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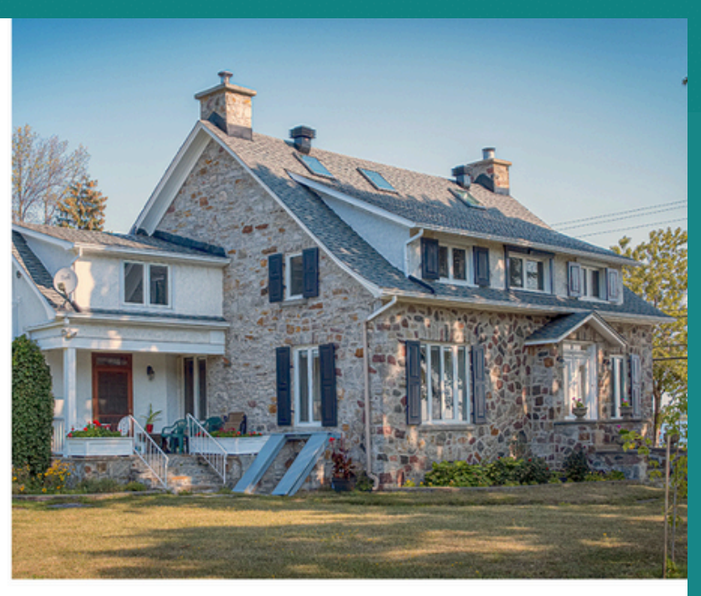
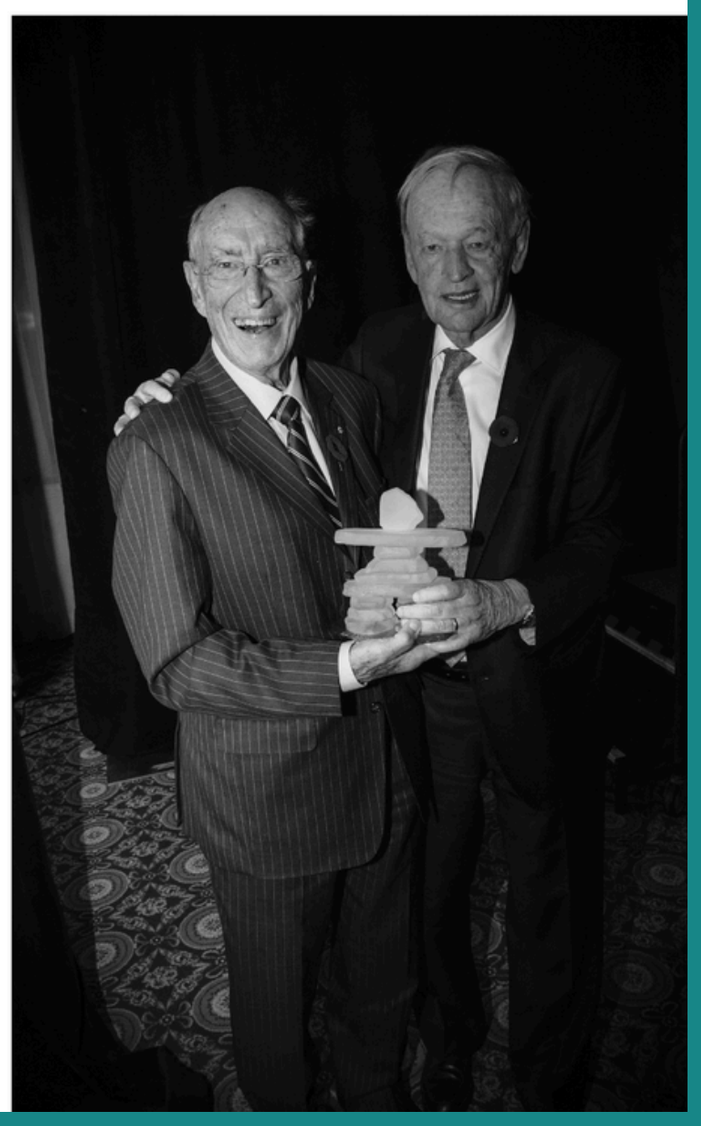
The Canadian Journal of Commercial Arbitration





REMEMBERING MARC LALONDE

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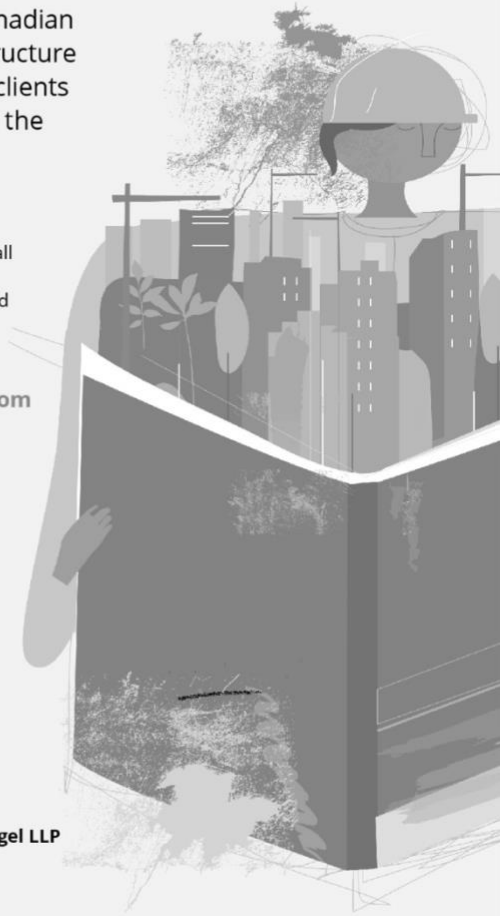

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EDITORS' NOTE

This is a special issue of *CJCA* in honour of a great Canadian and a towering figure in international arbitration: the Honourable Marc Lalonde PC OC KC (1929-2023). Lalonde's career seems to have been enough to fill three lives. He made important contributions to Canadian government and society, legal practice in Canada, and to the development of international investment law and arbitration. This issue is our respectful and loving tribute to him.

Marc Lalonde was born in L'Île-Perrot, Québec, on July 26, 1929. He came from a longstanding Québec family, the fourth of five children of Joseph Albert Lalonde, a farmer, shopkeeper, and local village mayor, and Laura (née St-Aubin).

After earning degrees from the Université de Montréal, Oxford University, and the University of Ottawa, Lalonde had stints in the Department of Justice during the Diefenbaker government, at the Université de Montréal, and in private practice in Montreal. He then re-joined government, setting off a long tenure in the highest ranks of the Liberal Party of Canada. He was a policy advisor in Lester Pearson's Prime Minister's Office, headed a task force on securities regulation and corporate disclosure, and served as Chief of Staff to Prime Minister Pierre Trudeau, of whom he was for decades one of the closest confidants. In 1972, he ran for office and was elected Member of Parliament for the Montreal riding of Outremont. He was rapidly named to the cabinet, holding several key portfolios: Minister of National Health and Welfare, Minister of State for Federal-Provincial Relations, Minister responsible for the Status of Women; Minister of Justice; Minister of Energy, Mines, and Resources; and Minister of Finance. A staunch federalist, he was the preeminent Québec minister in the Liberal governments of Pierre Trudeau and John Turner.

In 1985, Lalonde retired from politics and joined Stikeman Elliott in Montreal. There, he helped the firm expand its international presence and was first appointed as an arbitrator

in an investor-state dispute. He went on to become one of the world's most in-demand investment treaty arbitrators, as well as a Judge Ad Hoc of the International Court of Justice in two cases: Fisheries Jurisdiction (*Spain v Canada*) and Legality of the Use of Force (*Serbia and Montenegro v Canada*). He retired from Stikeman Elliott in 2006, at the age of 77, but continued to be active as an arbitrator, declining new appointments only after he turned 90.

Lalonde passed away on May 6, 2023, aged 93, healthy and vital until nearly the end. He and Claire, his wife of 67 years, had four children (including Paul, who contributed to this special issue) and nine grandchildren.

This special issue publishes personal remembrances of Marc Lalonde from some of the most prominent figures in international arbitration and from some who learned (proverbially or literally) at his feet, which we present as a tribute to Marc Lalonde and his family. We express our gratitude to the many contributors, a mark of Lalonde's prominence in our field and the numerous friends and colleagues on whom he made an indelible impression. In addition to Paul Lalonde, they are (in alphabetical order): Barry Appleton, Louise Barrington, Jonathan Brosseau, Mariel Dimsey, Zachary Douglas, Yves Fortier, Fabien Gélinas, David Haigh, Gabrielle Kaufmann-Kohler, Barton Legum, Barry Leon, Jan Paulsson, Stephen Schwebel, Brigitte Stern, Pierre Tercier, and Janet Walker.

Thanks to the good offices of Barry Leon, I had the chance to visit with Marc and his wife Claire in Autumn of 2022, in the historic Lalonde home in L'Île-Perrot (built in 1753 and inhabited continuously by Lalondes since then). I remember his warm hospitality, his penetrating gaze, and his ready smile. The story of our visit is recounted by Barry in his remembrance for this issue, so I will not belabour it here, except to say that I came away with the impression of brilliance but also wit, ambition but also pragmatism, formidableness but also kindness, and this conviction: *Marc Lalonde était non seulement un grand arbitre, mais aussi un grand québécois et un grand Canadien.*

To round out the issue, we include two pieces of "regular" content. The first is a review by *CJCA* Editor Anthony Daimsis of a new book by Doug Jones AO and *CJCA* Editor Janet Walker CM, *Commercial Arbitration in Australia Under the Model Law, 2rd Edition*. Australia exemplifies a common law jurisdiction that has wholeheartedly adopted the UNCITRAL Model Law; in addition to its intrinsic interest, the book will be of great practical utility in other Model Law jurisdictions, very much including Canada. The second is my case comment on the Court of Appeal for Ontario's long-awaited decision in *Aroma Franchise v Aroma Canada*, a judgment that was released just as this issue was (belatedly) about to go to print.

Please consider submitting your own writing to *CJCA*, (see https://cjca.queenslaw.ca/submission) and do not hesitate to contact us with article ideas, feedback, or suggestions.

Joshua Karton, *Managing Editor*
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A SON'S PERSPECTIVE

Paul Lalonde[*]

I was very pleased to be invited by the *CJCA* to make this contribution to remembrances of my father. My brother and my sisters join me in thanking all those who are contributing to the publication of these tributes. Our father cherished the arbitration community and cherished his role in it. He was not one to chase accolades or recognition, but we know he would be pleased that many arbitration *confrères* and *consoeurs* he respected have taken the time to share their memories of him.

My father was born in the summer of 1929 on a farm on the outskirts of Montreal, on an island at the intersection of the Ottawa and St. Lawrence rivers: *Île Perrot*. My father embraced and was proud of his rural origins, and his upbringing in Île Perrot had a profound impact on his personality and values. He inherited the ancestral family farmhouse where he grew up from his father and lived there with our mother, Claire Tétreau, for the last three decades of his life. He had a deep sense of belonging to his house on the shores of Lac St-Louis and the surrounding land. My siblings and I are very grateful that he was able to live there independently with our mother up to the very end.

Our father had a knack for leaving an impression on the people he met and with whom he worked. It has been a great pleasure for me throughout my own career to have strangers from around the world, upon learning of my connection to Marc Lalonde, share their stories of meeting or working with our father in one or the other stage of his illustrious professional life. It was always a pleasure to hear these funny anecdotes, expressions of admiration, and remembrances from former colleagues and collaborators. Even people who were political adversaries or on the other side of some contentious matter

[*] Paul M. Lalonde, Partner and National Practice Group Leader - Regulatory, Dentons Canada LLP, Toronto.

seemed to have some fond memory to share, either illustrating the personal or professional respect my father inspired or his unique, often mischievous, sense of humour.

Our father was fundamentally a philanthrope in the sense that he was gregarious and genuinely interested in people, whatever their station or occupation in life. These qualities served him well in his political life, and while he was renowned for his polymathic grasp of complex policy issues, he also relished the "retail" side of politics. Notwithstanding the heavy load he carried as a cabinet minister, he made sure to tend to local riding matters and, at election time, he relished in meeting constituents and canvassing in his riding. He always came back with some inspiring, amusing, or surprising stories about his doorstep interactions with strangers. He loved to regale us with these stories, like the time a small boy answered the door, and when my father introduced himself, the boy turned around and called out "Mom! Michael Jackson's at the door!" You can't make this stuff up, as they say.

Our father could also see the humour in almost any situation and had the gift of finding the turn of phrase or *bon mot* to defuse a tense situation. He was a raconteur and he enjoyed his own material, often laughing to tears when trying to retell a joke of which he was particularly fond. He loved to bestow nicknames and use terms of endearment with those close to him. If he liked you, there was an excellent chance he had a nickname for you.

Our father taught us many lessons, mostly by demonstration rather than sermonizing. He seldom offered us unsolicited advice or sought to impose his views on us. One of the lessons he taught us is the irreplaceable value of hard work and persistence. His energy, endurance, drive, and work ethic are legendary. My father faced a number of serious health issues in his long life but he never let them slow him down—at least not for long. Once, several years ago, my father was on a procedural conference call on an arbitration when, as a result of a serious cardiac issue ,he briefly lost consciousness. He woke up on the floor of his home office and realized what had happened. He got

himself up, dusted himself off, finished the call to the parties' satisfaction, and only then phoned his cardiologist. Less than forty-eight hours later, he was undergoing life-saving emergency open-heart surgery. He was not about to let a trifling matter like a leaking aorta get in the way of finishing a conference call!

My father loved his work and found deep satisfaction and fulfillment in it. Over breakfast one morning, when he was in his late seventies (still over a decade from retiring), I suggested to him that while his health still allowed he should slow down and spend more time fishing and engaging in other leisure activities. I argued that he was financially secure and had accomplished so much, so maybe it was time to relax. He looked away from his morning newspaper for a moment and decisively shut down this line of discussion. He looked at me over the frame of his glasses and said firmly "I like to work." I dropped the subject.

Our father was also possessed with a deep sense of appreciation for the blessings he enjoyed in life, and he never fussed about what he could not control. He kept moving forward without complaining, whatever came his way. After major heart surgery in his sixties, the cardiologist told him he could never play tennis or squash again, two sports he adored. He did not complain or feel sorry for himself, he just adjusted and focused on the things he could still do. He swam, he walked, and he skied well into his 80s. He just kept going. In the last quarter of his life, he stared down and beat a number of life-threatening health challenges. He had this iron will to keep marching on, to keep enjoying life, but also to keep working and deploying his prodigious professional and intellectual skills as long as he possibly could. He was tough and resilient, and we could be forgiven for thinking he would just go on forever.

It is not possible to properly pay tribute to our father without mentioning our mother. Their over sixty-seven years of life together is the foundation of our family and an inspiration to everyone who knew them. My mother deserves to share equally in whatever tribute or accolade my father receives. My parents

shared an incredible partnership of love and respect, and those of us who knew our father best know exactly how crucial our mother's contributions were to his endeavours.

On behalf of the Île Perrot branch of the Lalonde clan, I wish to thank all of those who accompanied our father in his political, professional, and academic journeys. So many remained good and loyal friends, often long after the professional relationships ended, and every one of these professional companions helped my father achieve so much that was deeply meaningful to him. The outreach, tributes, and reminiscences we have heard and read in the weeks and months since his passing have brought great comfort to our family and, in particular, to our mother.

MARC LALONDE'S MENTORSHIP SERVES AS AN INSPIRATION FOR THE ARBITRATION COMMUNITY

Jonathan Brosseau[*]

I. WITH PRIVILEGE COMES RESPONSIBILITY

"I was taught by both my family and my college that higher education was a privilege, not a right, and that if you were lucky enough to get this level of education, you had a duty to serve." Marc Lalonde, with keen eyes, imparted these insights to me during an oral history project focused on his remarkable life and career.[1]

The insights resonated with me a decade ago, as an aspiring Canadian arbitration practitioner with the privilege of interviewing one of our nation's most esteemed politicians and international arbitrators. They hold an even greater significance for me today as I have grown to better understand how they encapsulated Marc's philosophy of life, marked by his selflessness, unwavering integrity, and quick wit.

Marc and I conducted extensive interviews at Concordia University's Center for Oral History in Montreal, Canada, during the fall of 2014. At each session, Marc was sharp yet sensitive, resolute yet reflective, and, most significantly, incredibly

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[*] PhD/DCL Candidate (Full Scholarship), Université Paris 1 Panthéon-Sorbonne and McGill University; Europaeum Scholar; member of the Québec Bar.

[1] Jonathan Brosseau, "From Canadian Minister to International Arbitrator: The Oral History of Marc Lalonde" (2016) 6:1 Journal of Arbitration and Mediation 73–124. The published version of this peer-reviewed article is freely accessible on the Social Science Research Network (SSRN): <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2833994>. I thank Professor Andrea Bjorklund for inspiring me to undertake this project. Quotations from my interviews with Marc Lalonde are used throughout this remembrance, and are not separately footnoted.

generous. I arrived ten minutes late to one of our meetings, flushed with embarrassment, having fallen asleep at my desk following an all-night work session. With a knowing smile, he turned the situation into a tactful challenge, saying "I had promised you 90 minutes; you will now have to make even better use of the remaining 80."

I believe I succeeded, and I was undoubtedly relieved when he told me he shared that sentiment. In a manner very characteristic of Marc, his primary aspiration was that the resultant text, which was, after all, *about him*, would "help sustain the interest of young Canadians like [me] in international arbitration".

My aspiration, for both the original project and this brief piece, is to provide insights into otherwise unavailable areas of international dispute resolution. Specifically, the aim is to present the recollections of a "first generation" international arbitrator and to draw a coherent narrative from them, under the supervision and guidance of esteemed legal anthropologist, Professor Ronald Niezen. The analysis is intended to illustrate how Marc was appointed within a fragmented and uncoordinated arbitral "system" and reveal how he contributed to developing this emergent field through his awards, scholarly writings, and arbitration development initiatives in Canada.

Such insights would otherwise be "unavailable" for three distinct reasons. The first is that, in addition to valuable empirical research using numerical data to analyse the development of international arbitration,[2] oral history can unearth the informal practices and socio-cultural dynamics that have shaped these developments.

The second reason is that there remains a lack of publicly available information concerning international arbitration

[2] See e.g. Sergio Puig, "Social Capital in the Arbitration Market" (2014) 25:2 European Journal of International Law 387–424.

during the 1980s, 1990s, and early 2000s. This era was characterised by minimal media and public interest in arbitration, limited internet access, and a strong emphasis on confidentiality.[3] Without oral history, practices and experiences from these decades would remain hidden.

The third reason is that these arbitrators' insights may soon be lost. "First generation" arbitrators, or "grand old men" as Professors Dezalay and Garth famously characterised them in *Dealing in Virtue*,[4] have increasingly begun to pass away. Oral history is an irreplaceable means to preserve their accounts and legacies.

Driven by similar motivations, the Institute for Transnational Arbitration embarked on a series of oral history interviews since the mid-2010s, now comprising 24 interviews.[5] This project on Marc's career not only conducted similar interviews but also culminated in a peer-reviewed article that included comprehensive historical research to corroborate and contextualise these interviews, thereby heightening its academic value.

Significantly, courts have increasingly recognised oral history as an admissible and probative source of evidence in

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[3] See e.g. Anthony Depalma, "Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say", *The New York Times* (11 March 2001) online: www.nytimes.com <http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html>.

[4] Yves Dezalay & Bryant G Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order (Chicago: University of Chicago Press, 1996) ch 2–3.

[5] The Center for American and International Law, Institute for Transnational Arbitration, "Preserving Perspectives: International Arbitrators in Their Own Words", available freely online: <https://vimeopro.com/user34174610/ita-oral-history-interviews>.

litigation.[6] For instance, in *Delgamuukw v British Columbia*, Chief Justice Lamer, writing the majority opinion for the Supreme Court of Canada, held that the laws of evidence must be adapted to accommodate "the use of oral histories as proof of historical facts," among others, as an essential means to bridge the evidentiary gaps that would otherwise exist.[7]

II. FROM MENTORSHIP TO MASTERY

As Pierre Trudeau's most valuable political ally, Marc benefited from the mentorship of his dear friend. Upon completing his formal education, Marc was torn between pursuing a career in law or acting. He consulted Mr. Trudeau, a decade his senior, who advised him to pursue legal studies first and reassess his career aspirations after. Although Marc ultimately opted for a career in politics and law, he noted that his children have playfully suggested that he essentially "chose to be an actor," perhaps because he demonstrated skills in persuasion, storytelling, and audience engagement that were not entirely dissimilar to the ones used in acting.

Marc's first appointment came in the 1980s, at the recommendation of Mr. Trudeau. Laurie Craig and Jan Paulsson, partners at Coudert Frères in Paris, had initially sought to appoint Mr. Trudeau for a billion-dollar dispute initiated by Iran against the Commissariat à l'Énergie Atomique de France (CEA). This dispute arose from the termination of the Shah of Iran's Nuclear Energy Program in the aftermath of the 1979 Iranian Revolution. Upon declining the offer, Mr. Trudeau strongly recommended Marc as a candidate. Marc was offered and accepted the role, and subsequently took on another appointment in a related dispute initiated by Iran, this time against the French European Gaseous Diffusion Uranium

[6] See the cases cited in John A Neuenschwander, *A Guide to Oral History and the Law* (Oxford: Oxford University Press, 2009).

[7] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 atpara 87.

Enrichment Consortium (EURODIF).[8] Marc later described both as the favourite cases of his career, because they were "so interesting, so political at the same time as being commercial cases."

All parties involved in these arbitration proceedings concurred that Marc had demonstrated exceptional aptitude as an arbitrator from the outset. Mr. Paulsson recalls, "[t]hese cases arose in an atmosphere of considerable tension, and it became immediately clear that Marc Lalonde's insight, even-handedness, and courtesy to all participants contributed considerably to reducing frictions and apprehensiveness…. He sat with some of the giants of the world of international arbitration at the time and belonged in their company."

The presidents of these tribunals were Professor Pieter Sanders, an eminent arbitration scholar and then-President of the International Council for Commercial Arbitration (ICCA), and Judge Pierre Bellet, a former president of the French Cour de cassation and member of the Iran-United States Claims Tribunal. Marc impressed both, who subsequently recommended him for future appointments.

During his first arbitration, Professor Sanders also invited Marc to serve on ICCA's board, which he enthusiastically accepted. Marc was later chief organiser for the ICCA Congress in Montreal, marking the first major international arbitration event hosted in Canada, with a record attendance of over 600 practitioners. Marc candidly recognised that the position represented a "very important factor" in enhancing his professional visibility and securing subsequent arbitrator appointments. This was because "[t]he hardest case is the first

[8] These cases were *Iran v CEA (France)* (1984), ICC Arbitration No 5124 and *Iran v EURODIF (France)* (1985), ICC Arbitration No 5514, respectively. See Emmanuel Gaillard, "L'affaire Sofidif ou les difficultés de l'arbitrage multipartite" [1987] Revue de l'arbitrage 275.

one to get", and "[i]f you do a good job, you can hope that your reputation will do the rest for you."

Marc was even more pleased that the Montreal Congress heightened the Canadian legal community's engagement with international arbitration. He was delighted that emerging Canadian legal practitioners under 40, who did a "fantastic job" in orchestrating the Congress, have sustained their interests and remain actively involved in international commercial arbitration today.[9]

Furthermore, Marc laid the foundation for advancing international arbitration in Canada. He was instrumental in advocating for Canada's adoption of the UNCITRAL Model Law in 1986, which positioned the country as the first adherent of the newly enacted framework. Beyond legislative endorsement, he actively promoted international commercial arbitration within Canada through numerous scholarly publications and presentations.[10]

Recalling his motivations, Marc explained that his efforts were not a vehicle for self-promotion. Instead, he believed Canada had a unique, yet untapped, potential to become a hub for international arbitration. This stemmed from Canada's dualistic legal system, which incorporates elements from both common law and civil law traditions, and its nuanced geopolitical stance, being neither fully aligned with the United States nor with Europe but still engaging with both partners.

Marc adjudicated several landmark cases of the 1990s and 2000s. Twice, he served as an ad hoc judge appointed by Canada to the International Court of Justice (ICJ). These were the

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[9] These are the Honourable Babak Barin (now Quebec Superior Court Judge), Mr Eric J. Ouimet (now head of BCF's Litigation group), and Murray L. Smith KC (now an independent arbitrator in Vancouver).

[10] See especially Edward C Chiasson & Marc Lalonde, "Recent Canadian legislation on arbitration" (1986) 2:4 Arbitration International 370.

Fisheries Jurisdiction case (Spain v Canada)[11] and the Legality of the Use of Force case (Yugoslavia v Canada).[12] He viewed these roles as "a great honour" and "enjoyed every minute of it." Judge Stephen Schwebel, President of the Court at the time, noted that Marc had approached the cases with his "characteristic acuity and gentility".

Marc was also appointed alongside Professor Karl-Heinz Böckstiegel and Judge Charles Brower to the first case under Chapter 11 of NAFTA, Ethyl Corporation v Canada.[13] Judge Brower recalled his experience on that tribunal: "I have sat with Marc Lalonde in the Ethyl case and prize him most highly as a colleague since then. He was totally impartial and independent, seeing things as a good, objective arbitrator should see them." This case established a precedent for subsequent NAFTA cases and catalysed Marc's career as a sought-after investor-State arbitrator.

Reflecting upon his decades of work as an adjudicator, Marc stated that one of the most daunting tasks involved ascertaining liability, noting "these cases end up before arbitrators because the issues are not black and white." He confessed to agonising over some decisions.

More broadly, for Marc, resorting to international adjudication is an imperfect yet necessary mechanism to reconcile might with right. Using the South China Sea conflict as an example, he fervently advocated, a decade ago, for the ICJ's role as a forum where legal principles can mitigate "brute force".

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[11] *Fisheries Jurisdiction* (*Spain v Canada*), Judgment on the Jurisdiction of the Court, [1998] ICJ Rep 432.

[12] *Legality of Use of Force* (*Yugoslavia v Canada*), Preliminary Objections, [2004] ICJ Rep 279.

[13] *Ethyl Corporation v Canada* (1998), UNCITRAL/NAFTA, Award on Jurisdiction (24 June 1998).

Marc insisted that a rules-based system was superior to a world governed by raw power and arbitrary coercion. His observations hold even greater pertinence in light of contemporary geopolitical realities.

Ultimately, Marc's career trajectory illustrates a cyclical pattern of mentorship. Guided early on by Pierre Trudeau, Marc rose to prominence in Canadian politics and eventually international arbitration, later reciprocating that mentorship to younger Canadian legal practitioners. His life's work manifests the transformation from mentorship to mastery.

III. THE MARC LALONDE ARBITRATOR RESIDENCY

Marc's philosophy serves, and should further serve, as an inspiration for the international arbitration community. His fervent advocacy for nurturing the next generation of arbitration practitioners calls on establishing an arbitrator residency programme, which would assist carefully selected candidates in securing their first arbitrator appointments. The programme could be called the "Marc Lalonde Arbitrator Residency."

The proposed programme would pair promising mid-level or senior-level practitioners, between the ages of 35 and 50, with some of the most distinguished arbitrators currently in practice, who would provide them with mentorship and guidance over two years. The residency would include a stipend, providing arbitrator residents with the financial resources to attend networking opportunities and arbitration events alongside their attributed mentors.

While the paradox of requiring experience for first-time appointments may never be entirely overcome, the residency would furnish emerging arbitrators with the most effective tools available: access to mentorship, networks, and visibility. This would not only embody Marc's belief in the duty to serve, but also contribute to increasing the diversity of arbitrators in terms of gender, backgrounds, and origins.

Marc's son, Paul Lalonde, has noted that his father was "not one to linger much on his legacy," but has left others to do that for him.[14] The proposed residency would be a fitting way to pay homage to his enduring legacy by nurturing the brilliant arbitrators of tomorrow.

[14] Alison Ross, "Marc Lalonde 1929-2023", *Global Arbitration Review*, available online: <https://globalarbitrationreview.com/article/marc-lalonde-1929-2023>. In a similar vein, Canadian historian George Ramsay Cook asserted, "Lalonde never needed or wanted the limelight; he always chose effectiveness over publicity": *The Teeth of Time: Remembering Pierre Elliott Trudeau* (Montreal: McGill-Queen's University Press, 2006) at 40.

IN MEMORIAM: REFLECTING ON THE LEGACY OF THE HONOURABLE MARC LALONDE, A PILLAR OF INTERNATIONAL ARBITRATION

Barry Appleton, FCIArb[*]

My journey with Marc Lalonde commenced in a transformative era for international arbitration. It was a time when the North American Free Trade Agreement (NAFTA) was forging unprecedented pathways in reconciling investment treaty disputes among advanced, liberal market economies. As fate would have it, Marc presided as one of the arbitrators in my first foray into arbitration—Ethyl Corporation v Canada.

On paper, Marc Lalonde's resume was nothing short of awe-inspiring. This was a man who had served as the Principal Secretary to the Prime Minister of Canada and held ministerial portfolios for Finance, Health, and Energy. I grew up in Canada with a close ear to politics. You would be forgiven for feeling daunted at the prospect of arguing a case before someone of such formidable stature.

But Marc never traded on intimidation. From the outset, his affable demeanour and acute attention to detail dismantled any hesitations I had. He was, at his core, a luminary who yet remained down-to-earth. At every session, it was apparent that he had mastered every file, every piece of legislation, and every nuance of case law. His fairness was unparalleled, his insight penetrative. Marc revered the rule of law and viewed arbitration not merely as a mechanism but as a sacred institution dedicated to the equitable resolution of complex disputes.

[*] Co-chair, American Bar Association International Arbitration Committee; Co-Director, New York Law School Center for International Law; Managing Partner, Appleton & Associates International Lawyers LLP

The Ethyl Corporation case, the first NAFTA claim involving Canada to advance to a hearing, confronted pioneering issues such as regulatory choices, the principles of fair and equitable treatment, expropriation, and national treatment. While I advocated for Ethyl, an American company affronted by Canadian policies that seemed to favour Canadian interests disproportionately, Marc's role was instrumental in providing a balanced, thorough examination of these groundbreaking questions.

Yet, the magnitude of Marc's legacy transcends the written opinions and settled cases. He was an architect of the very system of international arbitration as we know it today, shaping its edifice through not just the Ethyl case but countless others that followed. As a young and malleable attorney at the time, he profoundly influenced how I perceived and engaged with the arbitration profession. His integrity, professionalism, and unwavering commitment to the rule of law became standards against which I would measure my own practice.

Generosity punctuated Marc's career. He was perpetually willing to lend his time and wisdom to mentor the next generation of legal professionals. One of my lasting regrets is not having invited him to speak to my students at New York Law School's Center for International Law. Knowing Marc, he would have relished the opportunity as much as the students would have benefited from his insights.

In Marc Lalonde, we have lost a luminary who was as rare as he was influential. They truly don't make them like Marc anymore. His passing leaves a void in the international investment community; it is the departure of a leader whose unwavering devotion to the rule of law was imbued with grace and a deep sense of humanity.

Farewell, Marc. Your legacy will continue to illuminate the path for all of us in the field of international arbitration.

REMEMBRANCE OF MARC LALONDE

Louise Barrington[*]

Across Canada and even abroad, it was the time of Trudeaumania. Marc Lalonde was in the headlines as Pierre Trudeau's principal secretary, but then was elected to Parliament. During my politically formative years, I knew of him as Canada's Attorney General and as Minister of State for the Status of Women. It wasn't until more than a decade later that we actually met in person. I had just begun my job as Director of the ICC's Institute of International Business Law and Practice (now fortunately renamed as the Institute of World Business Law). Marc was one of the 40 or so brilliant minds recruited by Professor Pierre Lalive to represent their countries in an international think tank for exploring new legal problems from a comparative perspective. (Could there be intellectual property in a telephone directory? Could arbitrators order security for costs? How to treat expert testimony in common and civil law hearings?) Marc was one of the few institute members who was not a tenured or chair professor at a renowned national university. Shortly after I took on the Institute job, he popped into my little office at the ICC after an arbitration hearing and introduced himself.

Unlike some of the rather stuffy brainiacs that populated the Institute, Marc had that wonderful Québecois knack of immediately putting people at ease. In no time at all, we were chatting about everything from Canadian politics, to his children and growing brood of grandchildren, to schemes for making the Institute more relevant to practitioners. Over my years at the Institute, we would meet at the annual Institute meetings or at ICC Conferences, where Marc would graciously introduce me to any of the international "gods of arbitration" that I hadn't already met. An introduction from Marc could open any door!

[*] Independent Arbitrator and Mediator, Arbitration Place; Principal, Aculex Transnational Inc.

Again, in contrast to many of the colleagues of his generation, Marc never expressed any doubt about the idea that women too could be arbitrators. Not just one or two "special" exceptions to the old boys' club of arbitrators, but any woman—with the intelligence, drive and perseverance to do it—could sit on equal terms with male arbitrators.

We would continue our friendly conversations over drinks or dinner. He was always ready to listen and offer insights. Although Marc didn't mince words, his truth was never harsh. He was a realist, but a kind and encouraging one with a keen sense of humour. In short, a perfect professional, a bon vivant, and a good friend.

In later years, we lost touch, but I saw his international reputation continue to grow as one of Canada's foremost arbitrators. The fact that Marc was still being appointed at the age of 90 speaks to the trust and respect he commanded in the international legal community. Now, Marc rests in peace, sadly departed from Claire, his wife of 67 years, and his family, friends and colleagues. Their sadness must be tempered by the knowledge that Marc's memory will live on in their hearts as well as those of international lawyers all over the world who had the pleasure of working with him.

REMEMBRANCE OF MARC LALONDE

Yves Fortier[*]

In May 2023, I lost a good friend, a committed Quebecois and a compleat and quintessential Canadian: Marc Lalonde.

Marc was a true renaissance man. He excelled at everything he did, and, during his long life, he did more than anyone I have ever known.

For those of us who dabble in the world of international arbitration, Marc was known as a five-star arbitrator, a reputation he richly deserved. But few people who do not live in Canada know that arbitration was the last of his many incarnations.

In his previous lives, Marc was, in turn, a brilliant lawyer, an accomplished professor, the masterly Private Secretary of his good friend, Prime Minister Pierre Trudeau, and a much-admired elected politician who served as Minister in important portfolios, including Health and Welfare, Justice, and Finance, to name but a few.

And when he could have retired to his splendid home on an island west of Montreal and enjoy life with Claire, he opted instead to become an international arbitrator.

His first appointment came when Pierre Trudeau, who had joined a law firm in Montreal after politics, declined an invitation to chair an important Tribunal. The former Prime Minister recommended, instead, his friend Marc, who accepted

[*] I practiced law with Marc in Montréal in the 60s and 70s before he went to Ottawa. We remained in touch when he was in Ottawa. And, when he started his career as an arbitrator, we often interacted on panels, in symposia etc. When I was President of the LCIA, he was President of the North American branch.

and, of course, performed brilliantly. As they say, the rest is history.

Appointments came in droves and, as in all of his previous remits, he excelled in that role and soon became a much admired and respected arbitrator.

It was only 3 short years ago that he told me during a nice lunch that he had decided, as he put it, to hang up his skates!

Today, the international arbitration community, and indeed all Canadians, mourn the death of a true renaissance man: The Honourable Marc Lalonde.

Rest in peace, *mon ami* !

REMEMBERING A ROLE MODEL

Fabien Gélinas[*]

Marc Lalonde inspired respect and admiration in most of those who had the good fortune to meet him and to work with him. His life was such, however, that he was able to touch many who had never met or interacted with him. I was one of those people.

As a young man, I studied politics in Ottawa before turning to law. This was at a time when Marc, having served in numerous government positions over the years, served as Minister of Finance, the last cabinet position he held. In my free time, I would go to the House of Commons to listen to the debates, which in my general recollection were not especially inspiring. But one of the most vivid memories I have from my visits to the House was of Marc Lalonde taking questions in relation to the finance portfolio. He left the indelible impression of a towering figure whose intellect and calm demeanor when he spoke somehow transformed the entire House, for a brief but precious moment, into the high-level political assembly we should all aspire to have. He was no mere politician; he was a true statesman. Here was someone, I thought, who could serve as a role model.

Marc Lalonde left another mark on my life before I got the chance to meet him. By this time, I had completed my doctoral studies in England and was teaching at the Institute of Comparative Law, at Paris II. The story, so far as I can reconstruct it, is that Robert Briner, the then president of the ICC International Court of Arbitration, had told Marc that the Secretariat of the Court was in need of someone with a bijuridical background who could work at a high level in both

[*] Sir William C. Mcdonald Professor of Law at McGill University. Formerly General Counsel of the ICC International Court of Arbitration and Chair of the Canadian Arbitration Committee, he serves as arbitrator in large international matters.

English and French. Marc had spoken about this to a few people in Montreal and the word somehow got back to me in Paris through a lawyer with a Stikeman connection. I first thought I would inquire into this opportunity, if only to assuage my curiosity about arbitration, a subject of which I was then almost entirely ignorant. To my surprise, I ended up getting an interview and then an offer to join. I was excited about the international nature of the work and quickly decided I would press pause on the academic career I was pursuing. Under Robert Briner, I was quickly promoted to General Counsel, which in time gave me the experience that allowed me to continue in the field as an arbitrator when I went back to academia several years later.

After returning to Canada, I had the privilege of interacting with Marc at various arbitration events, but never in the context of arbitration proceedings. When I told him about his role in my life, he was characteristically modest, and refused to take any credit for the positive impact he had had. This only served to reinforce the very favourable impression I had already formed of him, not only from his time in Ottawa, but also from the reports of numerous friends and former students who had had the fortune to sit with him or to argue a case before him. They uniformly saw him as sharp, fair, and wise, as well as generous, gentle, and kind. Those are qualities I had associated with Marc, and for which he will long be remembered, and missed.

REMEMBRANCE OF MARC LALONDE

David R. Haigh KC[*]

Marc was a leader, a colleague and, ultimately, a friend. I first met him as a politician, but came to know him better in the arbitration community, and then later, even more when sitting with him as an arbitrator.

Through all these experiences, he always impressed me as a highly intelligent, warm, humorous, and decent man. With all his accomplishments, he humbly acknowledged how lucky he was to have had the opportunities he enjoyed. His quiet pride in his family's pioneering settlement in Québec was a deep part of his character.

We shared discussions about our summer gardens, issues of the day and, of course, the legal questions before us. We also exchanged insights about the big questions, our meaning and purpose. He was unfailingly curious, thoughtful, and impressive in his depth and sincerity.

[*]David Haigh KC is an independent international arbitrator practicing in Calgary, Alberta. He has an extensive background in investor state and commercial energy disputes.

REMEMBRANCE OF MARC LALONDE

Hon. Barry Leon[*]

My strongest memories of Marc Lalonde, some of which I share here, converge to illustrate that Marc was a wonderful and generous person who leaves a tremendous legacy in arbitration, in Canada and globally.

To my mind his successes in arbitration—and likely in other fields—flowed in important ways from him being thoughtful, genuine, warm, kind, and welcoming.

Marc would treat people in arbitration circles, and in the other situations in which I saw him over the years, in a way that made them, and anyone observing, feel that he had a real interest and affection for them. Which I believe he did.

Perhaps my earliest memory of Marc in arbitration circles was late one evening at the bar in a crowded downstairs pub, likely in Ottawa's Chateau Laurier Hotel, with many younger lawyers around. Marc was standing at the bar with them, talking and laughing with them, telling stories, and making them feel welcome in the world of arbitration.

On another occasion, during an afternoon break in an autumn arbitration conference at the Chateau Laurier, Marc and I took a walk in the warm sunshine up through the Parliament Hill walkway towards the Parliament Buildings. A man who had held a security guard position for a long time on Parliament Hill recognized Marc. He greeted Marc as he must have done decades earlier when Marc was a cabinet minister in the Government of Prime Minister Pierre Elliot Trudeau. And Marc greeted him as someone he had known for a long time, asking

[*] Independent Arbitrator and Mediator, Arbitration Place, 33 Bedford Row Chambers, and Caribbean Arbitrators; Executive Editor, Canadian Journal of Commercial Arbitration.

him some question—likely about his family—and making him the focus of all his attention for the minute or two during which they spoke. The respect and affection for Marc was palpable.

At one point, at a Canadian Bar Association arbitration conference in Calgary (part of now-Justice Barak Barin's great Canadian arbitration initiative, which ultimately led to the International Council for Commercial Arbitration holding its biennial conference in Montreal in 2006, with Marc at the forefront), I was afforded the privilege of introducing Marc early in the morning at the beginning of the conference.

I went through his impressive CV, and then Marc came to the microphone: "Good Morning. I am Marc Lalonde. I am the person who brought you The National Energy Program!"

Marc had been Canada's Minister of Energy, Mines and Resources when the NEP was introduced. For those who don't remember, or never knew, Wikipedia reminds us:

> The NEP proved to be a highly controversial policy initiative and sparked intense opposition and anger in Western Canada, particularly in Alberta. The province's premier, Peter Lougheed, was a vocal opponent of the NEP on the grounds that it interfered with provincial jurisdiction and unfairly deprived Alberta of oil revenue. In 1981, Lougheed and [Prime Minister Pierre] Trudeau reached a revenue-sharing agreement. Opponents claim that due to the NEP, the unemployment rate in Alberta rose from 3.7 percent to 12.4 percent, the bankruptcy rate in Alberta rose by 150 percent, and Alberta's losses were estimated to be between $50 billion and $100 billion (though Alberta's unemployment rate, bankruptcy rate, and revenue losses were

> also affected by the early 1980s recession and a crash in oil prices).
>
> The term "Western alienation" was coined as a result of the NEP … The NEP contributed to the creation and rise of the Western Canadian-based and right-wing populist Reform Party.

Marc had been Canada's Minister of State on federal-provincial relations in the wake of the Parti Québécois victory in the 1976 Quebec provincial election. He served as Minister of Health of Canada in 1972–1977 and Minister of Justice and Attorney General of Canada in 1978-79. In 1980, he became Minister of Energy, Mines and Resources. Marc was appointed Minister of Finance in 1982, tabling budgets in 1983 and 1984.

Another wonderful involvement with Marc was in 2006, when Janet Walker and I organized "The Changing Face of International Commercial Arbitration" as part of the International Law Association's Biennial Conference in Toronto, ILA 2006. This program may have been the first international arbitration event to focus on diversity. ILA 2006 followed right after the International Council for Commercial Arbitration (ICCA) Conference in Montreal.

We had 13 diverse "faces" on the panel – women and men of various racial, religious and geographic backgrounds, of different legal traditions, of different linguistic backgrounds, and of a range of ages. Marc ticked several of those boxes for us and, not surprisingly, was a supporter of genuine diversity in international arbitration from the get-go.

A decade ago or more, when I was commuting weekly between Ottawa and Toronto, I ran into Marc disembarking in Toronto from a Porter Airlines flight. It was July 25th and Marc was coming to Toronto for a meeting of the board of directors Sherritt International, the Canadian mining company of which he was a director (and because of which he was barred from entering the US—Sherritt was an investor in Cuba). Marc mentioned that the next day was his birthday. That began a tradition, which I treasure, of contacting Marc each year on July 26th to wish him a happy birthday.

Marc finished his last arbitration when he was about 91, and perhaps because of COVID or perhaps because I was negligent, I missed his 92nd birthday. I did not miss his 93rd (July 26, 2022) although it was with some trepidation that I telephoned him on his personal home line.

Was he well? Would he remember me?

I was delighted that he answered. He sounded happy and sharp as a tack. Marc said they were just finishing a birthday

lunch. I apologized for interrupting and offered to end the call. Marc dissented, saying that they were washing dishes, and if I hung up, he would need to return to helping with the dishes.

Marc told me about the historic home where Claire and he were living and that had been in his family for several lifetimes, saying that his Grandfather was born and died there, his Father was born and died there, he was born there, and if his kids would stop trying to get them to move, he would end his days there too.

He invited me to visit at their home on Île-Perrot, outside Montreal, when I would next be in town.

Canadian Arbitration Week (CanArbWeek) 2022 was in Montreal in October.

As things worked out, I was going to have the Saturday afternoon free, after the ICC Canada Arbitration Committee annual meeting. I arranged to visit Marc and Claire Lalonde at their home outside Montreal. Preferring to have company, I invited Josh Karton to join me (as his flight back to Taiwan was not until the evening).

Josh and I spent a couple of hours with the Lalondes on a sunny fall afternoon, sitting in their living room chatting, sharing a bottle of wine, enjoying some tasty light accompanying food and looking out over the water at the skyline of Montreal.

Then it was time to leave, and we said warm good-byes. Final good-byes, as it would turn out.

Thank you, Marc, for what you brought to arbitration, globally and in Canada, and to so many of us.

THE HON MARC LALONDE PC OC KC IN A WORD

Professor Janet Walker CM[*]

I welcome the opportunity to add this brief remembrance to the many well-deserved tributes to our dear friend and valued colleague, the Hon Marc Lalonde PC OC KC. I heartily endorse the many other warm discourses on his life and his many wonderful contributions to the field of arbitration and, in the interests of brevity, I will not repeat them here.

Instead, allow me to recall a special moment in which Marc made a comment that was so striking that, despite the memory of the specifics of the occasion having faded, the comment remains clear to this day. , Its impact has become, if anything, more significant to me with the passage of time.

It was during a panel presentation at one of the ICC Canada Arbitration Committee's Annual Conferences, although which year escapes me. The topic of the panel was one of perennial popularity: the qualities that make a good arbitrator. Having heard three or four eloquent discourses on the subject by the other panellists, my head filled with ideas, I listened eagerly as the moderator turned to pose the question to Marc.

Marc began by summing the matter up in a word: "judgement."

Of course, he went on to explain the observation in greater detail, but the penetrating insight in that comment has remained with me ever since. For despite the obvious merits in the many other important qualities—diligence, integrity, decisiveness, and the like—at the end of the day, it is the exercise of good judgment that enables us to best serve the needs of the parties whose cases have been entrusted to us. It is

[*] Professor, Osgoode Hall Law School; Independent Arbitrator, Toronto Arbitration Chambers, Atkin Chambers (London), and Sydney Arbitration Chambers; Executive Editor, *Canadian Journal of Commercial Arbitration*.

a quality that is the compendious result of all the other qualities combined, but it is not subsumed in them. It is one that we may all hope to hone with experience but cannot be assured of doing so merely by serving in many cases.

So much more could be said on the topic, but I defer to the readers themselves, particularly those who knew Marc, to consider the arresting simplicity of the thought, its profound wisdom, and the way in which it reflects the character of our good friend who brought so much to our field and to our community.

REMEMBRANCE OF MARC LALONDE

Mariel Dimsey[*]

My first encounter with Marc Lalonde was in my very first case as an associate, back in 2007. It was a large investment arbitration, and I was hideously out of my depth. The week-long jurisdictional hearing went by in a blur, but Marc left a lasting impression on me. First and foremost, he was kind. I was a new associate who had no idea what she was doing and was probably making mistakes left, right, and centre. However, he never called out any of this and gave the sleek impression that he hadn't even noticed. Second, he was a seasoned professional and was prepared. He was not the presiding arbitrator in that case, but was by far the most experienced. Again, he did not let his seniority and experience overshadow and dominate. He waited his turn, asked appropriate and fair questions, and awaited an answer. Third, he was able to create an atmosphere of respect and courtesy in what was otherwise a hotly contested case. He had a sense of humour, appreciated humour used by counsel (in small doses), and ensured that everyone from the expert witnesses through to the stenographer felt comfortable and was getting breaks when they needed them. Finally, he was technologically savvy. Although he was almost 80 at the time, he was deftly using the electronic bundle prepared by counsel with far more ease that the two other arbitrators, one of whom was decades his junior!

I have thought often about Marc in the time since that first hearing—in cases where arbitrators were less prepared, where the atmosphere in the hearing room became hostile, or where the tech failed. I feel incredibly grateful to have encountered him at such an early stage of my career. He was, in every sense of the word, a true role model. I felt more than one pang of sadness when I heard of his passing in May. 93 is a good innings by any

[*] Managing Partner, CMS Hasche Sigle Hong Kong LLP; Past Secretary-General, Hong Kong International Arbitration Centre

measure, but he has nevertheless left a gaping hole in the world of international arbitration. May he rest in peace.

REMEMBRANCE OF MARC LALONDE

Zachary Douglas KC[*]

Marc Lalonde had such a long life and illustrious career that it gave others the time to get to know him from different vantage points. My first sighting of Marc was literally not much more than that: my old law firm appointed him as an arbitrator in one of the early investment treaty arbitrations. I distinctly remember thinking that we must be doing something serious if a former Canadian Minister was prepared to be engaged in this capacity. I certainly became familiar with Marc's extraordinary CV around this time but that was about the extent of it.

My second encounter with Marc was of an entirely different nature. By this stage I had lost some of my hair too and thus was deemed qualified to sit as an arbitrator by my peers. And then good fortune struck: I was appointed to sit on tribunals alongside Marc on a few more investment arbitrations. He declared each of them to be his last but I suspect that there were a large number of such "final" cases that keeping him busy over the course of many years. Despite being roughly half his age and with no ministerial portfolios to speak of, I quickly found myself on very friendly terms with Marc. He was extremely approachable and had a wicked sense of humour. He welcomed me to one case with a pithy statement of everything that was wrong with each of the parties, to the horror of our more circumspect chairman. Marc was supremely modest about his life in politics, but I was supremely curious, and thus he was subjected to my questioning whenever there was a lull in the proceedings. He didn't affirm or deny his continued influence behind the scenes. Whose advice would have been more valuable to any politician or lawyer of my generation? It was an obvious deduction to make.

[*] Barrister, 3 Verulam Buildings; Professor of International Law, Geneva Graduate Institute; Professor, LUISS Rome

MEMORIES OF AN ARBITRATION

Gabrielle Kaufmann-Kohler[*]

While a lot could be said, has been, and will still be said about Marc, I would like to remember two occurrences and thereby pay tribute to his rich personality and remarkable achievements.

I was sitting with him in an investment arbitration about a mining concession, and remember being impressed by his deep knowledge of this industry; he had a perfect grasp of all the technical and business issues. No wonder, he had been a long-time member of the board of a mining company. At the same time, I was struck by how well he understood the inner workings of a state. That was less surprising—as everyone knows, he had a long past in government, holding a number of diverse portfolios, from finance over mining and resources to justice. And finally, as a lawyer, he mastered the law. He did so without getting lost in technicalities, focusing on the true purposes of the norm, with strong common sense and a good sense of justice. Drawing on his vast experience and combining it with his natural authority, his resolve, and his understanding of human nature, he was a truly formidable arbitrator, a model for many of us and certainly a model for me.

I also remember a letter he wrote to me at the time of his ninetieth birthday. I had sent my wishes and regrets for not being able to attend the celebrations in person. He replied in the kindest of terms although my message did not call for an answer, saying among other things that we would not be able to sit together anymore as he was about to retire from practice as an arbitrator, but he would continue to read the awards issued in my cases. I have often reflected on this letter: How wonderful to be able to say at ninety years of age that you will now think about retiring, when regular people retire a quarter of a century

[*] Professor, Geneva University; International Arbitrator, Lévy Kaufmann-Kohler.

earlier (admittedly not in arbitration). This was the perfect illustration of Marc's longevity, but even more so of his extraordinary energy and positive attitude towards life.

The arbitration community is privileged to have counted Marc among its members, and I am lucky and grateful to have had the opportunity of working with and learning from him.

OF KINDNESS, COMPETENCE AND PRINCIPLE

Barton Legum[*]

Marc Lalonde presided over the first tribunal on which I sat as an arbitrator. It was 2009. Back in those days, it was common in ICSID cases to meet in person for the first session between the arbitrators and the party representatives. As was also common, the arbitrators and the tribunal secretary met for dinner the evening before the first session.

I felt a mixture of anticipation and nervousness. This was the start of my career as arbitrator, notwithstanding the arbitrations I had led as counsel. The other co-arbitrator, like Marc, was a more senior lawyer with a much longer and more illustrious career than mine.

Marc immediately put me at ease. His trove of anecdotes and stories enlivened the evening. At some point our discussions touched on consensus decision-making. Marc described what this meant in Canada when he served in the Cabinet of Prime Minister Pierre Trudeau. "The Prime Minister would say 'this is how I want it to be — does anyone have a problem with that' and then stare down each member of the Cabinet in turn." The consensus emerged because no one wanted to take on the Prime Minister.

That was not how Marc ran our tribunal. He was a real consensus-builder, discussing each suggestion and working out an approach that was both appropriate and acceptable to all.

We also discussed, during the course of that dinner, a troubling state of affairs. Marc had some years before agreed to

[*] Bart Legum is a founding partner of Honlet Legum Arbitration, a Paris-based arbitration boutique. Earlier in his career, he served as co-chair of the litigation practice of a global law firm and lead counsel for the United States in the first arbitrations under the investment chapter of the North American Free Trade Agreement.

serve on the board of a Cuban company. Canada had normal relations with Cuba and it was perfectly normal for him, as a citizen and resident of Canada, to serve in that capacity. The US, however, had imposed unilateral sanctions on Cuba. Marc's service on the board of that company earned him a flag in the US passport control system.

This meant that every time he travelled to the US, he spent hours in passport control. This was so even when he travelled as a member of an ICSID tribunal. While Marc was of course expert in the ICSID Convention and the obligations of safe passage for arbitrators it required of Contracting States,[1] US passport control officers were not. Despite his efforts, and those of ICSID and the Canadian government, the situation persisted. It became clear that Marc had a choice: resign his position on the board and again travel trouble-free to the US; or maintain his position and forgo travel to Canada's neighbour and largest commercial partner.

Marc maintained his position on the board despite the personal inconvenience it caused. He was a man of principle. Canada was sovereign and independent from its strongest ally and trading partner to the south. His actions reflected that principle.

The parties settled our arbitration not long after the first session. However, the example that Marc set—of kindness, competence and principle—remains with me to this day.

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[1] See *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965 (entered into force 14 October 1966, 7 signatories, 158 parties), 575 UNTS 159, art 2: ("persons acting as conciliators or arbitrators … not being local nationals, shall enjoy the same immunities from immigration restrictions … and the same treatment in respect of travelling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.").

REMEMBRANCE OF MARC LALONDE

Jan Paulsson[*]

Marc Lalonde arrived in the arena of international arbitration as a man who had been a dominant figure at the pinnacles of public service and renown.

I was then a young lawyer in Paris, sent on some trivial errand to meet him at his hotel—I think to deliver documents. I was prepared to be in awe in case I actually ran into him, but supposed it more likely that I would leave the package with the concierge. Instead, I made an instant friend (as will surprise no one who knows the man). To start with, he was staying in a perfectly ordinary hotel. Moreover, he was actually waiting for me downstairs and apologized for the inconvenience he had caused me. Next, he said he felt like stretching his legs and "the least he could do" was to walk with me back to my place of employment. And so, walking back to the Champs-Elysees, we had a chat as though we were both enthusiastic neophytes, and he asked *me* things like "I'm a beginner in this line of work, how these rules actually function?" This was as down-to-earth person as I had ever met: considerate, inquisitive, self-deprecating.

And so, I thought, this is what my father meant, the thousand times he instructed me (invariably in English): *always simple, always great*.

[*] Judge, Court of Cassation of Bahrain; President, SCCA Court, Saudi Center for Commercial Arbitration

REMEMBRANCE BY STEPHEN SCHWEBEL

Stephen Schwebel[*]

Marc Lalonde was an arbitrator of international distinction and, more than that, a man of distinguished intellect and character.

[*] Independent Arbitrator; former President of the International Court of Justice

SITTING AND WALKING WITH MARC ...

Brigitte Stern[*]

I had the pleasure and honour to sit five times in investment arbitration cases with Marc Lalonde; in three cases, we were co-arbitrators and in two cases he was the President. It has always been challenging to discuss cases with him, as he was an excellent and subtle lawyer and, above all, had a great sense of justice.

I will only refer to one of our common cases, which presented an unusual outcome.[1] In that award, adopted by majority, Marc dissenting, the Members of the Tribunal adopted three different analyses. In brief, the President considered that the Tribunal had no jurisdiction *ratione materiae*, I considered that the Tribunal had no jurisdiction *ratione temporis,* because the investor had committed an *abuse of rights* at the time when it restructured its investment, and Marc considered that the Tribunal had jurisdiction, as the following extracts of the award and the dissent show:

Arbitrator Park's conclusion:

> In the view of Arbitrator Park, this reality prevents this Tribunal from taking jurisdiction over the current dispute. Neither the ECT nor the Netherlands-Turkey BIT contemplates jurisdiction over a claim brought by an entity which played no meaningful role contributing to the relevant host state project, whether by way of money, concession rights or technology.[2]

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[*] Emeritus Professor, University Paris 1 Panthéon Sorbonne.

[1] *Alapli Elektrik B.V. v Republic of Turkey*, ICSID Case No. ARB/08/13, Award, 16 July 2012.

[2] *Ibid* at para 389.

Arbitrator Stern's conclusion:

> In conclusion, because the investment was not a *bona fide* investment, as it was performed at a time were the facts at the root of the dispute were already known and a dispute was already a high probability, the Tribunal has no jurisdiction over this investment, as it cannot benefit from the international protection granted by the ICSID/BIT/ECT mechanism.[3]

Arbitrator Lalonde's conclusion:

> While agreeing with some of the legal analysis of the Majority, I must register a dissenting opinion from their conclusion that the Tribunal has no jurisdiction to consider the merits of the case. My dissent relates to matters of law and facts.
>
> In my view, the Tribunal has jurisdiction *ratione personae, ratione materiae and ratione temporis* under both the BIT and the ECT.[4]

The following extracts substantiate Marc's conclusions:

> In the present case, Claimant having registered as a Dutch company on 26 April 1999 clearly meets the definition of "an investor" under both the BIT and the ECT. I believe that Prof. Stern shares that view.
>
> …

[3] *Ibid* at para 417.

[4] *Ibid* at paras 1-2, Dissenting Opinion.

I disagree with Prof. Park's conclusion that "Claimant cannot be considered as an "Investor" pursuant to either the ECT or the Netherlands-Turkey BIT", Claimant having made "no relevant contribution to the Project".[5]

…

The next issue to be addressed is the one of jurisdiction *ratione temporis,* which appears to be the main point upon which Prof. Stern bases her conclusion that the Tribunal has no jurisdiction in this case. My disagreement with her is not so much with her interpretation of the law in that regard but with her interpretation of the facts.

…

Her view is that "the main purpose" of the creation of Claimant was "to gain access to ICSID arbitration at a time when there were already important disagreements between the Turkish company and the Turkish authorities, the precise disagreements that are at the core of the present claim of Claimant". I beg to differ.

I have no quarrel with her references to *Mobil* (which I have already commented upon) or to *Phoenix.* I also agree with her that, to quote *Phoenix,* "once the acts which the investor considers are causing damages to its investment have already been committed", the investor cannot re-arrange its affairs so to claim the

[5] *Ibid* at para 8

> benefits of investment protection under a BIT or the ECT.
>
> I also agree that there is a dividing line between good faith and bad faith restructuring. However, I have serious concerns about reaching a negative conclusion about a restructuring, on the basis of an investor "seeing a dispute looming with his own government" or when "the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration". Large development projects, whether a State is a party or not, regularly give rise to disagreements between the parties. Entrepreneurs are constantly sailing in a fog of "looming disputes".
>
> Prof. Stern is right to state that "(t)he dividing line occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a high probability and not merely a general future controversy" but I would add that one is not talking here about any dispute but about the one which is specifically the subject of a claim under an investment treaty.
>
> In my view, the present case is very far from even approaching that famous dividing line … [6]

The award was brought by the investor before an ICSID *ad hoc* Annulment Committee. The Annulment Committee did not annul the award, as it considered that what was important was the existence of a majority for the conclusion, not necessarily the roads to arrive at such conclusion:

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[6] *Ibid* at paras 39-44.

> The Committee considers that the Tribunal accomplished the task of determining whether or not it had jurisdiction in compliance with the ICSID Convention. Indeed, the Award was rendered by a Majority made up of Arbitrators Park and Stern, who agreed that the Tribunal lacked jurisdiction to hear the case. The Hon. Marc Lalonde dissented, having reached the conclusion that the Tribunal had jurisdiction.
>
> Therefore, the decision that the Tribunal lacked jurisdiction to hear the case was lawfully taken by a majority of two out of three arbitrators, in strict compliance with Article 48 of the ICSID Convention.
>
> As stated in the Award, Arbitrator Park reasoned that the Tribunal lacked jurisdiction because the Claimant was not an investor, having failed to make any personal contribution to the Alapli Project. Arbitrator Stern considered that the Tribunal lacked jurisdiction because the timing of the investment reflected the lack of good faith of the Claimant. They consequently agreed that jurisdiction was lacking.
>
> Contrary to the Applicant's allegations, these lines of reasoning were not contradictory, but complementary. [7]

But the Annulment Committee went even a step further, stating that even if the reasonings of the arbitrators forming the majority were contradictory—which it considered was not the

[7] *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014 at paras 160-161.

case—the general principle was that what really matters is how the arbitrators decide: for or against jurisdiction:

> However, even assuming for purposes of the present analysis that the lines of reasoning employed by Arbitrators Park and Stern were contradictory, this would not affect the validity of the Award in any way. In the *ad hoc* Committee's view, what matters for the validity of the Award is how the Majority *voted*. The fact that the members of the Majority may not have agreed on the reasoning leading up to the identical vote is irrelevant.[8]

I will not only remember *sitting* with Marc, I have also quite vivid memories of *walking* with him.

During a hearing in Frankfurt, we had our traditional Tribunal dinner in a nice and elegant restaurant, but quite far away from the place where the Members of the Tribunal were staying. After dinner, I was expecting to go back to the hotel by taxi, but Marc, always strong and dynamic, declared that the weather was nice, that a "*promenade digestive*" is good for health, and that we would go back on foot. Although he had assumed the portfolio of Minister of State for the Status of Women,[9] he did not pay attention to my high heels and the uneven pavement all over. So, I was *running* for half an hour, trying not to lose my dear colleagues, but we all arrive safely back, ready to be *sitting* again the next day to listen to more testimonies, expert reports, and submissions from the Parties!

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[8] *Ibid* at para 165 [emphasis in original].

[9] In this function, he launched important reforms for the advancement of women's rights, culminating in the publication of "Towards Equality of Women".

HOMMAGE A MARC LALONDE

Pierre Tercier[*]

Marc Lalonde était de la race des Seigneurs.

Il n'était pas seulement un arbitre universellement réputé ; il faisait partie de ce petit groupe de personnalités qui ont fortement et définitivement marqué de leur empreinte tout le monde de l'arbitrage durant le second vingtième ; avec Peter Sanders, Berthold Goldmann, Pierre Lalive, Pierre Bellet, Robert Briner, Piero Bernardini, Martin Hunter, Johnny Veeder, pour ne citer que quelques noms parmi ceux qui nous ont quittés.

Travailler à ses côtés fut pour moi et comme pour tant d'autres une expérience inoubliable. Dans quelques procédures que j'ai eu l'honneur de présider, dans les manifestations professionnelles dans lesquelles nous nous sommes rencontrés, et par-dessus tout dans les contacts personnels que nous avons pu développer.

Mais qu'apportait-il donc de si particulier ?

> Une prestance. Grand, fort, droit, un port de tête assuré, une voix un peu rocailleuse matinée de l'accent québécois, un regard soutenu, une démarche posée. Bref : Marc était debout. Sa force et sa santé étaient proverbiales. Je me souviens avoir terminé avec lui quinze jours d'audiences difficiles dans le souterrain sans fenêtres d'un grand hôtel parisien, avec Brigitte Stern à nos côtés ; il nous a quitté un peu précipitamment, détendu et en pleine forme, pour prendre l'avion pour Singapour où il devait entamer dès le lendemain une bonne semaine d'audiences. Sa présence respirait la confiance et inspirait le respect.

[*] Professeur émérite de l'Université de Fribourg (Suisse); Président honoraire de la Cour internationale d'Arbitrage de la CCI (Paris)

Une connaissance exceptionnelle de la vie sociale. Qui pouvait à part lui tirer ses expériences de l'exercice des plus hautes fonctions administratives et ministérielles ? La compréhension des rouages de la politique, de la vie sociale, du commerce ne s'apprend pas vraiment sur les bancs de l'Université. Il faut avoir été confronté aux domaines les plus compliqués pour en avoir une vue complète. La première condition nécessaire à qui veut ensuite décider consiste à comprendre. Sa maîtrise était impressionnante.

Un sens de l'écoute. Il ne suffit pas d'apprendre et comprendre, encore faut-il savoir écouter. Ce qui m'a toujours frappé chez Marc, c'était précisément cette aptitude, cette volonté de commencer par écouter, sans préjugé (quel beau mot !). J'aime rappeler à mes étudiants cette sentence de Goethe « Reden ist eine Bedurfnis, Zuhören eine Kunst. ». Parler est un besoin, écouter est un art. Dans les quelques procédures que j'ai eu la chance de mener avec lui, j'ai toujours admiré son attention, non seulement à ce que disent les parties et leurs conseils, mais surtout à ce que soutiennent les collègues siégeant à ses côtés. Fort de son autorité, il aurait pu imposer ses opinions ; jamais il ne le fit sans avoir d'abord écouté. Son ouverture d'esprit était admirable.

Le courage de décider. Comme le ministre qu'il fut, l'arbitre doit avoir le courage de trancher et donc de départager des intérêts souvent contradictoires au nom des valeurs qui fondent les relations sociales. L'objectif n'est pas de plaire ou de compromettre, par exemple à la partie qui l'a désigné. Il faut savoir trancher en application des convictions profondes de chacun. Et Marc était un homme de conviction. Ses positions ont pu partiellement diverger de celles de ses collègues, il l'exprimait alors avec clarté et respect pour les autres. Son courage était à la mesure de ses convictions.

> Une indépendance sans faille. Pour décider, il faut tenir compte de tous les éléments de droit et de fait. L'intelligence n'y suffit pas, il faut de l'indépendance et du travail. Marc n'en a jamais manqué. Mon premier souvenir de lui, qui est aussi le plus fort, remonte à la décision *Cementownia*, aux côtés de Christopher Thomas. Quel bonheur pour un président de sentir à ses côtés des co-arbitres totalement imprégnés du souci de dire la justice.
>
> Une belle humanité. Impossible d'exercer cette fonction de juger, l'une des plus ambitieuses sans doute, sans disposer de qualités humaines incontestables. Jusque dans les dernières années de sa carrière, Marc a gardé cette droiture. La communauté de l'arbitrage n'est pas un simple groupement professionnel. Elle a une âme. Marc savait la faire vibrer. Quels souvenirs que ces petites attentions qu'il offrait à ses collègues en arrivant de Montréal avec pour chacun (y compris la secrétaire du Tribunal ou la conseillère de l'ICSID), une petite bouteille de sirop d'érable préparée par son épouse. C'est le lieu de l'associer à Marc pour tout ce qu'elle a su lui apporter.

Toute notre gratitude à toi Marc, pour ce que tu as été et pour tout ce que tu nous as donné. On n'oublie pas les Seigneurs, on ne t'oubliera pas.

Marc Lalonde is truly considered a master of international arbitration. I had the honour of knowing him as an arbitrator and as a friend, and having an opportunity to witness his ability to listen, his courage to decide, his unwavering independence, and his exceptional human qualities.

MO' APPOINTMENTS MO' PROBLEMS? AROMA FRANCHISE V AROMA CANADA

Joshua Karton[*]

The decision of the Court of Appeal for Ontario in *Aroma Franchise Company Inc. et al. v Aroma Espresso Bar Canada Inc. et al.* had been hotly anticipated by arbitration lawyers across Canada.[1] The decision of the application judge in Ontario Superior Court [2] had caused something of a sensation, setting aside two international awards based on a finding of reasonable apprehension of bias on the part of a well-known Toronto arbitrator, after the arbitrator failed to disclose a second appointment by the same law firm during an ongoing arbitration. The decision raised concern for arbitrators in Canada and other Model Law jurisdictions who accept multiple appointments from the same law firm, especially in niche fields of practice or smaller communities where the number of qualified arbitrators may be small.

While the outcome represents something of a return to normalcy after a surprising trial court decision, *Aroma* not only clarifies some key legal issues relating to arbitrator bias, both within Canada and for other Model Law jurisdictions, it also has great relevance for cases involving multiple appointments of an arbitrator by the same party or counsel.

I. BACKGROUND

Aroma Canada was the master Canadian franchisee of Aroma Franchise, a US coffee shop chain; it effectively acted as a middleman between the franchisor and individual coffee shop owners in Canada. Alleging various breaches of the master franchise agreement, Aroma Franchise took steps to terminate the contract and assume Aroma Canada's role with respect to the Canadian franchisees; Aroma Canada also alleged various breaches of the agreement by Aroma Franchise. The contract contained an arbitration clause calling for arbitration in

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[1] 2024 ONCA 839 ["*Aroma* ONCA"].

[2] 2023 ONSC 1827 ["*Aroma* ONSC"].

Toronto before a sole arbitrator, under the ADRIC Arbitration Rules, which themselves incorporate the UNCITRAL Rules for international arbitrations.[3]

The parties mutually agreed to appoint an experienced Toronto-based practitioner as the sole arbitrator, who ultimately held that Aroma Franchise had wrongfully terminated the contract and awarded damages to Aroma Canada. Aroma Franchise applied to set aside the award, leading to the Ontario court proceedings.

Unbeknownst to Aroma Franchise, most of the way through the proceedings, the firm representing Aroma Canada, Sotos LLP, appointed the same arbitrator in an unrelated case. Just prior to issuing his award, the arbitrator emailed the parties; mistakenly, he copied a Sotos LLP lawyer from the other case, and did not copy two of the three lawyers involved in *Aroma Franchise v Aroma Canada*. The other Sotos LLP lawyer, who was included on the email, was involved in both cases. When Aroma Franchise's counsel asked why not all of the lawyers involved were copied but this other lawyer was, the Sotos LLP lawyer who did receive the email replied only, "Thanks, Matt. Please continue to add Michelle." Neither he nor the arbitrator mentioned that they were also working together on the unrelated case.

When the arbitrator issued his final award, he again mistakenly copied the Sotos LLP lawyer from the unrelated case. When counsel for Aroma Franchise inquired about this, they put the matter bluntly: "...in light of [the lawyer's] inclusion in this email thread, our clients wish to have clarification as to why he was copied, including whether there is or has been any other relationship of any kind between Mr. Arbitrator and Sotos LLP, including any other appointments as arbitrator or mediator." The arbitrator replied the same day, stating only, "That was my mistake. [He]should not have been copied." This email did not answer the question posed. Four minutes later, the Arbitrator sent a further response stating: "Sotos has retained me as an arbitrator on another matter which is ongoing."

[3] This will no longer be the case under the new ADRIC Arbitration Rules, which take effect on January 2, 2025. The new rules have not yet been publicly released at time of writing.

When Aroma Franchise's counsel sent a further series of questions, the arbitrator replied, in part:

> The issues in that case do not involve franchise law but there are contract issues in an industry completely unrelated to the Aroma business and in a different contractual relationship. I believe the contract issues are not in any way related to the contract issues in the Aroma case. I don't believe there is any overlap in the issues between the two cases. I am not aware of any connection between the parties in that arbitration and the Aroma arbitration.

Aroma Franchise advised the arbitrator that they intended to apply to the Ontario courts to set aside the award on grounds of reasonable apprehension of bias. After the arbitrator issued a final award on interest and costs, Aroma Franchise proceeded with its set-aside application.

II. THE SUPERIOR COURT DECISION

At the Superior Court, application judge Steele J, applied Ontario's *International Commercial Arbitration Act*, which enacts the UNCITRAL Model Law. In finding that there was a reasonable apprehension of bias, the application judge focused on the issue of disclosure, citing in particular Art. 12(1) Model Law, which requires an arbitrator to "disclose any circumstances likely to give rise to justifiable doubts about his impartiality or independence".

The application judge also cited the *IBA Guidelines on Conflicts of Interest*[4] as "instructive", although she acknowledged that they were not binding. She emphasized General Standard 3(a) of the IBA Guidelines, which provides that arbitrators must disclose any relevant factors circumstances that "may, in the eyes of the parties" give rise to doubts as to the arbitrator's impartiality or independence, and noted that this obligation persists throughout the arbitral proceedings.

[4] International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (23 October 2014) <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918> ["IBA Guidelines"].

Although the judge acknowledged that two appointments by the same firm in quick succession does not match any relationship on the IBA Guidelines' Orange List (which requires a minimum of three appointments by the same firm), she affirmed the non-exhaustive nature of the IBA Guidelines' lists.

The application judge also made extensive reference to the UKSC's decision in *Halliburton v Chubb*.[5] She acknowledged that the cases were distinguishable, in particular because *Halliburton* involved multiple appointments by the same party in related cases, while *Aroma* involved two appointments by the same law firm in unrelated cases, and that *Halliburton* was decided under different legislation (the England & Wales *Arbitration Act 1996*, which includes an additional requirement to show substantial injustice not found in the Model Law, and which lacks an express statutory requirement of disclosure). Nevertheless, the application judge held that the sole arbitrator should have disclosed to the Aroma parties his second appointment by the Sotos law firm. The court concluded that "it is a bad look" that mid-way through the Aroma arbitration, lead counsel for one party retained the same arbitrator in another arbitration in which he was also lead counsel.[6]

The decision emphasizes context. First, and most important for the application judge, correspondence between counsel from before the arbitrator's appointment showed a particula0r concern about prior relationships between counsel and potential arbitrators, which the judge seems to have found created a heightened duty to disclose. Second, the arbitrator had not previously been appointed by Sotos LLP in any other arbitrations, so it could not be said that he was the firm's "go to arbitrator for franchise disputes". Third, there was 15 months of overlap between the two arbitrations without any disclosure of the second appointment. And Fourth, the revelation of the second appointment came only through inadvertent copying of the wrong lawyer on an email, and then the arbitrator (and the Sotos lawyers) did not immediately disclose the second appointment after that inadvertent revelation, but rather continued to decline to mention until a second inadvertent revelation and a series of pointed questions from counsel. Accordingly, the application judge found that there was a failure to disclose facts that should have been disclosed, leading to a

[5] [2020] UKSC 48 ["*Halliburton*"].
[6] *Aroma* ONSC, *supra* note 2 at para 87.

reasonable apprehension of bias, and that the arbitrator's awards therefore must be set aside and a new hearing ordered.

The general sense in the Canadian arbitration community was that, while the arbitrator should have "come clean" after the first inadvertent disclosure, the Superior Court decision created more problems than it resolved.[7] First, although the application judge relied on *Halliburton* for her findings on disclosure, she does not seem to have considered *Halliburton*'s holding as to apprehension of bias, in particular that the UKSC held that there was no apprehension of bias despite arbitrator conduct that was substantially more egregious than that the conduct involved in the *Aroma* case.[8] Second, in finding that disclosure of the second arbitration was required, the application judge referred to the parties' subjective expectations, relying on correspondence between the parties' counsel that the arbitrator could not have seen, and which accordingly should not have been held to create any heightened sensitivity to conflicts on the part of the arbitrator. Third, the application judge criticized the arbitrator for taking two overlapping appointments from the same firm while at the same time criticizing counsel for appointing the arbitrator twice despite having no previous experience with him. Did the Court really mean that *a lack of previous appointments* by the firm raises more concerns than a *long history* of appointments? Finally, and perhaps of greatest concern, counsel for Aroma Franchise argued that the proffering of money to the arbitrator by the Sotos firm for the second appointment was in itself fatal to the arbitrator's impartiality in respect of the first appointment; the application judge never explicitly held against this, but rather implied that the mere prospect of an additional appointment could be sufficient to ground a finding of bias due to the potential for profit inherent in the relationship between

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[7] Here I rely in particular on Bruce Reynolds, James Little, and Nicholas Reynolds, "The Implications of Repeat Arbitral Appointments: Aroma Franchise Company v Aroma Espresso" (2023) 4(1) Can J Comm Arb 60.

[8] There, the arbitrator in question was appointed in three arbitrations arising from the same factual background (the Deepwater Horizon incident). *Halliburton v Chubb* was the first. The arbitrator did not disclose to Halliburton that Chubb had appointed him in the second arbitration (in which Chubb was represented by the same firm of solicitors, Clyde & Co), and also failed to disclose his appointment in the third arbitration (which involved a different insurer, but the same insured as in the second arbitration). He described the nondisclosures as an "oversight". *Halliburton*, *supra* note 5 at paras 16-17.

arbitrators and counsel. If this logic is taken to its conclusion, no arbitrator could ever be considered impartial if they accept more than one appointment from the same party or firm. But even if one does not go that far, arbitrator impartiality may come under scrutiny although multiple appointments are practically unavoidable, such as in smaller markets or specialized fields with limited pools of qualified arbitrators. After all, there are only a few experienced arbitrators in Toronto who have significant expertise in franchise law.

III. THE DECISION ON APPEAL

The ONCA allowed the appeal, overturning the application judge's decision on the question of reasonable apprehension of bias. However, since Aroma Franchise had also raised other grounds for set-aside, which the application judge did not address because she found that the award should be set aside for apprehension of bias, The ONCA remanded the matter back to the Superior Court for consideration of those grounds.

First, the ONCA cleaned up a possible area of uncertainty by holding explicitly that the common law "reasonable apprehension of bias" standard[9] is equivalent to the Model Law's "justifiable doubts" standard.[10] Having concluded this early in its decision, the Court referred to the two tests interchangeably thereafter. I have never been able to discern a substantive difference between the two formulations, and cannot see any principled reason why the standard for challenge to an arbitrator or their award on grounds of bias should be different in domestic and international cases. I therefore welcome the explicit equation of the two tests.

The Court was writing for a Canadian audience, and there is value in reassuring that audience that the familiar test under domestic legislation and case law matches the test under the Model Law, which is less well-known in Canada. However, the Court ought to have started from Article 2A(1) of the Model Law, which provides that the Model Law should be interpreted in accordance with its international origin and the need to promote uniformity in its application. This provision requires courts to avoid interpreting the Model Law by reference to (potentially divergent) national laws, and to check their

[9] Codified in Arts 11 and 13 of the Ontario *Arbitration Act*, 1991, SO 1991, c 17.
[10] *Aroma* ONCA*, supra* note 1 at para 2.

interpretations against those reached by courts in other Model Law jurisdictions so as to promote uniform application of this uniform text. It was, therefore, improper for the Court to interpret the Model Law's "justifiable doubts" standard by reference to Canadian or English case law applying the "reasonable apprehension of bias" standard, even if the two appear to be functionally identical. In other words, the Court should have applied *only* the "justifiable doubts" test, noting along the way that the "apprehension of bias" test would lead to the same outcome, rather than conflating the two tests.

Since the application judge had based her finding of reasonable apprehension of bias on the arbitrator's failure to disclose the second arbitration, the ONCA turned next to the question of disclosure. It held that, since Art. 12(1) of the Model Law applies an objective test for disclosure (in contrast to the subjective "eyes of the parties" test in General Standard 3(a) of the IBA Guidelines), the application judge erred in considering subjective factors that the parties did not make known to the Arbitrator. The Court continued, "Under the objective test, the Arbitrator's failure to disclose his engagement in what the application judge herself termed a second unrelated arbitration – one which, vis-à-vis the ongoing MFA Arbitration, had no common party or overlapping issues of significance – was not a breach of the legal duty of disclosure."[11] The application judge's reference to *Chubb v Halliburton*, while a justifiable resort to precedent,[12] misstated the applicability of that precedent: "*Halliburton* found that disclosure was legally required 'where an arbitrator accepts appointments in multiple [arbitrations] concerning the same or overlapping subject matter with [a] common party'. Here, the application judge found that there were no significant overlapping issues and no common parties."[13]

Accordingly, the ONCA found that the application judge had not in fact applied the objective test for disclosure in Art. 12(1) of the Model Law, but rather a subjective test that took into account correspondence between the parties of which the arbitrator had no

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[11] *Ibid* at para 11.

[12] *Halliburton* involved different legislation, the English *Arbitration Act 1996,* so it is not directly apposite. However, the UKSC held in *Halliburton* that the English case law on an arbitrator's duty to disclose should develop consistently with the Model Law and other international comparators. *Halliburton*, *supra* note 5 at paras 112-115.

[13] *Aroma* ONCA, *supra* note 1 at para 81 (citation omitted).

knowledge—and of which a reasonable observer similarly would have been unaware: "On the question of whether the Arbitrator failed to make legally required disclosure of a matter that would likely raise a justifiable doubt about his impartiality, correspondence that the Arbitrator was not reasonably aware of cannot be germane."[14] While the IBA Guidelines are relevant, they are not the applicable law; applying the General Standard 3(a) test was therefore a legal error.

Next, applying the objective test for disclosure in Art. 12(1) Model Law, the Court found that the arbitrator had no legal duty to disclose that he had been engaged for the second arbitration, since there was no common party in two arbitrations and no overlapping issues. These circumstances also made the facts in *Aroma* sufficiently distinct from *Chubb v Halliburton* that a different outcome was warranted: "The concern that a party to an arbitration … would have the chance to address the same or related issues arising out of the same incident before the same arbitrator in a second arbitration, without the presence of the other party to the first arbitration … is completely absent in this case." (para. 100).

The Court also distinguished *Aroma* from a facially similar case, *Aiteo Eastern E&P Company Ltd v Shell Western Supply and Trading Ltd et al,* a recent decision of the England and Wales High Court (Commercial Court).[15] First, in *Aieto*, the arbitration was governed by the ICC Rules, which apply a subjective "eyes of the party" rule for arbitrator disclosure. Second, in *Aiteo*, the arbitrator accepted two additional engagements by the same law firm, for expert advice that amounted to a co-counsel arrangement with that firm. Accordingly, in *Aiteo* there were multiple failures to disclose, not just one, and the facts not disclosed amounted to a "different and far closer relationship" with counsel than existed in *Aroma*.[16]

The Court also addressed the relevance of the IBA Guidelines' "Orange List" relationships.[17] It observed that the Orange List does not

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[14] *Ibid* at para 89.

[15] [2024] EWHC 1993 (Comm) ["*Aiteo*"]. Since *Aiteo* was released after the appeal hearing in *Aroma*, the *Aroma* parties were given leave to make additional submissions on the case.

[16] *Aroma* ONCA, *supra* note 1 at para 106.

[17] As the IBA Guidelines describes the Orange List, it is a non-exhaustive list of situations that "may, depending on the facts of a given case, give rise to a

include an overlapping appointment by the same counsel as a circumstance where disclosure is "required". While the Orange List is not intended to be exhaustive, and the commentary mentions other circumstances where disclosure may be required based on a case-by-case-assessment, none of the circumstances mentioned in the commentary was apposite.

Characterizing these other circumstances where disclosure would be required, the Court reasoned that, "In my view, the very logic of the IBA Guidelines suggests that the circumstances that would require disclosure must go beyond an appointment by the 'same counsel appearing before an arbitrator, while the case is ongoing'. Were it otherwise, the situation would be included in the Orange List."[18] While circumstances such overlapping parties and issues (as in *Halliburton*), a close relationship with counsel (as in *Aiteo*), or an appointment that brings the total to the "critical mass" included in the Orange list could tilt toward a disclosure requirement, none of those circumstances was present in *Aroma*.

The Court then addressed the application judge's intimation that the mere existence of an income-producing arrangement for arbitration services can, in itself, impugn an arbitrator's neutrality. This was an aspect of the Superior Court decision that particularly concerned the arbitration bar, and the Court properly criticized the trial court decision. It reasoned,

> It is well understood that arbitrators are paid by the parties over whose arbitration they preside. … Yet arbitrators are expected to meet the same high standards of fairness and impartiality whether they are nominated by a party or chair a tribunal…. In other words, the law forbids partiality toward the party who nominated the arbitrator and who therefore was responsible for the arbitrator being able to earn

doubt in the eyes of the parties and must therefore be disclosed pursuant to General Standard 3." *IBA Guidelines*, *supra* note 4 at Introduction, para 3.

[18] *Aroma* ONCA, *supra* note 1 at para 110.

> fees. Instead, it requires, and presumes, impartiality.[19]

In short, while an ongoing profitable relationship between arbitrator and counsel could give rise to justifiable doubts, no such relationship existed here.

The Court next turned to the question of whether arbitrators are entitled to a presumption of neutrality. A long line of Canadian case law holds that judges have a "strong presumption" of neutrality,[20] a presumption that had also been applied to other adjudicators whose mandate comes from a statute.[21] In at least one case, *Jacob Securities*, an Ontario Court had held that this presumption to privately appointed arbitrators, "whose function is in the nature of judicial determination".[22] The ONCA expressly adopted this conclusion, in rather strident terms:

> The legislature allows parties to entrust their disputes to arbitration and restricts recourse to court when they have done so. It would undermine the integrity of this legislatively endorsed system of dispute resolution, as well as confidence in the finality of the results coming out of it, to hold there to be no presumption that those results were reached by an impartial decision-maker. This would place the entire arbitral scheme under an unwarranted cloud.[23]

Of course, this presumption can be overcome by evidence of arbitrator bias. The Court therefore turned next to the implications of its finding that the arbitrator had no duty to disclose the second appointment for

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[19] *Ibid* at para 115.
[20] *Ibid* at para 133, citing *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 76; *R. v S. (R.D.)*, [1997] 3 SCR 484 at para 49.
[21] *Aroma* ONCA, *supra* note 1 at para 134, citing *Ontario Provincial Police v MacDonald*, 2009 ONCA 805 at para 44; *Terceira v Labourers International Union of North America*, 2014 ONCA 839.
[22] *Jacob Securities Inc. v Typhoon Capital B.V.*, 2016 ONSC 604 at para 40. It is perhaps notable that the judge in *Jacob Securities*, Mew J, is himself an experienced arbitrator, especially in international sports disputes.
[23] *Aroma* ONCA, *supra* note 1 at para 137.

the question of bias. Explaining the legal context, the Court (correctly) observed that, under the Model Law, a failure to disclose information that should have been disclosed "is germane to, although not determinative of, whether an arbitral award should be set aside for reasonable apprehension of bias" [24]. The Court characterized the arbitrator's failure of disclosure relied on by the application judge as "a failure to meet the parties' expectations for disclosure of which he was never informed"; accordingly, it could not support a finding of reasonable apprehension of bias.

IV. COMMENTARY

The ONCA's decision in *Aroma* puts to rest much of the anxiety engendered by the Superior Court and reaffirms Canada as sitting firmly within the mainstream of Model Law jurisdictions. However, even some commentators who agree that there was no legal duty to disclose the second appointment might still conclude that the arbitrator's conduct in appearing to conceal that appointment after the initial inadvertent disclosure was grounds for justifiable doubts about his independence and impartiality. The case is not an entirely cut-and-dried one.

There are only two legally novel aspects of the judgment, both more relevant to an internal Canadian audience than to other Model Law jurisdictions. The first is the Court's express adoption of a presumption of neutrality for privately-appointed arbitrators and the second is the explicit equating of the "reasonable apprehension of bias" and "justifiable doubts" tests. It is also notable that the Court found that, on its own, a repeat appointment by the same party or counsel does not trigger a duty to disclose. There must be some additional circumstance, such as the overlapping parties and issues in *Halliburton*, the close collaborative relationship between arbitrators and counsel in *Aiteo*, or a "critical mass" of repeat appointments as described in the IBA Guidelines' Orange List.

The case is also helpful in shedding light on the nature of the "justifiable doubts" standard under Art. 12(1) of the Model Law. As the Court found, that test is entirely objective, in contrat to the subjective "eyes of the parties" test in General Standard 3a of the IBA Guidelines. Under the Model Law, arbitrators have a legal duty to disclose only those facts and circumstances that might, in the eyes of a reasonable

[24] *Ibid* at para 12.

observer, give rise to justifiable doubts about their independence and impartiality. In applying that standard, subjective concerns of the parties that were never communicated to the arbitrator are irrelevant. Arbitrators' duty to disclose cannot be affected by information to which they were never privy, unless the parties agree to import a subjective standard, such as by expressly adopting the IBA Guidelines.

This decision is particularly helpful in preserving the viability of arbitration in niche fields of practice, smaller arbitration markets, and other circumstances where there are not large numbers of arbitrators who possess the qualifications stipulated by the parties (although the ONCA did not expressly address this issue). Where counsel do not have many qualified options to choose from when appointing an arbitrator, and where arbitrators will of necessity see the same counsel frequently, they can rest easier in knowing that a mere repeat appointment should not attract successful challenges or set-aside applications.

Nevertheless, the case still serves as a warning to counsel and arbitrators, as the Court in *Aroma* acknowledged that circumstances exist where overlapping appointments by the same law firm or party will raise a reasonable apprehension of bias. Regardless of the outcome in *Aroma*, arbitrators should still hew to the principle of "when in doubt, disclose".

COMMERCIAL ARBITRATION IN AUSTRALIA UNDER THE MODEL LAW, 3RD EDITION

DOUG JONES AO AND JANET WALKER CM

Reviewed by Anthony Daimsis, FCIArb[*]

The UNCITRAL Model Law now holds sway across more than 100 jurisdictions worldwide. While compilations of judicial and arbitration rulings that invoke the Model Law are readily available, it's rare to find a resource that delves as deeply and thoughtfully into these cases as *Commercial Arbitration in Australia Under the Model Law* does.

At first blush, one might be forgiven to believe that this book is inward-looking, that is, of interest only within Australia. However, this would be a mistake. Although the book focuses on Australia's Commercial Arbitration Acts (CAAs), what is soon revealed is that Australia has a somewhat unique approach to domestic and international arbitration. It has taken the Model Law at its word and transformed its domestic (commercial acts) and international acts to reflect a global understanding of commercial arbitration and apply it throughout Australia. Hence, the book, which discusses both commercial arbitration cases in Australia and cases outside of Australia that have interpreted the Model Law, is a treasure trove of insight and analysis for lawyers, arbitrators, judges, teachers, and all students of international commercial arbitration. As Canada is a Model Law jurisdiction and all its provinces have Model Law legislation, this work is of direct relevance to Canadian lawyers.

Now, in its third edition, this work stands out for providing readers with profound insights and analyses of commercial arbitration in action in Australia, thereby continuing to set the standard for commentary in the field.

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The third edition welcomes a new author, Professor Janet Walker, a renowned expert in arbitration and conflicts of law. Indeed, her work on conflict of laws is the standard in her home country of Canada. As the Honourable James Alsop AO, who penned the foreword to the third edition, notes, Professor Walker adds a new dimension to the previous two editions, which were already highly praised, by imbuing the third edition with an elegant prose style.

In this meticulous examination of commercial arbitration within Australia, the text unfolds across thirteen well-structured chapters, accompanied by two appendices. The initial chapter serves as a gateway into the realm of commercial arbitration in Australia, explaining its historical evolution and embedding it within the broader spectrum of alternative dispute resolution methods. This narrative doesn't merely recount history; it reifies the legal framework of arbitration, demonstrating how arbitration has taken root in Australia. This section is pivotal, as it brevets the reader with the knowledge required to navigate the intricacies of Australia's arbitration infrastructure.

Chapter Two embarks on a discourse on Part 1A of the Commercial Arbitration Acts (CAAs), laying the foundational principles and objectives aimed at ensuring a fair and final dispute resolution. Through an exacting one-to-one correspondence with the Model Law provisions, the ensuing chapters elucidate the alignment and deviations of Australia's Commercial Arbitration Acts with the Model Law, maintaining an admirable fixity to the original structure, thereby facilitating ease of comprehension and ease of application to other Model Law jurisdictions.

For example, Part 1, Section 1(5), which addresses the arbitrability of the dispute, is also the provision of the Model Law (Article 1(5), found in Chapter 1) that speaks to arbitrability. The text's architecture mirrors the compartmentalized nature of the CAAs and Model Law, with each segment dissecting the provisions, highlighted by a comparative analysis that spans across jurisdictions, notably referencing seminal decisions like the United

States Supreme Court's ruling in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc.*[1]

This comparative lens extends to discussions on arbitration agreements, the nuanced interpretations of phrases within these agreements, and the exploration of doctrines and legal principles that influence arbitration. In this section, an interesting discussion on particular forms of words used in arbitration agreements, like "arising out of", "arising in connection to", and "arising under", and a comparison between the English House of Lords's decision in *Fiona Trust & Holding Corporation v Privalov*[2] and the Australian High Court decision in *Rinehart v Welker*,[3] reveals some asymmetry between the Australian and English approaches.

This Part further offers interesting insights on topics like non-signatories, the Group of Companies Doctrine, and novation and succession, to name only a few.

Part 3 begins with an explanation of why the CAAs decided to omit the equivalent to Model Law Article 11(1). This provision permits parties to exclude potential arbitrators based on their nationality. Interestingly, in its first statutory iteration of the Model Law, the province of Ontario in Canada also omitted this section, believing (incorrectly) that this provision sought to sanction discrimination based on nationality. However, its updated statute, which adopts the 2006 Model Law amendments, brought it back, perhaps understanding that the Model Law's phrasing was a response to those jurisdictions that required parties to appoint an arbitrator who was a national of the State of the seat of arbitration.

The book progresses to dissect pivotal aspects of the arbitration process, such as competence-competence, separability, and arbitrator-ordered interim measures, in Parts 4 and 4A, with a commendable depth that brings clarity to the often complex judicial

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[1] 473 US 614 (1985).

[2] [2007] 4 All ER 951.

[3] (2012) 95 NSWLR 221.

review standards applicable to jurisdictional challenges. The historical trajectory of interim measures is traced from their judicial origins to their current embodiment within arbitration frameworks, reflecting the evolution toward a more modern arbitration ethos as envisaged by the 2006 amendments to the Model Law.

This section contains one of the most cogent explanations I have seen of the thorny question of what standard of review inures to a challenge under Section 16 of the Model Law. Although the general position globally is that a hearing *de novo* is appropriate, given that it should be a court that has the last word on a tribunal's jurisdiction, the question is more complex. Indeed, as the authors note, the Australian position, as expressed in *Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd*, adopts a *de novo* approach but defers to the tribunal's reasoning where the latter is cogent.[4] In justifying the *de novo* approach, this section cites authorities and cases from multiple jurisdictions.

Part 4A provides an excellent historical overview of interim measures, beginning from the era when only courts could issue them to early arbitration rules that contemplated arbitrator-issued interim measures, and then the 1985 Model Law approach with its inherent limits. The book explains that although the CAAs adopt the more modern approach to interim measures envisioned by the 2006 amendments to the Model Law, they do not adopt the latter's provisions permitting preliminary orders on an *ex parte* basis.

In addressing the conduct of arbitral proceedings, the text delves into the principles of fairness and equal opportunity, offering a critical interpretation of the Model Law and CAA provisions that ensure a balanced approach to case presentation.

The Model Law's equivalent to Section 18 of the CAAs has created some (albeit exaggerated) uncertainty with its use of the phrase "full opportunity of presenting his case". Although Model

[4] (2018) 57 VR 576.

Law Article 18 does not require, in fact, a full opportunity (whatever that would mean), but rather a fair and equal opportunity amongst the parties to present their cases, it is helpful that the CAAs have clarified this language by adopting the phrasing "each party must be given a reasonable opportunity of presenting the party's case". This section of the book provides a clear discussion of the matter and is informative.

The discourse extends to the assistance of courts in evidence-gathering, shedding light on the detailed provisions within the CAAs that enhance procedural clarity. This section is particularly enlightening given the deliberately general terms in which the Model Law is drafted, whereas the CAAs are far more comprehensive. In this way, readers have an excellent opportunity to consider how Australian authorities view the questions that may arise under this section, and readers are exposed to practical approaches to real-life procedures.

The book's penultimate section (comprising chapters 9, 10, and 11) focuses on the award phase, the termination of proceedings, and nuances of the law applicable to the merits of the dispute.

Chapter Nine finds one of the better discussions on the rules of law that apply to the merits of a dispute. Here, we see the extensive knowledge and experience of the authors on full display as they clarify this thorny question. Indeed, the difference between rules of law, laws, and applicable conflict of laws rules are comprehensively explained. This Part is a must-read for anyone sitting as an arbitrator or acting as counsel in cases where the parties to the dispute have not chosen a law to govern the merits of their dispute.

Other important aspects of arbitration falling within this Part include provisions regarding settlement and consent awards and the limited ability of the tribunal to correct calculation or similar errors in an award.

Additional provisions absent in the Model Law are addressed in Part 6. These include provisions authorising the tribunal to order specific performance of a contract in circumstances where the court would have the power to do so. Section 33B provides, consistent

with many arbitration rules, that unless otherwise agreed by the parties, the tribunal will determine the costs of the arbitration at its discretion. It also adds the ability of a tribunal to limit an award for costs to a specified amount.

The culmination of this scholarly work addresses critical facets of setting aside awards and the recognition and enforcement of awards, emphasizing the New York Convention's role and the specific procedural nuances of the Australian context.

While the CAAs largely enact the Model Law, differences exist. For example, a distinctive feature of recourse in the CAAs is the regime for appeals on questions of law from arbitral awards in Section 34A. This section makes an appeal available, but only with both the agreement of the parties and leave of the court.

Another helpful feature is the clear distinction drawn between procedural objections and jurisdictional objections. Here, the book references cases that make this difference somewhat clearer than it too often becomes. As the Model Law proper specifies no formal standard of review, whether for procedural or jurisdictional questions, the CAAs in this respect are superior. The authors offer constructive comments to guide the reader in understanding the differences.

Chapter 10 addresses the setting aside of awards and, to an extent, appeals from awards. Chapter 11, which addresses recognition and enforcement, focuses more on the New York Convention and should be read in conjunction with Chapter 10.

Quite helpfully, the commentary goes on to explain the burden of proof and the distinction between awards and orders (with the latter not subject to enforcement via the New York Convention), suspension of awards, arbitrability and associated enforcement issues, and enforcement against a company in voluntary administration. This last point remains a thorny one around the world. Canada's own Supreme Court has tackled a related issue in *Peace River Hydro Partners v Petrowest Corp.*, albeit under

domestic arbitration and in a receivership context.[5] The clash of policies between arbitration and insolvency varies from jurisdiction to jurisdiction, and domestic arbitration approaches may not neatly graft onto international arbitration approaches. This section of the book explains the policy choices Australian courts have addressed.

The final chapter (Chapter 12, titled Part 9 – Miscellaneous) considers a range significant provisions from beyond the Model Law, offering a comparative perspective with other jurisdictions. As just one example, this chapter has a provision for which there is no equivalent in the Model Law specifying what to do upon the death of a party. Where other jurisdictions have equivalent provisions, this chapter highlights them. Another interesting discussion is on general and specific arbitrator immunity.

This book is a testament to the authors' assiduous efforts, providing an indispensable resource for understanding commercial arbitration in Australia—and in other Model Law jurisdictions. Through thorough research and comparative analysis, it offers a reified understanding of the legal principles at play, ensuring its readers are well-equipped to navigate the complex arbitration landscape within Australia and beyond.

Commercial Arbitration in Australia Under the Model Law does more than merely add to the current literature on the Model Law. It provides its reader with a coherent and comprehensive resource written in an easily digestible format. It is an essential addition to any arbitrator's, lawyer's, law school's library and will undoubtedly become the "go-to" book of reference on implementation of the Model Law.

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[5] 2022 SCC 41.

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