to be done any act to delay or prevent an award being made.[29]

This encourages parties to engage fully in the development of the process and to support arbitrators in resolving disputes over the procedure of the arbitration and in fashioning appropriate procedures that enhance efficiency. In most arbitrations, the subtle interplay between the authority of the tribunal and party autonomy is achieved more through moral suasion than through the coercive exercise of the tribunal's powers. The bare provisions of the Model law that appear to bind a tribunal to the agreed position of the parties and to permit it to exercise discretion only where the parties have not agreed, may not assist a tribunal in guiding the parties to more effective and efficient procedures.

In contrast, provisions that give the tribunal powers and responsibilities, and that establish correlative responsibilities for the parties, transform party dictates on the procedure into *proposals* for discussion, and give the tribunal confidence that the directions and orders that it issues will be followed. These provisions promote the engagement of arbitrators and parties in a collaborative effort to conduct the arbitration efficiently. As mentioned, this is particularly important in domestic cases, which often proceed without institutional rules containing provisions like those in the LCIA Rules quoted above.

5. Appeals on a question of law

The most contentious of issues for the reform of domestic commercial arbitration are probably those of whether there

[29] *Commercial Arbitration Act*, *supra* note 13 at s 24B.

should be appeals on a question of law. On the one hand, arbitration is prized for its finality, and the parties' freedom to choose to resolve their disputes outside the confines of the courts. Review of the merits of the award by a court could undermine this choice. Finally, where the parties have chosen their decision-maker, particularly where the tribunal is comprised of three arbitrators, it seems inappropriate to have the merits of the dispute revisited by a first instance judge who has been assigned randomly to the matter.

Nevertheless, appeals on a question of law have been included in the various arbitration acts modelled on the English legislation, raising the question of the historic role of appeals. Two points of context are worth noting. First, where the legislation also provides for the arbitration of non-commercial matters, this will include matters involving statutory and other legal rights that reflect important social policies. Societies are unlikely to accept that a private dispute resolution system supported by legislation and the courts would permit parties to depart from the application of these policies in deciding the dispute without the possibility of review by the courts. This concern, however, is less pressing where the arbitration legislation is limited to commercial matters.

Secondly, the English provisions for review on a question of law have a very different history and application from those in the legislation of Australia or Canada. The position of London, historically, as an international dispute resolution venue of unique significance is said to have grown from the application of English commercial law around the world.[30] Accordingly, ensuring that the jurisprudence continues to develop through the caselaw, and ensuring that it is applied correctly by arbitrators, has been essential. Furthermore, in maritime

[30] Lord Justice Gross, "A Good Forum to Shop in: London and English Law Post-Brexit" (Speech delivered at the 35th Annual Donald O'May Maritime Law Lecture, 1 November 2017), online (pdf): *Judiciary of England and Wales* <https://www.judiciary.gov.uk/wp-content/uploads/2017/11/gross-lj-omay-maritime-law-lecture-20171102.pdf> [Gross].

disputes, a field in which the annual caseload of the LMAA outpaces that of the major international institutions combined,[31] the law goes hand-in-hand with the standard insurance forms. This symbiotic relationship[32] between arbitral tribunals and courts was once enshrined in the "case stated" procedure, by which arbitrators could ask the courts for a determination on a point of law as it applied to a specified set of facts.[33] This may now be history, but its function has survived in the English *Arbitration Act 1996*, section 69 provision for appeal on a question of law.[34] These considerations have less significance for domestic commercial arbitration in Australia or Canada.

In the Australian legislative reforms, various means were considered for retaining appeals but constraining their availability. Following two decades of debate, the CAAs now contain narrow arrangements for appeals on a question of law:

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[31] Sofia Syreloglou et al, "The UK Maritime Sectors Beyond Brexit", (2017) at 14–18, online (pdf): *University of Southampton* <https://perma.cc/974P-6W7F>.

[32] Gross, *supra* note 30.

[33] Lord Hacking, "The 'Stated Case' Abolished: The United Kingdom Arbitration Act of 1979" (1980) 14 *Int. Lawyer* 95.

[34] Section 69 of the *Arbitration Act, 1996* provides

> (b) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except—

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

- within three months of receiving the award,[35] an appeal may be sought by any party to the agreement, but only if the parties agree ***and*** the court grants leave.[36]
- leave may be granted if (a) the determination of the question *will* substantially affect the rights of one or more of the parties;[37] ***and*** (b) the question is one which the tribunal was asked to determine;[38] ***and*** (c) it is just and proper in all the circumstances for the court to determine the question.[39]
- the court must not grant leave unless satisfied that on the basis of the findings of fact in the award, the decision of the tribunal on the question is obviously wrong.[40]
- the court must not grant leave unless satisfied that on the basis of the findings of fact in the award, the question is one of general importance and the decision of the tribunal is at least open to serious doubt.[41]
- the application must identify the question of law to be determined and state grounds on which appeal should be granted.[42]
- the court is to determine the application for leave without a hearing, unless it appears to the court that a hearing is required.[43]
- the court may confirm, vary, set aside in whole or in part or remit award if the appeal is successful ***but*** s 34A(8)

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[35] Section 34A(6) of the *Commercial Arbitration Act 2010*, or three months from the date of the tribunal's response to a request for interpretation, clarification, or correction of the Award.

[36] *Commercial Arbitration Act*, *supra* note 13 at s 34A(1)—(2).

[37] *Ibid* at s 34A(3)(a).

[38] *Ibid* at s 34A(3)(b).

[39] *Ibid* at s 34A(3)(d).

[40] *Ibid* at s 34A(3)(c)(i).

[41] *Ibid* at s 34A(3)(c)(ii).

[42] *Ibid* at s 34A(4).

[43] *Ibid* at s 34A(5).

> the court may set aside the award only if it is inappropriate to remit.[44]

Of these provisions, the most important is the conjunctive requirement of the parties' agreement *and* the leave of the court. That the availability of an appeal is optional removes the shadow of the lack of finality from the arbitral process, replacing it with a provision that supports party choice by requiring the parties to opt in.

The opt-in requirement signals to commercial parties that there is no general expectation that the decisions of a tribunal will be reviewable in the courts. Moreover, as it is unlikely that parties will agree to permit an appeal once the arbitration is underway, the availability of appeals is limited to business relationships in which at least one of the parties requires judicial oversight as a basic feature of its dispute resolution. Enabling the parties to choose to allow appeals makes it possible for them to choose arbitration without losing the opportunity of court review. It may serve the needs of parties that might otherwise seek to establish more controversial asymmetric arbitration clauses in which a party with greater bargaining power reserves for itself alone the freedom to litigate its claim instead of going to arbitration.[45]

The leave requirement is designed to reduce further the availability of the appeals, thereby promoting finality and judicial economy. However, leave requirements can be difficult to apply in ways that will achieve the desired result. Disappointed parties who are determined to reverse the

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[44] *Commercial Arbitration Act*, *supra* note 13 at s 34A(7).

[45] Brooke Marshall, "Asymmetric jurisdiction clauses and the anomaly created by Article 31(2) of the Brussels I Recast Regulation" (2022) 71:2 *ICLQ* 297; Alexander Gay, "Legal pitfalls in asymmetrical arbitration clauses" (15 May 2019), online: *The Lawyer's Daily* <https://www.thelawyersdaily.ca/articles/12278/legal-pitfalls-in-asymmetrical-arbitration-clauses>.

outcome of the arbitration, and who are able to invest the resources in the effort to so do, may seek leave to appeal regardless of the merits of their entitlement to it. Clever arguments will be developed to establish why the question appealed *will* substantially affect the rights of the appellant, why the question is one of general importance, why the decision of the tribunal is at least open to serious doubt, and why it is just and proper in all the circumstances for the court to determine the question on appeal. Some parties may also seek to persuade the court that the application for leave requires an oral hearing and cannot be decided in writing. Regardless of the odds of success, applications for leave (particularly those that are heard orally) may undermine finality and judicial economy.

Therefore, of the two requirements—party agreement and leave—the requirement of party agreement is the more decisive in promoting the ends of finality and judicial economy; but each requirement serves a useful purpose, and it is only by requiring both party agreement and leave that the two requirements have the desired effect.

One further provision for ensuring that the law is applied correctly that has been included in the CAAs is the infrequently used option for a party to an arbitration agreement to ask the court to determine a question of law during the course of the arbitration—a vestige of the now-obsolete English case stated procedure.[46] This provision can be excluded by the parties, and it can be invoked only with the consent of the arbitrator, where the arbitrator has been appointed, or with the agreement of all the parties. Together with the many other mechanisms in the legislation for redressing dilatory tactics, it appears to have caused little mischief and, when invoked successfully, to have proved useful.[47]

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[46] *Commercial Arbitration Act*, *supra* note 13 at 27J.

[47] *Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG*, [2018] EWHC 1056 (Comm) at [1]—[2] per Males J. (Court observing

6. Optional protocol on confidentiality

Commercial arbitration is a private process, but few national laws and institutional rules provide for the confidentiality of the process, the documents, and the outcome. The Model Law is silent on the question. Some who choose arbitration do not expect or need assurances of confidentiality. Those who do choose arbitration believing it to be confidential may not need confidentiality in every dispute that might arise, and they may not need it for all aspects of a dispute. Nevertheless, subject to the need to disclose certain information, and the need to resolve certain disputes in public, it is generally accepted that the parties should be entitled to maintain the confidentiality of their commercial arbitration if they wish to do so.

The issue for legislators is whether it is appropriate to leave it to the parties to provide for confidentiality, creating the risk of disappointment for parties who thought that it was assured by the choice of arbitration, or whether it should be included it in the legislation so that it can be guaranteed by choosing the seat. The framers of the Australian domestic legislation chose the middle ground of including a default protocol for confidentiality that the parties may exclude.

This protocol addresses several complexities associated with confidentiality, such as the circumstances in which confidential information may be disclosed,[48] and in which the Tribunal may allow disclosure;[49] and the circumstances in which the Court may prohibit[50] or allow[51] disclosure. These

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the utility of this method of resolving the question of whether "without prejudice" communications represented a binding settlement).

[48] *Commercial Arbitration Act*, *supra* note 13 at 27F.

[49] *Ibid* at s 27G.

[50] *Ibid* at s 27H.

[51] *Ibid* at s 27I.

provisions may be supplemented or varied by the parties in agreements between them and in applications to the tribunal, but the inclusion of the protocol in the legislation reflects a formal commitment to the principle of confidentiality that creates a foundation for support by tribunals and the local courts.

IV. MAINTAINING CONSISTENCY WITH THE MODEL LAW FOR DOMESTIC COMMERCIAL ARBITRATION

With these measures customizing the Model Law for adoption by the Australian States and Territories, the drafters achieved a first-rate legislative regime for commercial arbitration in Australia. However, the true genius of the CAAs lies not so much in the departures from the Model Law, but in their *consistency* with it. Apart from the distinctive features of the Acts, which are identified above, the legislation faithfully adheres to the Model Law—from its language and structure to its section and paragraph numbering.

This point is critical. The Model Law has been "adopted" in many different ways around the world. In some civil law jurisdictions, the Model Law provisions have been integrated with those of the Civil Code and the Code of Civil Procedure.[52] In some common law jurisdictions,[53] provisions of the Model Law have been introduced into a single statute with a variety of other provisions designed to reflect the interests of local legislators. In others, such as the Canadian provinces, the Model Law is a schedule appended to an implementing statute that contains the locally drafted provisions. As a result, the official UNCITRAL website refers to countries that have enacted arbitration laws *based on* the Model Law.[54]

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[52] *Civil Code of Québec* SQ 1991, c 64; Code of Civil Procedure, SQ 2014, c 1.

[53] E.g., the legislation in the British Virgin Islands and in India.

[54] "Disclaimer: A model law is created as a suggested pattern for lawmakers to consider adopting as part of their domestic legislation. Since States

In Australia, the CAAs include sections numbered identically with the articles of the Model Law and text that reproduces those articles faithfully. Apart from gender neutrality and a few modernized terms, every departure and every addition to the Model Law is highlighted in commentary that is included in the text. In this way, domestic commercial arbitration practitioners in Australia are practising commercial arbitration pursuant to the Model Law, not merely inspired by the Model Law.

Why does this matter? The importance of this is seen from s 2A of the Model Law itself, which provides that, "in the interpretation of this Act, regard is to be had to the need to promote so far as practicable uniformity between the application of this Act to domestic commercial arbitrations and the application of the provisions of the Model Law … to international commercial arbitrations … ."[55]

The reference here to uniformity in interpretation is no mere vague exhortation. The Model Law, unlike typical common law statues, comes with an official commentary to guide its interpretation.[56] But more than this, through the United Nations Commission on International Trade Law (UNCITRAL) it also

enacting legislation based upon a model law have the flexibility to depart from the text, the above list is only indicative of the enactments that were made known to the UNCITRAL Secretariat. The legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted. The year of enactment indicated above is the year the legislation was passed by the relevant legislative body, as indicated to the UNCITRAL Secretariat; it does not address the date of entry into force of that piece of legislation, the procedures for which vary from State to State, and could result in entry into force some time after enactment" online: <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

[55] *Model Law*, *supra* note 14 at arts 2A.

[56] See Secretariat of the United Nations Commission on International Trade Law (UNCITRAL), "On the UNCITRAL Model Law on International Commercial Arbitration", online: *McGill University* <https://www.mcgill.ca/arbitration/files/arbitration /ExplanatoryNote-UNCITRALSecretariat.pdf>.

comes with a database of free and text-searchable online digest of cases from courts around the world that have interpreted and applied its provisions.[57] This database is but one source of many that offer commentary and reporting on the approaches to these provisions that have been taken by leading courts around the world.[58]

Accordingly, adopting the Model Law as the basis for Australia's domestic arbitration legislation has opened a gateway for every Australian arbitration practitioner and every Australian court into the leading jurisprudence on commercial arbitration from around the world. Moreover, by facilitating their familiarity with the Model Law, it has opened a gateway for them to contribute to that jurisprudence.

To be sure, there are counsel whose arbitration practices will be domestic throughout their career. However, the continuity in relevant provisions between domestic and international law enables all arbitration practitioners to benefit from state-of-the-art techniques in the field of commercial dispute resolution. More than this, it strengthens the collective appreciation of arbitration across the profession. As in Australia, young lawyers, who once had to choose between a career in domestic dispute resolution in Canada and an international practice abroad, would now be free to pursue exciting opportunities in both domestic and international arbitration without leaving Canada, relying on their

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

[58] See United Nations Commission on International Trade Law, "Travaux préparatoires: UNCITRAL Model Law on International Commercial Arbitration (1985)", online: *United Nations Commission on International Trade Law* <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial _arbitration /travaux>. See also United Nations Commission on International Trade Law, "Bibliography", online: *United Nations Commission on International Trade Law* <https://uncitral.un.org/en/library/bibliography>.

sophisticated grasp of the most prevalent arbitration statute around the world.

For all these reasons, the experience of the Australian legal community enacting uniform domestic and international commercial arbitration based on the Model Law can serve as a model for the reform of domestic commercial arbitration law in Canada.