THE ADOPTION OF THE UNCITRAL MODEL LAW BY THE FEDERAL REPUBLIC OF GERMANY IN THE LIGHT OF BRITISH COLUMBIA'S EXPERIENCES

by

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ABSTRACT

This thesis deals with the UNCITRAL Model Law, its general purpose and history, with the current situation and regulation of international commercial arbitration in Germany, with an examination of Canada's experiences with the Model Law and its acceptance by the Canadian Courts. It also deals with the question whether the Model Law really is an ideal arbitration law, and the thesis concludes with an evaluation of British Columbia's experiences and a strong recommendation to the German legislature to implement the UNCITRAL Model Law into the German statutes as soon as possible. The final chapter of this thesis contains a suggested English version of the new German International Commercial Arbitration Act. As an appendix, I have provided the texts of the British Columbia International Commercial Arbitration Act and the UNCITRAL Model Law.

The intention of my thesis is to examine how Canada, and its province British Columbia in particular, have implemented the UNCITRAL Model Law. In this context, the analysis emphasizes on the modifications of the original Model Law made by the British Columbia legislature, the British Columbia International Commercial Arbitration Act of 1986, this Act's acceptance by the Courts of British Columbia, the acceptance of the Model Law by Canadian Courts in general, the improvements in the area of international commercial arbitration in Canada since 1986, and the B.C. International Commercial Arbitration Centre.

There are two reasons for my investigation of the Canadian experience. The first reason is the fact that these Canadian experiences with the Model Law are of interest to the Federal Republic of Germany, because Canada was the first country in the world to adopt the UNCITRAL Model Law almost a decade ago, and the Federal Republic of Germany presently is considering implementing the Model Law as well. Therefore, Canada, and British Columbia in particular, can be exemplary models for Germany. The German adoption of the Model Law

is another main issue of this thesis which deals with problems arising in Germany in connection with the implementation.

My thesis is that the Federal Republic of Germany has to implement the UNCITRAL Model Law as soon as possible. Some facts to be discussed and results of my research that really support my thesis in this context are the goals of Germany concerning international commercial arbitration, the positive experiences of Canadian jurisdictions with the Model Law, the need for uniform commercial arbitration laws world-wide, and the warm reception of the Model Law by most international businesses and the Canadian Courts.

In the discourse of my thesis, I basically try to prove four points, namely that the implementation of the UNCITRAL Model Law in Canada and in its province British Columbia has been a successful undertaking, that the Federal Republic of Germany also needs to implement the Model Law, that there are no problems with the enactment of the Model Law due to its international origin in Canada, and that there are not likely to be any problems in Germany concerning this matter, either, and finally, that the BC-ICAA is the ideal and ingenious continuation of the Model Law which can be recommended to the German legislature, (a) with all its modifications made by the British Columbia legislature, and (b) with certain other modifications that have to made for a country like Germany due to its constitutional, economical and geographical situation. This thesis hence tries to elaborate the ideal and perfect International Commercial Arbitration Act (or Law?) for Germany -- thereby relying on the experiences and modifications made by British Columbia.

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Chapter 1: General Introduction

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Canada: No Man's Land no More[1]

These are the words Edward C. Chiasson uses to pertinently characterize the latest developments in the area of international commercial arbitration in Canada since 1986. In the last several decades, the increased frequency and complexity of international commercial transactions has resulted in a renewed interest in the benefits of international commercial arbitration and the need for consistent rules to facilitate its use. This is reflected in the relatively recent expansion in the number of international conventions on arbitral proceedings, arbitral centres, and arbitration rules. As well, many states have adopted or revised laws regulating international arbitration proceedings within their jurisdiction. Many countries are presently involved in a highly competitive struggle to attract and keep international commercial arbitration business.[2] Canada is part of this struggle, and even more so is the Federal Republic of Germany.[3] The situation for Canada, however, began to

1 E.C. Chiasson, "Canada: No Man's Land No More", (1986) 3 J.Intl.Arb. 67 at p. 67.

2 E.P. Mendes, "Canada: A New Forum to Develop the Cultural Psychology of International Commercial Arbitration", (1986) 3 J.Intl.Arb. 71 at p. 71, with further references.

3 Five years after the reunification of East Germany (the German Democratic Republic) and West Germany (the Federal Republic of Germany), it is probably safe to call the Federal Republic of Germany "Germany"; I have done so many times in this thesis.

improve with the implementation of the UNCITRAL[4] Model Law on International Commercial Arbitration[5] in 1986.

This chapter is a general introduction to my thesis and its topic, its methodological basis, the propositions it seeks to support, and to its scope of analysis. The other six chapters deal with the UNCITRAL Model Law and its general purpose and history, with the current situation and regulation of international commercial arbitration in Germany, with an examination of Canada's experiences with the Model Law and its acceptance by the Canadian Courts,[6] with the question whether the Model Law really is an ideal arbitration law, and it concludes with an evaluation of these experiences and a strong recommendation to the German legislature to implement the UNCITRAL Model Law into the German statutes as soon as possible. In the final chapter of this thesis, Chapter #7, I have drafted a suggested English version of the new German International Commercial Arbitration Act, and this chapter, Chapter #1, explains how I arrived there. As an appendix, I have provided the texts of the British Columbia International Commercial Arbitration Act and the Model Law.

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4 The abbreviation "UNCITRAL" stands for the United Nations Commission on International Trade Law, which was created by the United Nations.

5 In this thesis, abbreviations used for the UNCITRAL Model Law on International Commercial Arbitration are: Model Law, or UML if used in connection with articles, e.g. Art. 1(3) UML.

6 This thesis focuses mainly on Canadian arbitration in the province of British Columbia; I did not, however, limit my research to that province in order to develop a truly Canadian picture of international commercial arbitration.

A. Introduction to the Thesis Topic

The first intention of my thesis is to examine how Canada, and its province British Columbia in particular, have implemented the UNCITRAL Model Law. In this context, the analysis emphasizes on:

a. the modifications of the original Model Law made by the British Columbia legislature,

b. the British Columbia International Commercial Arbitration Act of 1986,[7]

c. this Act's acceptance by the Courts of British Columbia,

d. the acceptance of the Model Law by Canadian Courts in general,

e. the improvements in the area of international commercial arbitration in Canada since 1986,

and

f. the B.C. International Commercial Arbitration Centre.

In the discourse of this analysis, I will focus on the fact that the UNCITRAL Model Law is an internationally drafted body of law, and discuss whether this might lead to problems as to the relationship between international and domestic law.

Why do I analyze the Canadian experience on this matter? There are two reasons for my investigation of the Canadian experience. The first reason is the fact that these Canadian experiences with the Model Law are of interest to the Federal

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7 International Commercial Arbitration Act, S.B.C. 1986, c. 14; the abbreviation used for this Act throughout my thesis is: "BC-ICAA".

Republic of Germany, because Canada was the first country in the world to adopt the UNCITRAL Model Law almost a decade ago.[8]

> These [the new International Commercial] Arbitration Acts [of all provinces, territories and the federal government] have now catapulted Canada into the forefront of states having modern arbitration laws.[9]

Therefore, Canada, and British Columbia in particular, can be exemplary models for Germany. I am of the opinion that British Columbia's experiences with the Model Law and with the International Commercial Arbitration Centre are very useful for Germany, and besides, is it not time for the " old world" to learn from the " new world" for a change? The second reason is contained in the Preamble of the BC-ICAA that gives different motivations for the adoption of this Act by the legislative assembly of the province of British Columbia:

> [...] whereas disputes in international commercial agreements are often resolved by means of arbitration; and whereas British Columbia has not previously enjoyed a hospitable legal environment for international commercial arbitrations;
>
> and whereas there are divergent views in the international commercial and legal communities respecting the conduct of, and the degree and nature of judicial intervention in, international commercial arbitrations;
>
> and whereas the United Nations Commission on International Trade Law has adopted the UNCITRAL Model Arbitration Law which reflects a consensus of views on the conduct of, and degree and

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8 J.D. Gregory, "International Commercial Arbitration: Comments on Professor Graham's Paper", (1987-1988) 13 Can.Bus.L.J. 42 at p. 42, referring to W.C. Graham, "The Internationalization of Commercial Arbitration in Canada: A Preliminary Reaction", (1987-1988) 13 Can.Bus.L.J. 2.

9 P.J. Davidson, "International Commercial Arbitration Law in Canada", (1991) 12 Northwestern Journal of International Law & Business 97 at p. 106.

> nature of judicial intervention in, international commercial arbitrations;
>
> [...];
>
> therefore her majesty, by and with the advise and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows: [...].

The Preamble of the BC-ICAA recognizes the need for minimum judicial intervention in the area of international commercial arbitration which is in fact the most important principle of the UNCITRAL Model Law next to the principle of party autonomy. In sum, the second reason for my research is the promotion of arbitration as an accepted and recognized modern mechanism of alternative dispute resolution. And whereas Canada today enjoys a quite hospitable legal environment for international commercial arbitration, Germany does not. This thesis will hopefully contribute to change the situation for Germany by persuading the people in charge of the revision of German international commercial arbitration law that Germany needs to be a hospitable forum for international arbitrations, and that this hospitality -- in the light of a desirable uniformity of international trade laws -- can only be achieved by adopting the Model Law.

B. Scope of Analysis

This thesis attempts to analyze the adoption of the UNCITRAL Model Law in Canada and British Columbia for comparative legal reasons. The Federal Republic of Germany presently is considering implementing the Model Law as well. Therefore, the Canadian jurisdictions can serve as exemplary models for Germany. At this point, I want to identify the (still hypothetical) German adoption of the

Model Law as another main issue of this thesis since it [the thesis] also deals with problems arising in Germany in connection with the implementation. When I talk about the implementation of the Model Law by Germany, then I am biased; I have to admit that I am strongly in favour of the German adoption. But even though I am biased, my research is important research.

Why?

Because there are many problems that need to be solved before an implementation of the Model Law that was drafted by an international organization, the United Nations, can take place in Germany. Because there are conflicting legal norms and doctrines in many countries of the world when it comes to international commercial arbitration. Because many people need to be persuaded that the adoption of the Model Law is actually an improvement for Germany. Because Germany needs to update its international commercial arbitration law. And because the attitudes of different jurisdictions to arbitration are not the same throughout our world.

In Chapter #3 of this thesis, I identify the current German attitude towards international commercial arbitration. I analyze the legal norms and doctrines in the current German international commercial arbitration law that collide with certain provisions of the Model Law, and I suggest changes that may terminate these conflicts. As a result of my thesis, a suggested German version of the UNCITRAL Model Law that is largely based on the excellent modifications made by British Columbia will be created. This German version of the International Commercial Arbitration Act, therefore, takes into account all modifications of the original Model Law made by British Columbia, as well as its experiences (and Canadian experiences

in general) with the Model Law or the different International Commercial Arbitration Acts. After the analysis of the generally positive Canadian experiences with the Model Law, I make a, in my opinion, justified recommendation to the German legislature to also adopt the Model Law -- and this very soon, or the headline effect of the implementation will vanish. The nature of my research project thus is a comparative legal analysis, both of the current and quite modern Canadian international commercial arbitration law and of the current but outdated German international commercial arbitration law, and it is therefore largely descriptive, but also frequently suggestive, and hopefully persuasive.

My thesis thus is that the Federal Republic of Germany has to implement the UNCITRAL Model Law as soon as possible. Some facts to be discussed and results of my research that really support my thesis in this context are:

a. the goals of Germany concerning international commercial arbitration,

b. the positive experiences of Canadian jurisdictions with the Model Law,

c. the need for uniform commercial arbitration laws world-wide,

   and

d. the warm reception of the Model Law by most international businesses and the Canadian Courts.

My personal comments, opinions, and suggestions concerning the adoption of the Model Law by Germany can be found throughout this thesis, and I have to repeat that I am in favour of this adoption. But I hope to have proven my personal opinion by the closer analysis and discussion of both the German goals concerning international commercial arbitration and the Canadian goals in this area of 1986 that have been achieved by today.

C. Methodological Basis

Even though a biased hypothesis approach as a commencement is not necessarily the right way to begin a thesis, I want to use this traditional approach anyway. Again, my thesis is that Germany has to implement the UNCITRAL Model Law as soon as possible. The conceptual framework and research methodology that I have used to prove this hypothesis vary from issue to issue and from problem to problem. Mainly, though, I conducted my research by reading and analyzing both primary and secondary literature of German and Canadian scholars, judgments of Canadian and German Courts, German and Canadian statutes, the UNCITRAL Model Law and UNCITRAL documents, by conducting empirical research in form of a survey, and by interviewing experts in the area of international commercial arbitration.

I. Comparative Law

One of the main methodological approaches to my thesis is, of course, the approach of comparative law since I want to find out whether there is a better international commercial arbitration law for Germany than the present law. Since I try to draw conclusions from the experiences of an earlier implementation of the Model Law by one jurisdiction (Canada, or British Columbia) for the adoption of the same Model Law by another jurisdiction (Germany), I compare both legal systems and different values or traditions that exist in these jurisdictions. The law must be analyzed in a social context of both jurisdictions, and it must be clear how the law interacts with other situations in the two countries. Therefore, I investigate

the role of arbitration in Canada and Germany and its acceptance by the Courts of both countries. This is more or less an examination of arbitration law in different legal cultures and different legal systems, since British Columbia is a common law jurisdiction whereas Germany is largely based on civil law. But even though the structure of the law in Canada and in Germany is not the same, the consequences of legal relationships in both countries are quite similar to each other.[10]

In order to achieve a careful legal comparison, I selected all sections of the UNCITRAL Model Law that in my opinion must be modified before a German implementation of the Model Law can take place. Some of these modifications were made by British Columbia in the BC-ICAA, but some of these modifications are purely based on the structure of German law and its constitutional or traditional provisions. The selection of these different sections can therefore be explained with the need for their modification in order to achieve its successful application and use in Germany.

In the present political and academic debate, the following dominant concerns have developed with respect to problems involving an adoption of the UNCITRAL Model Law in Germany:

a. the definition of an "international commercial arbitration",

b. the scope of application of the UNCITRAL Model Law,

c. the form of the arbitration agreement,

d. the composition of the arbitral tribunal,

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10 T. Noecker, "Das Recht der Schiedsgerichtsbarkeit in Kanada", (1988) Diss.Ph.D., University of Muenster (Germany), at p. 17.

e. the jurisdiction of the arbitral tribunal,

f. issues already pending before a Court,

g. the referral of parties to arbitration by a Court,

h. challenges and removals of arbitrators,

i. decision competencies in challenges of arbitrators,

j. conflicts with public policy,

k. the adaptation of the other German arbitration law,

l. the arbitration award and the end of the proceedings,

and

m. interim measures of protection by Courts or tribunals.

When I asked myself how these concerns could be terminated and how possible problems involving the adoption of the Model Law could be solved, I decided to analyze British Columbia's experiences with the adoption of Model Law. In this context, I discuss the present situation of international commercial arbitration law in Germany by reviewing some of the most important German statutes, and I was able to show the disadvantages of some German provisions, especially in comparison to the Model Law. With regard to British Columbia, I take a closer look at the advantages that the new legislation has provided for international commercial arbitration in British Columbia since 1986, emphasizing the fact that there are no real disadvantages.

II. Empirical Research

As part of my empirical studies, I conducted a quantitative survey among about 100 companies of Europe and North America that are involved in international trade relations. Even though it is a small sample for a quantitative survey, I am quite pleased with the reactions and answers I have received. Since I have sent out most of the questions to Europe, Canada and the USA by fax, however, my resources as a student were naturally limited. The type of businesses surveyed, the form of the answer sheets, the questions asked, and of course the results of the survey will be discussed at appropriate points of this thesis. Most questions asked on the answer sheet were simple "Yes" or "No" questions of multiple choice style, and no qualitative answers were asked except for one where a ranking of advantages needed to be made.

The survey on the one hand focused on how the companies think the BC-ICAA has improved the arbitration proceedings in British Columbia, and on the other hand on what companies in Canada, in the USA and in Europe think of Germany as a place for arbitration (under German law) now and after the hypothetical adoption of the UNCITRAL Model Law.

III. Interdisciplinary Approaches

My thesis does not have that kind of extensive interdisciplinary approach that the authors of the readings for the Graduate Seminar at the University of British Columbia Law School 1994/95 have demanded, because I already had selected a well defined topic within two disciplines, namely the discipline of international

commercial arbitration law and the discipline of international trade law. The broad question I am asking in this context is whether the UNCITRAL Model Law is worth adopting and whether it is really the "ideal" arbitration law. In the course of my thesis, however, I limit this question to whether the UNCITRAL Model Law is the ideal international commercial arbitration law for Germany and whether this can be determined from Canada's or British Columbia's experiences, in particular.

Since arbitration law reflects the social, political or economical situation of a jurisdiction, a closer look at these three sciences was inevitable for my thesis in order to become substantial research. International commercial arbitration is strongly related to financial, political and trade aspects;[11] the international business community wants to save time and money and tries to achieve fast, fair and confidential settlements of disputes by consenting to arbitration instead of going to Court. Therefore, I look at the political and economical situation in Germany (and in Europe) to determine whether or not Germany should really adopt the Model Law. This is part of a closer investigation of the needs and advantages of businesses who actually consent to commercial arbitration to resolute their international disputes, and whether or not these businesses think that Germany needs a revision of its international commercial arbitration law.

Since I wanted this thesis to be of substantial value, I not only had to focus on the law or on judicial decisions, but also on why this or that provision is the law, or why this or that decision was made by a certain Court or arbitral tribunal. And how could I not have applied interdisciplinary research to my thesis? Law and other

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11 M.J. Mustill, "A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law", (1990) 6 Arb.Intl. 13 at p. 15.

sciences go hand it hand, law is an inter-discipline in itself; therefore, my research would have been interdisciplinary anyway, whether I had actually looked at politics, economics and other sciences or not.

IV. International Law

Since national laws are normally drafted with a state's own economic, social, and political interests in mind, it is not unusual for the application of any country's laws to an international economic transaction to conflict with the interests of other states and, sometimes, with the interests of the international economy in general.[12] Bearing these possible conflicts in mind, UNCITRAL drafted the Model Law to promote the progressive harmonization of private international trade law and international commercial arbitration in particular. These still threatening conflicts are one of my main arguments for an adoption of the Model Law by Germany, and I intend to focus on this argument quite strongly; therefore, my thesis will have a strong relation to international law or, as some scholars still call it, the law of nations.

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12 W. Janis, "International Law", at p. 45.

D. Propositions the Thesis Seeks to Support

Taking everything into account what I have explained so far, I can conclude this introduction by stating that, in the discourse of my thesis, I basically try to prove four points, namely:

a. that the implementation of the UNCITRAL Model Law in Canada and in its province British Columbia has been a successful undertaking,

b. that the Federal Republic of Germany also needs to implement the Model Law,

c. that there are no problems with the enactment of the Model Law due to its international origin in Canada, and that there are not likely to be any problems in Germany concerning this matter, either,

   and

d. finally, that the BC-ICAA is the ideal and ingenious continuation of the Model Law which can be recommended to the German legislature,

   aa. with all its modifications made by the British Columbia legislature,

   and

   bb. certain other modifications that have to made for a country like Germany due to its constitutional, economical and geographical situation.

This thesis hence tries to elaborate the ideal and perfect International Commercial Arbitration Act (or Law?) for Germany -- thereby relying on the experiences and modifications made by British Columbia.

The decision of the German legislature on the adoption can be expected in approximately four to five years from now.[13] Hopefully, this thesis is able to

efficaciously contribute something to that decision making process; nevertheless, I have achieved my goal if this thesis is able to persuade only one of the doubtful people that the adoption of the Model Law is indispensable and urgent. In this context, I am of the opinion that the various changes of the Model Law in British Columbia have been very successful, and that they are a perfect continuation of the original Model Law. In any way, I hope to be able to make an unerring recommendation to the German legislature to actually take on the UNCITRAL Model Law with all the improvements made by British Columbia and with all the suggestions made by me in the course of this thesis as soon as possible.

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13 O. Glossner, "Federal Republic of Germany", in: International Handbook on Commercial Arbitration, Suppl. 17, January 1994, at p. 2.

Chapter 2: The UNCITRAL Model Law

Chapter 2: The UNCITRAL Model Law

> ***The UNCITRAL Model Law is a distillation of the wisdom of experts from around the world, and it is in spirit and substance international.***[14]

The Model Law has been drafted by an international group of jurists which was employed by UNCITRAL.[15] This group of jurists, the Working Group on International Contract Practices, was entrusted with the project in 1981.[16] The Commission accepted the final version of the Model Law on June 21, 1985; then, on December 11, 1985, the UN General Assembly suggested to all member states to evaluate and adopt[17] the Model Law in view of the desired uniformity of procedural arbitration laws and the specific needs of international commercial arbitration practice.[18] Therefore, the Model Law has the basic recognition and support of many states around the world, in highly industrialized nations as well as in the

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14 T. Noecker, *supra* note 10 at p. 215.

15 United Nations document A/40/17, Annex I. For more background information about the UNCITRAL Model Law see the complete article by M.F. Hoellering,"The UNCITRAL Model Law on International Commercial Arbitration", (Winter 1986) 20 Intl.Lawyer 327 at p. 327 to 330, who rightly connects the project to develop a Model Law to the favourable experiences over the past twenty years with the 1958 New York Convention, and who also gives an overview over the guiding principles underlying the Model Law.

16 M.F. Hoellering, *ibid.*

17 According to K. Lionnet, "Should the Procedural Law Applicable to International Arbitration be Denationalised or Unified? The Answer of the UNCITRAL Model Law", (September 1991) 8 J.Intl.Arb. 5 at p. 5, the recommendation to adopt the Model Law is based on the consideration that national procedural laws were still far from attaining this objective in 1985.

18 United Nations General Assembly Resolution, A/RES/40/72, 11 December 1985.

developing countries. Furthermore, the Model Law is regionally and ideologically independent. It has received a great deal of world-wide attention by governments as well as prospective parties to an arbitration proceeding (arbitrants). It has been adopted by many countries so far, and the number of states incorporating the Model Law to regulate international commercial arbitration is increasing.[19]

Since the UNCITRAL Model Law has only recently been elaborated (1981 to 1985), its interpretation is often quite unclear. Its leading principles, however, are oriented towards the needs of modern arbitration in practical business life. With the enactment of the Model Law, Canada took on a modern arbitration law and leaped from the 19th century directly into the 21st. Edward C. Chiasson has formulated it this way and brought it to a very pertinent point:

> The new legislative environment in Canada is a dramatic move. It represents a kind of legislative leap-frog. Canada has moved from the 19th century directly into the 21st.[20]

The UNCITRAL Model Law was especially developed for international commercial arbitration. It contains very detailed provisions and rules in 36 articles. These 36 articles build up a practical and accommodating system of arbitration proceedings. The Model Law is considerably detailed, in part because it was

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19 The Model Law has been adopted as domestic law in Australia, Bulgaria, Canada, Croatia, Cyprus, Nigeria, Hong Kong, Russia and the US states of California, Connecticut and Texas. Additionally, most member states of the EEC (including the United Kingdom and France but excluding the Netherlands), the former socialist countries of the Czech Republic, Poland, Hungary, and the neutral Switzerland are presently studying a possible revision of their international commercial arbitration laws due to the advent of the UNCITRAL Model Law in 1985.

20 E.C. Chiasson, *supra* note 1 at p. 72.

designed as a model for countries with no law on the subject, and in part because of its civil law influences.[21]

In its basic principles, the Model Law puts into effect matters and principles that are very important to German arbitration law. These are, for example, equal treatment of parties (Art. 18 UML), impartiality and independence of the arbitrators (Art. 12 and 13 UML), full opportunity to present the case (Art. 18 UML), freedom of parties to determine certain issues (party autonomy, Art. 2, 4 and 10 UML), no judicial intervention, and if, only very limited (Art. 5, 8, 34, 35 and 36 UML), flexibility concerning the arbitral tribunal, the procedure, the applicable law, and the place and language of the arbitration (Art. 19, 20, 22 and 28 UML). These rules were developed against the background of the successful UNCITRAL Arbitration Rules[22] and reflect a blend of the diverse national approaches brought together under UNCITRAL auspices.[23] It is easy to observe that there are many provisions assuring party autonomy; therefore, party autonomy can be identified as one of the major principles of the UNCITRAL Model Law.[24] This is significant because in Germany similar ideas and principles of party autonomy prevail, which satisfies some of the basic requirements for an adoption of the Model Law.

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21 New York State Bar Association Report, "The UNCITRAL Model Law on International Commercial Arbitration", (Fall 1990) 23 NYU J.Intl.L.Pol. 87 at p.88.

22 The UNCITRAL Arbitration Rules, created by UNCITRAL, Resolution 31/98 adopted by the General Assembly on December 15, 1976.

23 R.K. Paterson, "Implementing the UNCITRAL Model Law - the Canadian Experience", (June 1993) 10 J.Intl. Arb. 29 at p. 29.

24 J.E.C. Brierly, "Canadian Acceptance of International Commercial Arbitration", (1988) 40 Maine L.R. 287 at p. 289; see also M.E. McNerney/C.A. Esplugues, "International Commercial Arbitration: The UNCITRAL Model Law", (Winter 1986) 9 Boston College Intl.Comp.L.R. 47 at p. 47.

The Model Law is based on three major concepts. The first concept is the just mentioned party autonomy, or the maximum freedom of the parties to conduct the arbitration in accordance with their stated expectation, rather than in accordance with general legal rules which may be irrelevant or may hinder the desire of the parties to achieve a fair but efficient resolution of their dispute. Secondly, such freedom should be limited only in very specific cases, in order to prevent major defects in the arbitral procedure, denial of justice, or violation of due process. Thirdly, arbitration is a mechanism of alternative dispute resolution, a way of settlement procedure, outside of the normal judicial system; use of this system should be limited to discrete circumstances and used only when necessary to further a goal of the arbitration.[25] These concepts of the Model Law mirror the basic needs of the international business community, since they provide for strict limitations on Court interference in the arbitral process.

> The role of the Court under the Model Law is to act as a facilitator to ensure the smooth functioning of the arbitration process rather than to interfere in it. In keeping with the idea that the parties should have the greatest degree of autonomy possible in arranging their affairs, the Model Law provides only the minimum of mandatory rules, leaving the parties free to agree on the procedure to be followed by the arbitral tribunal in deciding the case.[26]

But the Model Law also contains many provisions that are different from the current German international commercial arbitration law. These different provisions of the Model Law, however, are a better approach to the issue of international

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25 S.E. Lucio, "The UNCITRAL Model Law on International Commercial Arbitration", (1986) 17 University of Miami Inter-American L.R. 313 at p.313.

26 P.J. Davidson, *supra* note 9 at p. 105.

commercial arbitration than the German law, which lacks, e.g., the power of the arbitral tribunal to order interim measures (Art. 17 UML),[27] or the provision that an arbitrator has to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence even before a possible appointment as an arbitrator (Art. 12 UML).[28]

The Model Law was designed to harmonize the laws of UN member states to facilitate international commercial arbitration and to ensure its proper functioning and recognition. Its design arose from the desire to provide answers to the many problems encountered by parties contemplating an international arbitral remedy, demonstrated by the following quote of Janis that I quoted earlier and that I will quote again since it somewhat reflects the philosophy behind this thesis:

> Since national laws are normally drafted with a state's own economic, social, and political interests in mind, it is not unusual for the application of any country's laws to an international economic transaction to conflict with the interests of other states and, sometimes, with the interests of the international economy in general.[29]

The goal of the Model Law is to keep these conflicts as small as possible, as world markets continue to merge and international transactions become increasingly routine. To resolute disputes arising in these international transactions, the Model Law is one possible set of rules that can be applied to international commercial

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27 See Chapter #3 and Chapter #7, s. 17 of the suggested new German Act.

28 See Chapter #3 and Chapter #7, s. 12 of the suggested new German Act.

29 W. Janis, *supra* note 12 at p. 45.

arbitral proceedings that are also expected to increase considerably throughout the next decade.[30]

In summary, the UNCITRAL Model Law harmonizes national arbitration laws for and sets up rules which meet the modern requirements of international arbitration.[31] It is a true distillation of the wisdom of experts from around the world, and it is in spirit and substance international.[32] The UN member states now have to decide whether or not they want to incorporate the Model Law, and Germany is one of them.

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30 T. Noecker, *supra* note 10 at p. 98.

31 K. Lionnet, "The UNCITRAL Model Law: A German Perspective", (1990) 6 Arbitration International 343 at p. 343.

32 T. Noecker, *supra* note 10 at p. 215.

Chapter 3: The Situation in Germany

Chapter 3: The Situation in Germany

Germany maintains the status of a "dormant arbitration state"[33]

Since this thesis is meant to convince everybody who might be doubtful about a transformation of the UNCITRAL Model Law into the German arbitration law that this transformation is in fact necessary and overdue, I want to give an insight into the current German arbitration law, into the goals of the German government for the cities of Berlin, Bonn, Frankfurt and Hamburg as sophisticated centres for international commercial arbitration. I will examine what adjustments have to be made to the Model Law in order for it to be consistent with the *Grundgesetz*[34] and other legal traditions or practices in Germany. This chapter, therefore, deals with the present discussion about an implementation of the Model Law in Germany.

In this discussion, it is being debated whether some of the insufficient provisions of the German international commercial arbitration law should be replaced.[35] The

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33 O. Sandrock/J. Norton, "International Arbitration", Outline Notes of the Institute for International Business Law at the University of Muenster, (Germany), at p. 4.

34 The *Grundgesetz* is the German Constitution, abbreviated "GG".

35 The German international commercial arbitration law is currently codified in s. 1025 - 1048 ZPO (the ZPO is the German Code of Civil Procedure, hereinafter called ZPO), certain sections of the BGB (the BGB is the German Civil Code, hereinafter called BGB), certain sections of the HGB (the HGB is the German Commercial Code, hereinafter called HGB), certain sections of the EGBGB (part of the EGBGB is the German Code of Conflict of Laws, hereinafter called EGBGB), and many international multi- and bilateral treaties that will be mentioned and described at a later point of this thesis.

law on arbitration in Germany is largely contained in the ZPO that came into force in October of 1879 but that has been amended several times for changes in some of the provisions relating to arbitration. The last amendment was a result of the enactment of the Law Reform Act of 1986 concerning Private International Law, and it came into effect on September 1, 1986. It must be noted, however, that the currently valid German international commercial arbitration law is quite old. Some provisions date back to the last century:

> There are at present still national arbitration procedures originating from an era when arbitration had not yet developed into a genuine jurisdiction, and which therefore are no longer able adequately to meet present arbitration requirements.[36]

The statutory framework, however, has lost its appeal since the UNCITRAL Model Law was elaborated in 1985. Today, a Reform Commission attached to the Federal Ministry of Justice is studying a possible revision of the law. The results of its work, however, can not be expected before the late nineties.[37] This thesis is meant to be a convincing contribution to the work of the Reform Commission, and I will make my work available to its members.

The discussion about an implementation of the UNCITRAL Model Law is of great importance because on the one hand it is a very special and probably the only chance for Germany to become a recognized place for international commercial arbitration, and on the other hand it is a great opportunity to make the application of German international arbitration law much easier for foreign parties and

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36 K. Lionnet, *supra* note 31 at p. 344.

37 O. Glossner, *supra* note 13 at p. 2.

international clients.[38] It is also a chance for Germany to contribute immensely to the desirable uniformity of international commercial arbitration laws, made evident by the following statement of a report of the New York State Bar Association's International Litigation Committee (Commercial and Federal Litigation Section) on the Model Law in 1990:

> In view of the fact that world markets continue to grow and that international transactions become increasingly routine, the use of international commercial arbitration for dispute resolution can be expected to grow.[39]

In the world of today where comity is becoming an increasingly important issue, where a world community and global economy are developing,[40] the uniformity of international commercial arbitration laws is extremely valuable since arbitration is the mechanism of alternative dispute resolution used most in international commercial transactions.[41] Germany can take a big step into the direction of a uniform international commercial arbitration law, harmonized world-wide, by adopting the UNCITRAL Model Law.

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38 G. Loercher, "Schiedsgerichtsbarkeit: Uebernahme des UNCITRAL-Modellgesetzes?", 1987 ZRP (Zivilrechtliche Praxis) 230 at p. 230.

39 New York State Bar Association Report, *supra* note 21 at p. 109.

40 *De Savoye v. Morguard Investments Ltd. te al.*, (1990) 76 D.L.R. (4th) 256 (S.C.Canada); see also M.F. Hoellering, *supra* note 15 at p. 339 who describes the Model Law as a further step in the advancement of international commercial arbitration as a viable and preferred forum for the resolution of international business disputes that is greatly needed to facilitate and stimulate the smooth flow of international trade and investment.

41 A. Broches, "A Model Law on International Commercial Arbitration? A Progress Report on the Work undertaken within the U.N. Commission on International Trade Law", (1984) 18 George Washington J.Intl.L.Economics 79 at p. 95, who states that there was a growing interest in international commercial arbitration on the part of potential litigants, arbitration institutions and practitioners in 1984.

A. The Peculiarity of the German Situation

An implementation of the Model Law by the German government is not likely to be without any obstacles or critique. Many jurists and politicians in Germany have doubts as to the success of an adoption because of the international origin of the Model Law. They prefer a domestically developed, truly "German" international commercial arbitration law, tailored for the specific needs of Germany.[42] These people, however, do not take into account the fact that the UNCITRAL Model Law, with certain modifications and amendments, may be the best tailor available for Germany at this time in order to achieve its goal of becoming an internationally recognized place for commercial arbitration. Again, the purpose of this thesis is to persuade doubtful people like this that the Model Law, subject to some adjustments to be discussed in this thesis, is in fact the ideal international commercial arbitration law for Germany.

Nevertheless, questions arise as to whether Germany really has to adopt the UNCITRAL Model Law and as to how such a transforming implementation can be accomplished. The adoption of the Model Law into the German arbitration law reflects the justified interests of the international flow of trade, and it is also a big step towards a meaningful harmonization of the single state's procedural laws concerning international commercial arbitration.[43] Therefore, an implementation of the Model Law by Germany seems to be unquestioned, necessary and ideal. But, as is known, the devil is part of the details:[44]

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42 T. Noecker, *supra* note 10 at p. 66.

43 G. Herrmann, "Das UNCITRAL-Modellgesetz ueber die internationale Handelsschiedsgerichtsbarkeit und das nationale Recht", Manuskript fuer Nauplia-Kongress, at p.2.

> Nobody in Germany [not even me, even though I am strongly biased] can simply and inclusively demand an early adoption of the Model Law
>
> a. without considering any necessary modifications,
>
> and
>
> b. by hinting that Germany then would achieve more trust and confidence by foreign parties as a truly recognized place for international commercial arbitration.[45]

It is thus necessary to previously conduct a careful comparison between the provisions of the UNCITRAL Model Law and the relevant regulations of the current German international commercial arbitration law including international treaties.[46] Therefore, this thesis focuses on the most important points that are relevant in this context, and it investigates what modifications have to be made to the Model Law prior to an implementation in Germany. To answer this question, I investigate whether or not the Model Law indeed contains any advantages over the current German international commercial arbitration law in the 10th Book of the ZPO that would justify an implementation. Furthermore, I investigate whether the Model Law can be adopted as an additional new act (like e.g. the BC-ICAA) without changing the presently enacted statutes, or whether Germany has to create a completely new international commercial arbitration law on the basis of the Model Law, at the same time disposing of all outdated provisions concerning international commercial arbitration. This thesis tries to answer these questions by comparing the

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44 This is an old German saying.

45 G. Loercher, *supra* note 38 at p. 231.

46 See the treaties valid in Germany in Chapter #3 plus the Convention on International Commercial Arbitration of Panama City in 1975.

most important provisions of the Model Law with the current German international commercial arbitration law.

B. The current German Arbitration Law

The international commercial arbitration law of Germany is not one specific act or one specific statute. It is a confusing arbitrary composition of regulations and provisions from many different acts, codes, definitions in other codes, or international treaties, mainly dividable into four parts:

a. international treaties that apply to arbitration agreements,

b. domestic (or autonomous) German international commercial arbitration law as it is constituted in the ZPO,

c. European international commercial arbitration guidelines,

and

d. the autonomous German supplementary provisions concerning arbitration in the BGB, the HGB, and the EGBGB which contain special rules concerning formalities, procedure, arbitrability, time limitations, conflict of laws, etc.

With so many different provisions contained in different acts, codes or treaties, the work in the area of international commercial arbitration in Germany contains many hidden issues and uncertainties, mainly concerning procedural questions and substantive problems of conflict of laws. To answer these questions, many international treaties have been created. According to Art. 3 (2)(1) EGBGB, these treaties have to be applied first; only if they are not applicable or of no use to the

case, the autonomous German arbitration law can be applied as it is constituted in the ZPO, the HGB, the BGB, and the EGBGB.[47]

I. International Treaties in Germany

The German international commercial arbitration law of today consists of numerous international treaties. Germany has adhered to the following international multilateral Conventions in the field of arbitration:

a. the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of New York (10 June 1958); this convention also regulates questions of general meaning, e.g. the validity of arbitration agreements;

b. the European Convention on International Commercial Arbitration of Geneva (21 April 1961); this Convention has been ratified by more than 15 states, including some states of Eastern Europe; it is especially important to the trade between East and West; it is applicable next to the New York Convention; according to the doctrine of benefits constituted in Art. X(7) of this convention, parties can rely on the most favourable convention to them;

c. the Additional Agreement concerning the Application of the European Convention of 1961 of Paris (17 December 1962); this additional convention was set up to reform the 1961 convention and to make its application easier; it has to be applied before the 1961 convention itself;

d. the Geneva Protocol on Arbitration Clauses (24 September 1923);

e. the Geneva Convention on the Execution of Foreign Arbitral Awards (26 September 1926); these last two treaties are shut

47 E. Broedermann/J. Rosengarten, "Internationales Privatrecht", Hamburg 1989, at p. 1.

out by the New York Convention, but not from the conventions under #2 and #3; they are now only valid in connection to a few states, e.g. Portugal;

and

f. the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965.

The most important Convention in practice is the New York Convention of 1958. German Courts have demonstrated a favourable attitude towards the Convention and international commercial arbitration in general.[48] Germany has also concluded many bilateral treaties, containing provisions relating to arbitration, with the following countries:

a. Austria in 1959,

b. Belgium in 1958,

c. Greece in 1961,

d. Italy in 1936,

e. Netherlands in 1962,

f. Switzerland in 1929,

g. Tunisia in 1966,

h. the United States of America in 1954,

and

i. Russia (then USSR) in 1958.

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48 O. Glossner, *supra* note 13, at p. 20.

All of these treaties regulate most of the German international arbitration law. Only after it has been established that none of these treaties is applicable, do the autonomous ZPO or other supplementary codes and statutes begin to govern the area of international commercial arbitration.

With this confusing mass of international treaties and Conventions, however, it becomes especially difficult to apply the right source of arbitration law, even though the treaties themselves usually define their relations to other international treaties. Sometimes, the treaties bar each other because they have an overlapping area of application (e.g., the New York Convention of 1958 bars the Geneva Protocol on questions of enforcement of foreign arbitral awards); at other times, however, the treaties complement each other (e.g., the Geneva Convention of 1961 supplements the New York Convention on questions of recognition of foreign arbitral awards). If the areas of application overlap, either the more general rules apply (*lex specialis derogat legi generali; lex posterior derogat legi priori*),[49] or the doctrine of benefits allows parties to rely on the most favourable rule to them, as provided for in Art. X (7) of the Geneva Convention of 1961:

> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning arbitration entered into by Contracting States.

If none of the international treaties contain relevant provisions for a question arising in an international commercial arbitration case, the German international commercial arbitration law calls for the different autonomous conflict of laws provisions and domestic arbitration regulations mentioned above to govern the

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49 O. Sandrock/J. Norton, *supra* note 33 at p. 8.

dispute, the arbitration proceedings, or to determine the competent international jurisdiction of a Court or an arbitral tribunal.

It must be noted that, since the last century, the structure of the German international commercial arbitration law has become an increasingly complicated beast. Thus the selection of the right source of arbitration law in Germany can be quite confusing and especially difficult and time-consuming for foreign parties not familiar with German arbitration law. The character of Germany's arbitration law as a " complicated beast" can be identified as one of the reasons why the international business community has not selected Germany as a place for international commercial arbitration as many times as it should have according to Germany's immense participation in world trade. Nevertheless, the selection of the right source of law is very important for international commercial arbitration in order to answer the following questions:

a. Which arbitral tribunal is competent?

b. Is the arbitration agreement valid?

c. How to compose the arbitral tribunal?

d. What procedural law is to be applied?

e. What substantive law is to be applied?

f. What law is applied to the recognition of the arbitration award?

g. What law is applied to the enforcement of an arbitration award?

and

h. What Court has competent international jurisdiction concerning e.g. interim measures of protection or challenges removals of arbitrators?

The UNCITRAL Model Law is able to answer all of these questions in one distinct act, whereas the current German arbitration law has to call upon different international treaties, on procedural provisions of the autonomous ZPO, and on many substantive and supplementary provisions contained in the BGB, the HGB, and the EGBGB.

This whole complicated system of relevant provisions and the complexity of different sources of arbitration law lead to plenty of confusion among foreign parties and even German parties that want to apply German law to their arbitration proceeding or their contract that contains an arbitration agreement. Under these circumstances, it is certainly easier and simpler to call upon the UNCITRAL Model Law that has been recognized world-wide, and that is merely one easily comprehensible but nonetheless highly effective set of rules.[50]

II. Autonomous International Arbitration Law in Germany

This thesis is not an introduction to the current German international commercial arbitration law. To give an example of the outdated and confusing status of international arbitration law in Germany, however, I want to describe the way German Courts handle the recognition and enforcement of foreign arbitral awards, and the German law on arbitrability of the subject matter.

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50 M.F. Hoellering, *supra* note 15 at p. 338.

1. Recognition and Enforcement of Foreign Arbitral Awards

There are different rules and regulations in the German law concerning the recognition and enforcement of foreign arbitral awards if none of the international treaties mentioned above apply. Even though the recognition and enforcement of foreign arbitral awards is a very important issue arising in international commercial arbitration, the German law is absolutely outdated and very complicated on this point. Double exequatur, meaning a review by the Courts in the country of the arbitration as well as in the country of enforcement, is the rule.[51]

If a foreign arbitral award needs to be enforced in Germany, and if no treaty or Convention governs the enforcement, the procedure governing the judgment of enforcement by a German Court follows s. 1044, 1042 (1), 1042a, 1043 ZPO and a complicated procedure developed by the Federal German Supreme Court (BGH) in Karlsruhe.[52] The competent German Court (see s. 1045 - 1047 ZPO) decides upon the application of one party for enforcement according to s. 1042c ZPO either by way of decision if there has been no hearing or by way of judgment if there has been a hearing in front of the Court.[53] These decisions and judgments are subject to international treaties or to autonomous German arbitration law, particularly s. 1044

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51 Double exequatur was also the rule in Canada until the reform in 1986 which lead to great uncertainty as to the extent to which foreign arbitral awards could be enforced; see: T. Noecker/M. Hentzen, "The New Legislation on Arbitration in Canada", (Fall 1988) 22 Intl.Lawyer 829 at p. 829.

52 This Court is called the *Bundesgerichtshof*, abbreviated BGH, and it is the German Federal Supreme Court on Civil Law Matters, located in Karlsruhe. The BGH controls the law and jurisdiction of arbitration, and it assures the legal and jurisdictional continuity and unity within the entire territory of Germany as a final judicial instance.

53 According to the ZPO, hearings become necessary only if the other party claims certain objections to the enforcement.

(2) ZPO. The claimants, however, can rely on the most favourable provision to them according to the doctrine of benefits constituted in Art. X(7) of the Geneva Convention of 1961. The Court decides about the application for enforcement by testing further requirements developed by the Federal Supreme Court of Germany.[54] Two of these further requirements for a German Court's judgment or decision on the enforcement of a foreign arbitral award are:

a. subject of enforcement has to be a "foreign arbitral award"; according to German judicial practice this is usually the case when the foreign arbitral tribunal has applied foreign international commercial arbitration law;

   and

b. the enforcement of the award must not be contrary to German public policy, to essential public and moral interests of Germany as a state under the rule of law; and it must not be inconsistent with the good order and solid interests of the German society.

If the German Court decides in favour of an enforcement of the foreign award, this decision or judgment, however, is not yet sufficient to actually enforce the foreign arbitral award in Germany. In addition to a positive German judgment or decision on enforcement, the same foreign arbitral award has to be recognized by one of the German State Supreme Courts (OLGs) according to s. 722 and 723 ZPO and another requirement developed by the BGH. The foreign arbitral award will only be recognized if it is enforceable according to the law of the place of the foreign arbitration.[55] To achieve the recognition of the award, the claimant thus has to obtain a judgment or decision of the foreign Court containing a declaration that

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54 See also Chapter #7, s. 6 of the suggested new German Act, which gives jurisdiction for challenges and other matters related to arbitration to the German State Supreme Courts (abbreviated OLGs) as first instances.

55 BGH (*Bundesgerichtshof*) judgment of October 12, 1975, published in 58 BGHZ 231.

the award is enforceable at the place of the arbitration. If that is the case, the German State Supreme Court will declare the foreign arbitral award as recognized by way of judgment or decision, depending on whether or not there has been a hearing. Only then, the foreign arbitral award becomes enforceable like a German Court judgment.

In summary, the recognition of foreign arbitral awards in Germany demands three judgments, decisions or declarations by three different Courts of two different countries, namely Germany and the country of origin of the arbitration award, including one of the German State Supreme Courts. Therefore, only if the claimant has successfully achieved:

a. a positive judgment or decision on enforcement of the foreign arbitral award by a German Court,

b. the positive judgment, decision, or declaration of the foreign Court at the place of the arbitration award stating that the award is enforceable there,

and

c. the final positive judgment or decision of a German State Supreme Court concerning the recognition of the foreign arbitral award,

the foreign arbitration award can actually be enforced in Germany according to s. 722 and 723 ZPO and German case law. In German, this complicated way of recognition and enforcement is called "*Doppelexequatur*", and it is expensive, time consuming, and subject to immense Court supervision or intervention;[56] therefore, the German law does not resemble the parties' desire to fast arbitration with minimum Court intervention.

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56 O. Sandrock/J. Norton, *supra* note 33 at p. 10.

In contrast to this complicated German procedure, the UNCITRAL Model Law regulates the enforcement of foreign arbitral awards in only two provisions, Art. 35 and 36 UML. These provisions are mandatory law, and it cannot be otherwise, because they are concerned with control of arbitration through national Courts.[57] Arbitration agreements and arbitral awards are recognized and enforced under the Model Law irrespective of the location of the arbitration; a line is drawn only on the more substantive ground of whether or not an arbitration is international. Art. 35 UML was included to provide supplementary assistance in the enforcement of non-Convention awards (hence exactly where Germany needs it) without adversely affecting the operation of the New York Convention.

The Model Law proves to be very efficient on this point, and it also takes into account public policy. And most importantly, it only requires one judgment or decision by one Court of the country where the enforcement will take place. This easier procedure saves time and money for the parties, at the same time decreasing possibilities for Court supervision and intervention considerably. Therefore, in contrast to the German arbitration law, the Model Law satisfies the parties' desire for fast arbitration with minimum Court intervention.

2. The Arbitrability of Disputes in Germany

Under German law, the arbitrability of the subject matter in international commercial arbitration is quite restricted. According to s. 1025 (1) ZPO, an

57 K. Lionnet, *supra* note 17 at p. 16.

arbitration agreement can claim legal recognition only insofar as the parties to the dispute are authorized to dispose of the subject matter of their dispute by an amicable settlement. Hence, there is a clear parallel between the ability to settle a dispute and the power to enter into an arbitration agreement with regard to it. In principle, all commercial matters, including disputes on certain matters of antitrust, labour and industrial property, are susceptible of being arbitrated. There are a few exceptions to the general rule where the law expressly forbids arbitration:

a. the newly introduced s. 1025a ZPO forbids arbitration on matters involving the renting of private houses,

   and

b. according to s. 91 (1) GWB[58] an agreement to arbitrate disputes which may arise in the future in connection with restrictive trade practices is null and void, unless such an arbitral clause allows the parties to choose between arbitration and Court litigation at the time the dispute has actually arisen; it remains, therefore, possible to refer an already existing dispute in this field of arbitration; however, according to s. 91 (2) GWB, this submission must be contained in a separate document.[59]

The rules on arbitrability will not dramatically change upon an implementation of the Model Law in Germany, and they must be implemented in the new arbitration law due to constitutional reasons.[60] In this context, Art. 1 (5) UML contains a restriction that might be important:

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58 The "GWB" (*Gesetz der Wettbewerbsbeschraenkungen*) is the codification of the German Law of Restrictive Trade Practices (enacted in 1974).

59 O. Glossner, *supra* note 13 at p. 7.

60 See Chapter #7, s. 7 of the suggested new German Act.

> This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

For Germany, this expression of the Model Law has two effects: On the one hand, trust disputes according to s.91 GWB are not able to be resolved according to the Model Law; on the other hand, Germany must to stay with the basic idea of s.1025 ZPO which allows only such disputes to be subject to arbitration which parties can also amicably settle under German law. Because objective ability to reach amicable settlements is the principal test for arbitrability in Germany, these two exceptions must be incorporated in a new German International Commercial Arbitration Law.

C. Why does Germany need a new Arbitration Law?

Private international business arbitration seems to be a means of dispute resolution unparalleled in practical importance by any other procedural tool. Yearly statistics from the Court of Arbitration of the ICC[61] illustrate this very encouraging development. In 1946, four disputes were submitted to its Court of Arbitration. In 1956 this number increased to 32 disputes and in 1969 to 130 disputes. During the period 1970 through 1976, the annual average number of newly listed disputes was 170. This annual average increased again, to 250, during the period 1977 through 1982. In 1982, new cases exceeded 300 for the first time.[62] By 1985, the number of

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61 The "ICC" is the International Chamber of Commerce, Paris (France).

62 O. Sandrock/J. Norton, *supra* note 33 at p.2.

annual cases had increased to about 400,[63] and today the ICC handles about 800 international cases a year.[64] It can thus be noted that there is a growing interest on the part of businesses throughout the world in the use of arbitration to settle commercial disputes. The increasing volume of trade, the complexity of modern commercial contracts, and the tangled and conflicting laws of commercially active nations, all contribute to the advantages arbitration has over litigation in different countries, for settling disputes effectively, quickly and with a minimum of international bitterness.[65] The driving force for a revision of the German arbitration law is therefore commercial interest, but there are, of course, more reasons, including the increased use of alternative dispute resolution in international trade, the need for revision of Germany's outdated legislation, the overdue awareness by the German government of the commercial advantages of alternate dispute resolution outside the Courts, and -- especially since the reunification of (former) East and West Germany in 1990 -- relief to the overburdened judicial system.[66]

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63 B.J. Thompson, "A British Columbia Perspective on International Commercial Arbitration", (1987-88) 13 Can.Bus.L.J. 70 at p. 71.

64 O. Sandrock/J. Norton, *supra* note 13 at p.2.

65 As written in a letter by D. Straus, to Dean Rusk on March 1, 1966; the letter was then published in S.Exec.Doc.E., 90th US Congress, 2d Sess. 41 (1968).

66 Especially the Courts in the new states of Germany are overburdened because of the fact that many judges had to be replaced and that not enough Courts are available in (former) East Germany. Of course, replacement judges came almost exclusively from the West since Eastern jurists had to be educated in the new law first; therefore, many judges left West Germany to go help out in the East, thereby creating a new lack of judges also in the West.

I. Germany's Intentions

If Germany is to compete actively for international arbitration business, it must make its legal environment as inviting and comprehensible as possible. Other nations have recognized that, in a world market, sophisticated parties will always seek a forum with a favourable arbitral system. Germany is no longer an unchallenged economic metropole, and parties have a variety of sophisticated alternate places for international commercial arbitration available, like e.g. Hong Kong, Vancouver, Switzerland, New York, London or Paris. The reunified Germany -- with its new and historic capital of Berlin, its international port of Hamburg, its financial capital of Frankfurt, and with its old and now futile capital Bonn -- wants to become such a sophisticated place for arbitration, recognizing the increasing importance of international commercial arbitration as a means of dispute resolution in international transactions. Historic and glamorous Berlin as a world city, Hamburg as a gateway to the world, Frankfurt as "Europe's New York", and the old capital, idyllic and romantic Bonn, with its search for a new purpose (especially for all the old government buildings and facilities) are ideal places for modern and mature international dispute resolutions.

Perceived unfriendliness to arbitration in Germany, however, may lead parties to simply take their business elsewhere. Such an outcome is unnecessary and easily avoided. The German legal system offers much to parties familiar with its benefits, and a modest effort of adopting the UNCITRAL Model Law will make those benefits accessible and lucid to the international business community.

II. Germany's Status as a "Dormant Arbitration State"

At the present time, the parties can regulate their arbitration to a very large extent according to their wishes. In the absence of an express regulation of the parties, the arbitrators have the discretion to conduct the arbitration as they deem appropriate.[67] But even though some of the German arbitration provisions are quite liberal and flexible, they are too complex and operate too slowly to be accepted by the international business community,[68] as the above given example of recognition and enforcement of foreign arbitral awards has pointed out. And even though Germany's participation in world trade is very large, the number of international arbitrations subject to German law or of arbitrations actually taking place in Germany is relatively small. In 1985, the ICC Court of Arbitration in Paris took care of about 200 solely European international arbitration proceedings; of these were conducted 75 in France, 58 in Switzerland, 28 in Great Britain, 9 in Austria, and only 7 in the Federal Republic of Germany.[69] The situation for Germany has not yet improved (but the German government wants to change this by increasing the arbitration business in its territory): the statistics of the Court of Arbitration of the ICC in Paris[70] show that France, Switzerland, the USA and England were the countries most frequently chosen by parties in 1988.[71] The German Federal Republic was not one of them.

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67 O. Glossner, *supra* note 13 at p. 1.

68 G. Loercher, *supra* note 38 at p. 232.

69 O. Sandrock/J. Norton, *supra* note 33 at p. 4.

70 According to K. Lionnet, *supra* note 31 at p. 345, these statistics of the ICC can be considered as being representative for all international arbitration proceedings.

71 See the Annual Report of the International Chamber of Commerce, German Edition 1988, at p.26, and the English Edition 1988, at p. 28.

This status of Germany as a "dormant arbitration state"[72] is a consequence of reservations that foreigners still might have when considering Germany as a place for arbitration or when bearing in mind the application of German law, and it is also a problem concerning the German language. German is not an international language, and the German laws are not very frequently translated into English, French or Spanish, and they are especially not commented on in these or other world languages. Next to the barrier of language, however, there are two more dominant hindrances to remove:

a. a habitually subconscious feeling of mistrust towards Germany as a place for international dispute resolution by foreigners, not only due to the German history until 1945, but also because of recent problems involving the reunification of East and West Germany since 1990,

   and

b. the ignorance of Germany's international commercial arbitration law, especially due to language problems of the possibly interested clientele and to the above mentioned complexity of legal codifications concerning arbitration in Germany.

The effect of these factors is frequently being underestimated in Germany.[73] To decrease these negative effects by only creating a new " German" arbitration law of domestic German origin, it would take hard work and diligent efforts that could last for decades. Another truly " German" arbitration law, even though is might be new, modern and acceptable, would still be subject to language problems, historical obstacles and the need for further international promotion of this new law.

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72 O. Sandrock/J. Norton, *supra* note 33 at p. 4.

73 G. Loercher, *supra* note 38 at p. 233.

In this context, the UNCITRAL Model Law that does not need to be promoted on the international level any longer, offers an excellent opportunity to take a big step towards the decrease of the above mentioned obstacles for Germany. Considering the international development and UN origin of the Model Law, a reproach of ideological one-sidedness or inadequate representation of interests can hardly be made against Germany. Therefore, historical problems will no longer arise when choosing German arbitration law or Germany as a place for arbitration, if its arbitration provisions resemble the UNCITRAL Model Law. At the same time, the context and meaning of the German arbitration law will become easier to grasp and more accessible to everyone since the Model Law has official versions in almost every important business language of the world and is recognized world-wide.

An important prerequisite for achieving this goal is, of course, that Germany does not change the Model Law in too many ways. Some modifications will have to be made to bring it to perfection and to adjust it to the constitutional and legal situation in Germany, and I will discuss these essential modifications at a later point of this thesis.

III. Uniformity of International Commercial Arbitration Law

By adopting the UNCITRAL Model Law, Germany will contribute immensely to the world-wide harmonization of international commercial arbitration law where uniformity seems to be especially important.[74] In international commercial arbitration, the typical case is an arbitration between two parties who have their

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74 UN General Assembly Resolution, *supra* note 18.

places of business in different countries. The parties to an international contract often have confidence only in their own law, and in particular their own arbitration law, but have misgivings about the law of the other party -- not necessarily because the other law is in fact less favourable, but because foreign laws are not so familiar and are perceived as strange.[75]

> The fact that a national arbitration procedure has to be agreed -- which is unavoidable on grounds of enforceability -- always results in at least one party having to submit to an arbitration procedure with which it is not sufficiently acquainted.[76]

The Model Law was designed to reduce any subsequent misgivings by harmonizing the arbitration law world-wide. And since the misgivings about the German arbitration law are quite strong, the Model Law is the ideal solution for Germany's needs. As Lord Justice Kerr, President of the Chartered Institute of Arbitrators, concluded in one of his lectures:

> [...] The concept underlying the Model Law is to put an end to this state of affairs [misgivings about foreign arbitration laws] by widening the parties' choice of venue, and thus their choice of arbitration clauses for incorporation into their contracts. In so far as a country will have enacted legislation based on the Model Law, both parties will be able to find it easier to accept arbitration in that country, because they will basically know where they stand.[77]

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75 C.A. Fleischhauer, "UNCITRAL Model Law on International Commercial Arbitration", (1986) 41 Arbitration Journal 17 at p.18.

76 K. Lionnet, *supra* note 31 at p. 345.

77 M. Kerr, "Arbitration and the Courts: The UNCITRAL Model Law", (1985) 34 International Comparative L.Q. 1 at p. 7.

To know their exact position within Germany's international commercial arbitration law still seems to be out of sight for parties -- whether of foreign or German origin -- that are trying to arbitrate there. The clarifying help of the Model Law has not yet become reality for Germany when it comes to international commercial arbitration and the way its German regulation is regarded by foreign parties. An improvement can however be achieved for Germany by implementing the UNCITRAL Model Law in its jurisdiction to provide a well defined standpoint.

IV. Germany's Geographic Position

Another main argument in favour of an adoption of the Model Law by Germany is its geographic position. Germany, after its reunification and the collapse of communism in Eastern Europe in 1990, is the door of the European Economic Community to the "New East". Especially countries like Poland, Bulgaria, Hungary, the Czech Republic, and Croatia are on their way to increase trade with Western Europe.[78] These nations are on the verge of becoming industrialized and commercial areas of new and high standards. Some of these states in the "New East", like e.g. Croatia, have already implemented the UNCITRAL Model Law, and others will follow. If Germany wants to expand its position as the door to the "New East" in Western Europe, what better way could there be than adopting the same kind of dispute resolution mechanism as the states of the "New East" themselves? The same international commercial arbitration law throughout Germany and this newly emerging business community will provide a good basis for new trade

78 G. Loercher, *supra* note 38 at p. 233; K.H. Schwab, "Das UNCITRAL Model Law und das Deutsche Recht", (1987) Festschrift fuer Karl-Heinz Nagel, at p. 427.

relations from the start. This is especially true because of the fact that arbitration has been one of the most important means of dispute resolution in the former socialist countries, including former East Germany, the German Democratic Republic. The businesses in the "New East" are used to arbitration as a mechanism of dispute resolution. Therefore, these businesses are very likely to agree on using arbitration without great hesitation to resolve their international commercial disputes. In summary, the adoption of the Model Law by Germany is very essential to ensure a leading position of Germany within Europe in business relations and friendly dispute settlements with the "New East".

V. Empirical Research

As part of my empirical research, I have conducted a survey in order to get to know the opinions of international arbitrants of the UNCITRAL Model Law and what they think:

a. of Germany as a place for arbitration (under German law) now and after the hypothetical adoption of the UNCITRAL Model Law by the German legislature,

   and

b. what the advantages and disadvantages in British Columbia have been since the adoption of the Model Law in 1986.

This survey I have sent to numerous German, European, US American, and Canadian corporations that have been involved in arbitrations in British Columbia before and/or after 1986. I asked these corporations (or their legal departments) to fill out the survey sheet and then fax it back to me. I promised to treat all

information and replies anonymously. At this point, I will only disclose the results of the first part of the survey that is concerned with an adoption of the UNCITRAL Model Law by Germany. The results of the second part of the survey concerning British Columbia and its International Commercial Arbitration Act of 1986 are disclosed in Chapter #4 of this thesis.

1. Conduct of the Survey

To conduct my survey, I have sent out about 25 sheets to companies located in British Columbia, about 30 sheets to companies in the USA, about 25 sheets to companies in the EEC (outside of Germany), and more than 25 sheets to German companies. This might superficially seem like a small number of companies to consult for a quantitative survey, but my resources as a student were limited. Miraculously, almost all companies answered my request, and this quite quickly, and many also gave me their best wishes for my work. This was probably due to two facts: Firstly, I provided multiple choice answers since I did not assume that anybody in a multinational or other large corporation would have the time and passion to write an essay for me. Everything the representatives of the companies had to do was to make a mark at the most fitting answer and then fax it back to me. Secondly, I have sent most of the survey requests by fax instead of by mail and asked for an answer via fax as well. At the Jefferson Institute for Justice Studies in Washington, DC, where I participated in one of the research projects in 1992 as part of an internship,[79] I learned that prosecutors (and therefore corporations, too?) will

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79 In 1992, I contacted US prosecutors in major U.S. cities for interviews and conducted some of the fax and telephone surveys undertaken by the Jefferson Institute of Justice Studies (Washington,

almost instantly answer a fax on the same day but will never bother to reply to something that was sent to them by mail. For some reason, faxes are still regarded as something urgent and special, and I took advantage of that.

2. Results of the Survey (Part I)

Here are all the questions asked in the survey that are relevant for Part I of the survey as mentioned above. The results are disclosed right after the question as they were returned to me in a multiple choice style. An evaluation of the survey will follow after the last question:

a. Would you ever choose Germany as a place for an international commercial arbitration today?

yes:	29 %
no:	65 %
maybe:	6 %

b. Would you choose Germany as a place for that arbitration if Germany adopted the UNCITRAL Model Law?

yes:	54 %
no:	30 %
maybe:	16 %

c. Would you ever choose German law to govern an international contract involving international commercial arbitration agreements?

yes:	26 %
no:	70 %
maybe:	4 %

D.C.) to identify the needs and problems prosecutors face when confronted with complex drug and RICO cases.

d. Would you choose German law to govern that contract if Germany adopted the UNCITRAL Model Law?

yes:	59 %
no:	35 %
maybe:	6 %

These figures clearly prove that the possibly interested clientele, sophisticated corporations that frequently engage in international transactions and contracts, are very fond of the UNCITRAL Model Law. Furthermore, the willingness to go to Germany for international commercial arbitration proceedings would double among arbitrants upon an implementation of the Model Law in Germany, and so would the willingness to choose German law to govern an international contract involving an international commercial arbitration agreement. To summarize the results of "Part I" of my empirical research, I have to emphasize the warm reception of the Model Law by all arbitrants and the strong desire within the international community to consent to international commercial arbitration as a way of modern dispute settlements, especially under the UNCITRAL Model Law. As a result of my survey, I have to conclude that the international commercial arbitration business is very likely to increase in Germany upon the implementation of the Model Law -- as it is the German government's primary goal.

Taking all of these reasons why Germany might need a new arbitration law into account, I presume it is safe to conclude that Germany in fact needs a new international commercial arbitration law, and that this new law must be created by adopting the UNCITRAL Model Law.

D. What Problems might arise in Germany?

In the present debate in Germany, some dominant concerns have developed with respect to an adoption of the UNCITRAL Model Law. This thesis comparatively analyzes the Model Law and the current German international commercial arbitration law by focusing on important conflicting areas which may or may not be all of the problems or conflicts that should be mentioned in this context.

I. Scope of Application of the Model Law

According to its name and to Art. 1 UML, the Model Law is exclusively applicable to international commercial arbitration.[80] There might be difficulties with Art. 1 (1) UML if it is adopted without changes in Germany because it reads "[...] this law applies to international commercial arbitration." The term "commercial" may lead to problems since the German definition of this term is outdated and does not include all businesses the Model Law wants to be "commercial" according to the interpretation of the official footnote to Art. 1 UML. The definition of "commercial" in the German Commercial Code (HGB) does not include all business matters like e.g. investment, banking, leasing, carriage of goods or passengers by air, sea, rail or road etc., but only industrial or trade transactions for the supply or the exchange of goods or services.[81]

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80 See the language of the Model Law: "[...] for international commercial arbitration;" and "[...] applies to international commercial arbitration."

81 This definition in the German HGB dates back to 1953.

All " commercial" businesses are apostrophized as "merchants" in Germany, another old-fashioned term dating back to the last century.[82] Evidently the German definition of "commercial" needs to be updated to be able to comply with the definition of the Model Law. The German legislature is presently discussing the creation of a new definition that does not include certain " non-commercial" private parties (according to the HGB definition) due to reasons of consumer protection and other reasons, but that in every other way strongly mirrors the official UNCITRAL footnote of Art. 1 UML and its wide interpretation.

1. The Term "Commercial"

The Model Law contains a footnote in Art. 1 (1) UML that suggests that the term "commercial" should be given a wide interpretation. This footnote is a rather unusual thing for an official document of UNCITRAL but it gives much help for interpreting the Model Law in every new legislation where it might be adopted. The Model Law itself gives some details of what the definition of " commercial" should look like:

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

82 K. Schmidt, "Handelsrecht (HGB)", Section 1 II 2 at p. 7.

or business co-operation; carriage of goods or passengers by air, sea rail or road.

This is a more or less arbitrary count in any order whatever of economically relevant facts of law that leads to the question whether Germany can define the term " commercial" itself, or whether it has to adopt the Model Law's definition for the sake of uniformity. There are similar legal situations that have been found in Germany for a long period of time. For instance, the first multilateral treaty on arbitration in Geneva, the Geneva Protocol of 24 September 1923, in Nr. 1(2), contains a reservation in favour of each undersigning state to limit the obligation mentioned above to contracts which are considered as " commercial" under its national law. The same is true for Art. I (3)(2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which reserves every state that wants to implement this treaty the right to declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as " commercial" under the national law of the State making such declaration. This leads to the conclusion that it is principally left to the acting legislation of the implementing state to define the term of "commercial arbitration" within its own jurisdiction.

If defining this term in Germany, the German legislature has to keep in mind that the HGB with its historical limitation to professionally and industrially involved mercantile businesses has proven to be very narrow since "commercial" nowadays contains more than just industry or mercantile businesses in the form of selling goods. The German law is outdated and far behind in this perspective. The new definition of the term "commercial" is expected to be the modern and appropriate

solution for Germany,[83] redefined in the wide interpretation of the Model Law footnote to Art. 1 UML. The problem is that Germany can not change the definition of "commercial" due to reasons of consumer protection.

The Model Law's wide interpretation is too wide for Germany since it includes businesses that are not eligible for the stricter laws of the HGB. These businesses have to be "commercial" to be able to arbitrate under the Model Law, but they must not be considered to be "commercial" for any other legal issues arising, because being "commercial" in Germany implies to have stricter or different rules on taxation, formalities, contracts, remedies and transportation. The HGB is the modified civil code for merchants.

These "non commercial" businesses must have access to international commercial arbitration, even though they are not "commercial" under German laws. The ideal solution to this problem was found by the Canadian province of British Columbia in its BC-ICAA where there is an expansion and incorporation of the definition of "commercial" into the body of the statute at s. 1(6) BC-ICAA. The term "commercial" is very widely defined with regard to an illustrative list of examples of commercial matters found in a footnote to the Model Law. The official footnote helps to interpret the Model Law correctly and uniformly. Germany, therefore, should implement the footnote like British Columbia has done it in s. 1(6) BC-ICAA in order to make all businesses, whether or not "commercial" under German law, eligible for international commercial arbitration. This solution does not interfere with the status of these businesses as "non commercial" for other issues not

83 *Ibid.*

related to international commercial arbitration. At the same time, however, it provides their access to arbitration under the Model Law.

2. The Term "International"

The term "international" is defined by the Model Law itself in Art. 1(3) and 1(4) UML. Considering the help that the Model Law itself gives to its interpretation and considering the growing body of German case law on this matter, the definition of " international" commercial arbitration used by the Model Law itself will not involve many problems. Germany has experienced problems of exact definitions concerning the scope of application of an " international" law before (e.g., with the International Convention on the Sale of Goods of Vienna of 11 April 1980, or the European Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters of Brussels of 29 July 1968), without seriously affecting the actual incorporation or application of these laws.[84] Therefore, experience shows that differences in given definitions of technical or legal terms in a new body of law may be uncomfortable but do not establish a real barrier for Germany against adopting the UNCITRAL Model Law.

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84 T. Noecker, *supra* note 10 at p. 102.

3. The Place of Arbitration

According to Art. 1(2) UML, the provisions of the Model Law apply only if the place of arbitration is in the territory of this State. Therefore, once adopted in Germany, the Model Law would be applicable only to arbitrations taking place within its borders. The survey has demonstrated earlier that arbitrants are very zealous to go to arbitration under the UNCITRAL Model Law. If the Model Law is implemented in Germany, they might also be willing to go to arbitration there. Since one of the main reasons for Germany to implement the Model Law is the increase of arbitrations that actually take part in Germany (for arbitrations mean business, and Germany wants this business), the implementation of Art. 1(2) UML seems to be almost inevitable for Germany to reach its goals. With this important provision, the Model Law follows the so-called "territorial" theory; this theory provides the application of all procedural laws according to the place of arbitration (*lex fori*) and is of common use.[85]

It is questionable, however, whether Art. 1(2) UML would be regarded as a binding provision in Germany because it is usually possible to contractually agree upon the application of different procedural or commercial arbitration rules under German law. As consultations of the UNCITRAL working group show, the majority in that group wants Art. 1(2) UML to be an exclusive and therefore obligatory norm.[86] Herrmann, nevertheless, thinks that a contractual agreement to choose another law would be possible as well.[87] Following the opinion of the working

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85 K. Lionnet, *supra* note 17 at p. 15 (footnote 29).

86 K. Szasz, in: P. Sanders, "UNCITRAL's Project for a Model Law on International Commercial Arbitration", at p. 45.

group, however, which seems to be the majority opinion, there will not be a problem with the application of Art. 1(2) UML in Germany, because it will be regarded as a binding provision, thereby prohibiting the contractual agreement to other arbitration laws or rules.

II. The Arbitration Agreement

The Second Chapter of the Model Law contains provisions governing the arbitration agreement, its exact definition and issues arising as to formalities concerning the arbitration agreement.

1. Definition of Terms

According to Art. 7 (1)(1) UML, an "arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Rightly, the Model Law does not differentiate between arbitration agreements concerning already existent disputes and disputes that might arise in the future. This is also the position of the current German arbitration law.

Additionally, the two following concerns of the German law have to be incorporated into the new German international commercial arbitration law as well,

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87 G. Herrmann, "UNCITRAL's Work towards a Model Law on International Commercial Arbitration," (1983/84) 4 Pace L.R. 537 at p. 549.

even though they are not part of the Model Law, because they have proven to be valuable provisions within the German arbitration law:

a. with respect to an arbitration agreement referring future disputes to arbitration, s. 1026 ZPO declares that such an agreement has no legally binding force if it does not refer to disputes arising out of a defined legal relationship. Therefore, an agreement referring to arbitration all future disputes which may eventually arise between the parties, is invalid;

   and

b. section 1025 (2) ZPO declares expressly that an arbitration agreement is invalid if a party has exercised its economically or socially dominant position either in its conclusion or in the acceptance of provisions which give that party a superiority over the other party in the arbitration; the case of an economic predominance is especially given where an individual is faced by a quasi monopoly (insurance or delivery conditions); an example of social predominance is the dominant position in appointing or challenging an arbitrator.[88]

These two provisions have to be incorporated in the new German International Commercial Arbitration Act (or Law?) to maintain Germany's constitutionally required standard as a state under the rule of law.[89]

2. The Form of the Arbitration Agreement

Issues relating to the form of the arbitration agreement itself differ in all of the above mentioned codifications and treaties; some want it to be in writing, some want it merely to be part of the contract, and some do not say anything at all. Art. 7 (2)(1) UML, however, provides the following:

88 O. Glossner, *supra* note 13 at p. 6.

89 See Art. 20 GG.

> The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another.

In contrast to this provision, s. 1027 (1)(1) ZPO demands that the arbitration agreement must be concluded expressly and in writing, and that the instrument must not contain any agreements other than those referring to the arbitration procedure. The German provision therefore calls for a special document (the so-called "instrument") which may not contain other agreements than those directly related to the arbitration process. The Model Law does not establish the need for such a special document. It is, in fact, more generous concerning the form of writing than the German law. According to s. 126 BGB, the undersigning parties have to sign these documents in their own handwriting on the same sheet of the document. Therefore, the possibilities of Art. 7 (2)(2) UML, as there are the exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, would not be valid under the German law of formalities.[90]

But s. 1027 (1)(2) ZPO, however, loosens up this previous provision of s. 1027 (1)(1) ZPO, if the arbitration agreement is a business matter for the two parties and if neither of the two parties belongs to the trading professions set out in s. 4 HGB that distinguishes between "full" and "part" merchants.

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90 K.H. Schwab, *supra* note 78 at p. 428.

As regards the form of the arbitration agreement, a distinction must be made whether or not this agreement is concluded in the framework of a commercial transaction between parties who are qualified a " full merchants". In German law, there are "full" mercantile businesses and "part" mercantile businesses. The "part" mercantile businesses are referred to as being small, e.g. semi professional private persons doing business, or companies that do not earn a certain sum of money per year, or mercantile businesses that have not registered under the German Company Act; their status deprives them of certain rights and benefits, but it also protects them better than "full" merchants, but not quite as well as private consumers. The requirement of written form reflects the legislator's concern to protect "part" merchants against becoming unwittingly involved in arbitration. This protection was not deemed necessary for "full" merchants as they are thoroughly "commercial" and well aware of the existing arbitration practice.[91] Hence, only if the two parties are "full" merchants, the arbitration agreement does not have to be laid down in writing; it becomes valid if it is made orally or implicitly.[92] Therefore, s. 1027 (1)(2) ZPO is even more generous than Art. 7(2) UML if it comes to real commercially active businesses, the so called "full" mercantile businesses.

An implementation of Art. 7 UML into the German law seems to be without problems with respect to solely business matters, even though commercial business parties are currently not restricted by any writing necessities by law in Germany. This is insignificant, though, since in practice all agreements are made in writing anyway -- which is exactly what the Model Law demands. The " part" mercantile businesses are already subject to similarly strict formality provisions as they are

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91 O. Glossner, *supra* note 13 at p. 6.

92 K.H. Schwab, *supra* note 78 at p. 432.

contained in the Model Law. Consequently, no problems with the formal requirements of the Model Law are to be expected in Germany.

3. Separability of the Arbitral Clause

If the arbitration agreement is not part of a separate document but in an arbitral clause (which is usual for commercial transactions), the question might arise whether the arbitrators may decide upon the validity of the contract in which the arbitration clause is contained.[93] Contrary to earlier Court decisions, the German Federal Supreme Court (BGH) has confirmed the doctrine of separability, which had long prevailed in legal literature.[94] This decision by the BGH was received with great enthusiasm by the German and European legal literature; Professor Schlosser called it a truly excellent judgment since it represented the culmination of a clear trend which has been developing in the case law and in the literature prior to 1970:

> [...] the judgment fits in most harmoniously with a very welcome overall trend to interpret very generously the jurisdiction of arbitration tribunals (wherever established), in order to make possible an overall settlement and to prevent as far as possible the separate handling of unitary acts, i.e. partly by arbitration tribunals and partly by state tribunals. This trend is reflected (inter alia) in the fact that arbitration tribunals are also regarded as competent to determine the unwinding of relations after unilateral or agreed termination of contracts or rescission of contracts, and last but not least in the extensive legal precedents allowing binding

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93 The question of separability must, however, be distinguished from the question whether or not the arbitrators may judge upon their own competence; see also Chapter #4.

94 BGH (*Bundesgerichtshof*) judgment of February 27, 1970, published in 53 BGHZ 315 and in 83 ZZP 469 in German; published in English in (1990) 6 Arb.Intl. 79, by P. Schlosser, "The Decision of 27 February 1970 of the Federal Supreme Court of the Federal Republic of Germany", including a contemporary note by Prof. Schlosser. For more details on the case see also S. Boyd, "Arbitration under a Stillborn Contract: The BGH Decision of 27 February 1970", (1990) 6 Arb.Intl. 75.

agreements vesting in the arbitrators the power to rule on their own jurisdiction.[95]

This decision solved the problem that arose whenever an arbitrator was asked to decide on his own jurisdiction.[96] Considering the years that have passed since this judgment in 1970, it now becomes time to codify the doctrine of separability that currently is applied in Germany only under the status of interpretative case law. The new German International Commercial Arbitration Act (or Law?) is an ideal forum to codify the doctrine. Therefore, I recommend to incorporate this doctrine as a new statute (most likely as a subsection of s. 7 of the new German law) amending the implemented Model Law. This new subsection should have a similar content to Art. 16(1)(a) UML, that specifically provides for the separability of the arbitration clause from the rest of an invalid contract, but in Art. 16 UML the decision is left only to the arbitral tribunal and not for the Courts. Since this section is only for the purpose of an arbitral tribunal ruling on its own jurisdiction (Art. 16 UML), the doctrine of separability must hence be codified within s. 7 of the new German law, so that the Courts will be obliged by statute to treat such clauses as separable as well.

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95 P. Schlosser, *ibid*, with further references to judgments by two German State Supreme Courts, OLG Karlsruhe, 58 NJW 1148; OLG Koblenz 59 MDR 130; and with another reference to the BGH judgment of March 12, 1954, published in 7 BGHZ 184; 53 JZ 84.

96 S. Boyd, *supra* note 94 at p. 75.

III. Pending Issues and Reference to Arbitration

Concerning pending issues and references to arbitration, the current German arbitration law contains quite different provisions from the UNCITRAL Model Law. It will take a big effort to change this area of international commercial arbitration law in Germany since it touches fundamental constitutional issues.

1. The Provisions of Art. 8(1) UML

For cases where litigation is brought in front of a state Court in spite of an existing arbitration agreement, Art. 8(1) UML provides that the Court must refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. The German solution for stays of proceedings cases is the following: section 1027a ZPO simply provides that the litigation has to be set aside as inadmissible. The German solution promotes arbitration and minimum Court intervention which is usually the arbitrant's desire, and it stresses the parties' consent to arbitration. Therefore, I recommend to modify Art. 8(1) UML on this matter by substituting it with the wording of s. 1027a ZPO which has proven to be a practical solution.[97]

This recommendation is justified by the fact that there are even more serious problems concerning the provision of Art. 8(1) UML: Schwab interprets the provision of Art. 8(1) UML principally as a reference to a certain, already selected

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97 E. Broedermann/J. Rosengarten, *supra* note 47 at p. 44.

arbitral tribunal,[98] whereas Herrmann -- as Senior Legal Officer of the UNCITRAL Secretary an absolute insider -- interprets it not as a reference to another decision maker (e.g. the arbitral tribunal), but rather as a general reference to arbitration without certain rules for the ordinary state Courts as to what arbitral tribunal it has to call upon.[99] This latter interpretation makes more sense due to the same provisions in Art. II(3) of the New York Convention. Such a merely general reference would be unproblematic under German law. But it would be unlawful to make references to a certain Court or tribunal that does not exist yet and that still has to be set up. German constitutional provisions about due process of law forbid such a reference.[100] If there is a problem with setting up the arbitral tribunal, the German Court's reference would be final, closing the way to the Courts for good, no matter whether an arbitral tribunal will ever be set up or not.

In sum, it is impossible under German law to refer to an arbitral tribunal that has not yet been set up. Following Herrmann's interpretation there are no apparent problems. To support his view, may it be noted that even the UNCITRAL working group had concerns about the way the Model Law is handling the reference to arbitration.[101] Therefore, with regard to the international jurisdiction of foreign arbitral tribunals and domestic tribunals, s. 1027a ZPO should remain valid as the new s. 8(1) of a new German International Arbitration Act (or Law?) in order to avoid unnecessary problems of interpretation and constitutional questions. These

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98 K.H. Schwab, *supra* note 78 at p. 433.

99 G. Herrmann, *supra* note 43 at p. 22.

100 See Art. 104 GG.

101 T. Melts, in: P. Sanders, *supra* note 86 at p. 91.

problems are easily and nonetheless efficiently avoided by replacing Art. 8(1) UML with the language of s. 1027a ZPO.

2. The Provisions of Art. 8(2) UML

Furthermore, Art. 8(2) UML provides that where a Court action has already been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the Court. Following the Model Law, it becomes possible to have parallel arbitral and Court proceedings and Court judgments or arbitral awards. This constellation is unlawful in Germany since one proceeding per case is all that is allowed by the constitution.[102] A pending case in front of a Court generally shuts out arbitration, and vice versa, until either the Court dismisses the case or the arbitration proceeding is terminated. In sum, Art. 8(2) UML does not comply with the German law when it comes to pending cases. Therefore, it must be considered to neutralize Art. 8(2) UML without any substitution before implementing the Model Law in Germany in order to avoid possible constitutional problems.

IV. The Arbitral Tribunal

In its Third Chapter that deals with the composition of the arbitral tribunal, the UNCITRAL Model Law shows clear advantages over the current German law concerning this area of arbitration.

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102 See Art. 103 GG.

1. Number of Arbitrators

According to Art. 10(1) UML, the parties are free to determine the number of arbitrators. Failing such determination, the number of arbitrators shall be three according to Art. 10(2) UML. The German provision, s. 1028 ZPO, is different because it provides that each party has to appoint one arbitrator in the case of a failed determination of the number of arbitrators. Therefore, according to German law, a tribunal of two arbitrators will have to decide the case. The problem with only two arbitrators is obvious: the danger of a deadlocked arbitral tribunal that is not able to decide upon the issue is immense since there is no possibility of a majority vote. If the parties do not make further provisions in addition to those laid out in the ZPO, and the two arbitrators thus appointed cannot reach a decision, the arbitration agreement ceases to have effect, which is an undesirable result. It must be noted that it is advisable for Germany to regulate the appointment of arbitrators in more detail. The frequently criticized German provision of s. 1028 ZPO has proven to be of no use in practice and is frequently being circumvented by party agreements. Art. 10 UML thus contains the better solution and can be recommended for adoption in Germany.

2. Challenges and Removals of Arbitrators

With respect to challenges and removals of arbitrators, the UNCITRAL Model Law provides in Art. 12(1) UML:

> When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances

> likely to give rise to justifiable doubts as to his impartiality or independence.

This new principle seriously conflicts with old customary German law and traditional German institutions for quality arbitration in the large area of raw-material trade, which have existed for centuries in the German cities of Bremen, Luebeck, Rostock, and Hamburg, the so called "*Hanseatic League*" of the "*Hanse cities*":

> Specific mention should be made of "quality arbitration" which is, contrary to what its name suggests, a special type of valuation. Quality arbitration is, in essence, the determination by an expert as to whether the quality of goods is in accordance with the description contained in the contract. Quality arbitration plays a very important role in seaports such as Hamburg and Bremen. Many trade and commodity associations frequently administer quality arbitrations under their rules, which contain special provisions for quality arbitration. [...] Usually, the parties to a quality arbitration each nominate an expert. If the two experts fail to reach a decision, a third will be nominated by them or by the association and the decision of the majority will prevail.[103]

Commercial arbitration, often including quality arbitration, is widely practiced in Germany; the largest arbitration centre is Hamburg, where several hundreds of (mainly domestic) arbitrations take place daily.[104] Other places, where trade and commodity associations operate, such as Bremen and Frankfurt, also have well developed traditional arbitration practices and institutions.[105] On the one hand, these institutions should not be questioned just by adopting the Model Law as it is

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103 O. Glossner, *supra* note 13 at p. 4

104 O. Glossner, *supra* note 13 at p. 2.

105 *Ibid.*

since traditions have it that in quality arbitration the arbitrators (or experts) are treated very respectfully and generally are not questioned or challenged. On the other hand, if Germany does incorporate the Model Law without Art. 12 (1) UML and its duty to disclose, Germany again would be regarded as a very suspicious place for arbitration which is exactly what the German adoption of the Model Law should prevent.

My suggestion for cases involving quality arbitration is to make Art. 12 (1) UML subject to the parties consent (as part of a special German amendment of Art. 12a UML). In quality arbitrations, the parties have to decide about an application of Art. 12 (1) UML which satisfies the traditional requirements of a very respectful treatment of quality arbitrators (experts); in quality arbitrations, the parties should not be able to confront the arbitrators themselves with alleged nondisclosure of material facts unless the parties have consented to do so, because that would be incompatible with the deference usually given to specialist arbitrators in Germany. The parties should, however, be able to raise nondisclosure and other grounds for disqualification of arbitrators before a Court (Art. 13 UML).

The original Art. 12 (1) UML, however, can be implemented for all other kinds of arbitrations in Germany without any problems.

V. Competencies of the Arbitral Tribunal

Three interesting issues arise relating to competencies of the arbitral tribunal other than making an award: first of all the competence of the tribunal to rule on its own jurisdiction, secondly the competence of the tribunal to rule on challenges, and

finally issues concerning a failure or impossibility to act of arbitrators. All these three issues are subject to different solutions in the current German arbitration law and the UNCITRAL Model Law, even though German jurists have developed the well-known doctrine of "*Kompetenz-Kompetenz*" under which arbitrators shall have the power to determine their own competencies, including issues of jurisdiction.[106] The competence-competence question plays its role when the existence or validity of the arbitration agreement itself is at stake. The Model Law, however, recognizes not only the "*Kompetenz-Kompetenz*" of the arbitral tribunal, but it also adopts the doctrine of the separability of the arbitration clause.[107]

1. Competence of Tribunal to Rule on its own Jurisdiction

In Germany, the power of the arbitral tribunal to rule on its own jurisdiction ("*Kompetenz-Kompetenz*"), has not yet been codified into the German arbitration law. Opinions are divided as to the power of the arbitral tribunal to decide upon its own jurisdiction in the absence of an express and explicit agreement of the parties conferring jurisdiction upon the arbitral tribunal to decide this issue. Some German Courts as well as commentators deny the existence of such a power, while other Courts and commentators are willing to permit it, at least to a certain extent.[108] Of course, a ruling of the arbitral tribunal on its jurisdiction must ultimately be subject

106 O. Sandrock/J. Norton, *supra* note 33 at p. 7.

107 See Chapter #3.

108 O. Sandrock, "Arbitration between U.S. and West German Companies", (1987) 9 University of Pennsylvania J.Intl. Business Law 27 at p. 35.

to Court control. The timing of this control, however, was a highly controversial question that was eventually resolved as follows:

> In order to prevent possible waste of time and money, Art. 16(3) UML allows instant Court control; but to meet the conflicting concern, namely the fear of dilatory tactics by a recalcitrant party, three safeguards are built in: a short time period for such recourse to the Court, finality of the Court's decision, and discretion of the arbitral tribunal to continue the proceedings, even to make an award, while the issue of its jurisdiction is pending with the Court. Taken together with the discretion of the arbitral tribunal to determine its jurisdiction either as a preliminary question or in the award on the merits, this solution should be acceptable as a necessary compromise between these two legitimate concerns.[109]

The Model Law provides in Art. 16(1) UML that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. An implementation of a rule like this into the German arbitration law is overdue, since in international arbitration it would be unwise to consider the arbitral tribunal, in the absence of an express stipulation to the contrary, as destitute of all power to decide upon its own jurisdiction. It seems, instead, much more expedient to consider it as invested with such power in certain situations, for instance, in all cases where the claimant has originally introduced his request not before the competent local Court, but before the arbitral tribunal. In such cases, the reasons which generally induce the parties to an international contract to submit their eventual disputes to arbitration demand that the arbitral tribunal itself decide upon its proper jurisdiction, even if the parties have not

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109 S.E. Lucio, *supra* note 25 at p. 320; with regard to the underlined text: the German constitution does not have problems with deciding the issue of a tribunal's jurisdiction while the case is pending in front of the tribunal; only if the issue of the arbitration itself is pending in front of a Court, the tribunal would have no more jurisdiction under German law (see Art. 103 GG). See also s. 13 (7) BC-ICAA.

expressly empowered it to do so. Otherwise, the case would have to be moved to the competent state Court, resulting in loss of time and money. Undesirable forum-shopping might ensue and a period of uncertainty would govern the dispute of the parties. No one would know whether the litigation would finally remain before the state Court or whether it would have to be removed again to the arbitral tribunal. In the event a second (and final) removal back to the arbitral tribunal would have to be made, that tribunal would again have to read the files, consider the case, and perhaps weigh the same evidence and raise the same legal issues as the state Court had already done. In view of these circumstances, it would certainly be proper to presume that the parties wanted to have the arbitral tribunal entrusted with the power to rule on its own jurisdiction, if the claimant had, in the first instance, introduced his claim before the arbitral tribunal and not before the competent state Court. For the same reasons, the opposite solution would apply if the claimant had filed his claim first with the competent state Court. It would be appropriate in such a case to consider that Court as entrusted with the power to decide whether it would have jurisdiction to deal with the subject matter or whether the parties had, by valid arbitration agreement, referred the subject matter to an arbitral tribunal. Therefore, Art. 16 (1) UML seems to be a good and worthy provision that makes sense. It has to be recommended for implementation into the German international commercial arbitration law.[110]

110 In Chapter #3, I recommended to also implement Art. 16 (1)(a) UML as a subsection of s. 7 of the new German Act to finally codify the doctrine of separability in Germany.

2. Competence of the Tribunal to Rule on Challenges

The UNCITRAL Model Law, in Art. 13 (2)(2) UML, provides that, unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal itself shall decide on the challenge. This provision has lead to great controversy in Germany because the challenged arbitrator is entitled to rule on his own challenge according to the Model Law. This simply conflicts with all principles of a state under the rule of law like Germany, and thus violates Art. 20 GG.[111]

Many jurists want to change this allegedly unconstitutional provision of Art. 13(2)(2) UML before an adoption of the Model Law in Germany can take place. They suggest the following solutions:[112]

a. one suggested way to overcome this problem is the general appointment of a substitute arbitrator that would take over upon request to decide upon the issues of a removal of an arbitrator; the same procedure is common use for judges at German Courts; this suggestion is problematic in practice though, since it is usually hard enough just to find the main arbitrators for arbitration proceedings;

   or

b. the other suggested solution is to let the rest of the arbitral tribunal decide upon this issue, which of course is only possible if there are more than two arbitrators.

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111 Another note on the *Grundgesetz* (GG): Not long after October 3, 1990, when the German Democratic Republic acceded to the Federal Republic of Germany according to Art. 23 GG, working groups of jurists were set up to develop a new Constitution for Germany. This Constitution will bear a different name, since the Grundgesetz was only a temporary name until a German reunification.

112 T. Noecker, *supra* note 10 at p. 121.

In my opinion, however, these alternative solutions seem to be unnecessary due to the existence of Art. 13(3) UML, even though I agree with the problematic situation of Art. 13(2)(2) UML when it comes to the constitutional requirements of a state under the rule of law. The provision of Art. 13(3) UML calls upon a final request for removal of an arbitrator to a competent State Court,[113] which should satisfy all constitutional demands of a state under the rule of law according to Art. 20 GG. The easiest solution of this problem is to always let a competent German State Supreme Court decide upon the challenge of an arbitrator, without the previous procedure of Art. 13(2)(2) UML -- if the arbitrator does not withdraw from his office voluntarily, or if the other party does not agree to the challenge. On the one hand, this solution is faster and thus saves time and money, since the procedure of Art. 13(2)(2) UML will be waived, and since Art. 13(3) UML is applied in more than half of all challenges anyway;[114] on the other hand, this solution meets the needs of Art. 20 GG that requires Germany to be a state under the rule of law. Please see Chapter #7 of this thesis for the new suggested way of challenge procedures under s. 13 of the new German International Commercial Arbitration Law.

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113 This Court must be appointed in Germany by way of Art. 6 UML. See Chapter #7, s. 6 of the suggested new German Act which provides for the German State Supreme Courts (OLGs) to be the competent Courts for international commercial arbitration in Germany.

114 T. Noecker, *supra* note 10 at p. 76; O. Sandrock/J. Norton, *supra* note 33 at p. 12; and G. Loercher, *supra* note 38 at p. 231.

3. Failure or Impossibility to Act of Arbitrators

If an arbitrator becomes unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates according to Art. 14 (1) UML if he withdraws from his office or if the parties agree on the termination. Otherwise, a State Court or another authority shall decide this matter. Compared to the current German law, the Model Law contains a very practicable and good solution. Section 1033 ZPO provides for these cases that the whole arbitration agreement shall be void. This, of course, does not make sense as it stops the whole arbitration process instantly without providing new solutions for anybody. Article 14 (1) UML, therefore, has to be recommended for implementation in Germany, since it only terminates the mandate of an arbitrator and not the whole arbitration agreement.

4. Power of Tribunal to Order Interim Measures

According to Art. 17 UML, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. It may also require any party to provide appropriate security in connection with such measure. It is unclear, however, whether these interim measures are rendered in the form of an enforceable award, or whether the tribunal is only able to make non-enforceable orders for interim measures of protection. Personally, I tend to favour the latter interpretation, creating problems for Art. 17 UML in Germany. In the German literature, orders of interim measures of protection by an arbitral tribunal are

regarded as invalid,[115] because the judgment on enforcement of an award by a German Court demands a final arbitral award which is not the case for interim measures of protection. Therefore s. 17 of the new German law must include a subsection providing that interim measures of protection by an arbitral tribunal shall have the validity of an award in order for it to become valid and enforceable under German law.

VI. Conflicts with Public Policy

According to Art. 34 (2)(b)(ii) UML, an arbitral award may be set aside by a state Court if the Court finds that the award is in conflict with the public policy of this State. And according to Art. 36 (1)(b)(ii) UML, the recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only if the Court finds that the recognition or enforcement of the award would be contrary to the public policy of this State.

This reservation of public policy supervision is taken for granted in a state under the rule of the law. It is a *conditio sine qua non* of every state's permission to arbitrate disputes outside of a Court and to privately make awards that the state then helps to enforce if asked to do so. Public policy reservations are also part of almost all international treaties. Therefore, I expect no problems concerning public policy if Germany implements the Model Law, since it allows for the necessary reservations arising from local concerns of public policy or public order.[116]

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115 K.H. Schwab, *supra* note 78 at p. 434 (footnote 10) with further references.

116 J.E.C. Brierly, *supra* note 24 at p. 288.

In Germany's own interest though, it has to maintain its standard of public policy as it is today. Concerning public policy and its relevance to the UNCITRAL Model Law, Prof. Paterson wrote:

> The most profound of the Model Law perspectives is the recognition of an international public policy favouring the resolution of commercial disputes with international characteristics by non-judicial means, such as arbitration. This policy developed over the last 25 years from several sources: UNCITRAL itself, international business and legal practice, the decisions of appellate Courts in both civil- and common-law jurisdictions, and the efforts of governments.[117]

Prof. Paterson is saying that each country should be careful not to overlook the fact that international legal cases are different from wholly domestic cases. National public policy must be properly attuned to the peculiar needs of international situations. The danger, however, is that -- due to the uniformity of the law -- the same public policy standards might develop world wide to make the reciprocal recognition and enforcement of arbitral awards easier. Such an internationally equal public policy is dangerous to the domestic public policies of different nations, because through the international public policy they are forced to give away part of their autonomy. This supra-national public policy might supersede national public policy because of the harmonization of the law. Public policy, however, does not have to be uniform, because it has its roots in the values and laws of each different country (due to differences in ideology, politics, religion, systems etc.).

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117 R.K. Paterson, *supra* note 23 at p. 29.

Therefore, with respect to public policy, it must be noted that the relevant German public policy concerning arbitration has to maintain the same high standard as the normal *ordre public* of Germany. It must not be reduced to an international public policy which is more liberal and might eventually be reduced to foreign or international minimum standards. Reduced international public policy can not reflect principles and values of a state that has to recognize or enforce a foreign arbitral award. If all countries where the Model Law might be adopted or where it already has been enacted try to develop a common international definition of public policy, domestic public policy will eventually vanish. Of Course, if public policy is equal throughout the world, it becomes unnecessary -- but reduced to the minimum standards of the weakest part of the chain. Germany has achieved a high degree of public policy and enjoys the high legal standards of a state under the rule of law. Therefore, Germany must maintain its own public policy when implementing the Model Law by defining public policy the German way as part of Art. 34 and 36 UML; this can be achieved by the addition of another subsection to these articles that ensure the application of German public policy. Germany must not, however, implement harmonized public policy requirements together with the harmonized international commercial arbitration law since there are many substantially different views about arbitration among all states. To support my argument, I will quote Janis again:

> Since national laws are normally drafted with a state's own economic, social, and political interests in mind, it is not unusual for the application of any country's laws to an international economic transaction to conflict with the interests of other states and, sometimes, with the interests of the international economy in general.[118]

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118 W. Janis, *supra* note 12 at p. 45.

In this context, all countries that adopt the Model Law -- as well as the whole business community -- benefit from maintaining their own traditional public policies. Neither the UN origin nor even an eventual world-wide reception of the UNCITRAL Model Law necessarily imply the need for an automatic harmonization of public policy standards.

VII. Adaptation of the Current German Arbitration Law

In the event of an actual transformation of the UNCITRAL Model Law into the German legal system, the problematic question arises whether or not an adaptation of the current arbitration law to the Model Law is a good idea, or whether the enactment of an entirely new German International Commercial Arbitration Act is an even better idea. So Germany can implement the Model Law in two different ways:[119]

a. enact the Model Law as a completely new German International Arbitration Act that is based on the Model Law and that takes the changes suggested in this thesis into account (like in British Columbia)

   or

b. amend the ZPO and the other supplementary Provisions of the German Law, the HGB, BGB and EGBGB, and enact only some provisions of the Model Law (like in Quebec).

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119 There are, however, more possible ways of enacting the Model Law; further possibilities are discussed in M.J. Mustill, *supra* note 11 at p. 15, who conducted a survey on this matter within the United Kingdom.

This decision is up to the German legislature, but I strongly recommend to follow solution (a) due to the following reasons that are important for the success of a new German international commercial arbitration law..

1. The Importance of Acting Soon

The current German arbitration law is confusing and appears to be randomly put together. Nevertheless, it is a closed system in itself. The same is true for the UNCITRAL Model Law which is also a closed system in itself, but which is easier to understand and follow since it is one act. The Model Law functions quite well on its own, so a reform of the ZPO, BGB, EGBGB, HGB, and all the international treaties does not seem necessary. These provisions may remain valid for domestic commercial arbitration. To adapt the complex current German arbitration law together with an implementation of the Model law simply takes too long since the legislative process in Germany is not exactly quick. Germany though can only count on a high degree of publicity -- which it needs to increase the number of its international commercial arbitration proceedings[120] -- if it adopts the Model Law within the next few years. If Germany has to wait years and years for an implementation of the Model Law due to changes and adjustments of the outdated arbitration law to the new statutes, this effect of publicity will vanish. If Germany waived these unnecessary adjustments, however, it will create that kind of situation for parties who are subject to the provisions of the new law, as if they had agreed upon this new law (the Model Law) as a set of arbitration rules;[121] the fast

120 See Chapter #3 for the "headline effect".

adoption by Germany will create a similar positive effect to that of Canada which made the headlines by being the first country in the world to adopt the UNCITRAL Model Law. Therefore, I recommend a fast and complete adoption of the Model Law with the above mentioned changes, basically in a similar way British Columbia has implemented the International Commercial Arbitration Act in 1986.

2. The Problem of Multiple Regimes

There are more practical reasons why Germany should incorporate the Model Law as a separate act. National arbitration law which was created for national arbitration proceedings is seldom suitable for international arbitration that requires a special set of rules.[122] If Germany enacts the Model Law as a separate act, two different regimes will be in operation. Lord Mustill sees this -- for a similar situation in the UK involving common law -- to be involved in problems:

> There seems no point in introducing a complication where the existing [UK] system works perfectly without it. Moreover the creation of a dual regime would increase further difficulties [...].[123]

However, this dual regime has its advantages. Firstly, a clear line can be drawn between domestic and international (commercial) arbitration. Secondly, the enactment of the Model Law in form of a special law does not require any access to (German) procedural law or national proceedings and is therefore more

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121 For instance, the Rules for the ICC Court of Arbitration, or the Rules of the London Court of International Arbitration.

122 K. Lionnet, *supra* note 17 at p. 15.

123 M.J. Mustill, *supra* note 11 at p. 22.

understandable to foreign parties. The special law (the new Act) could be published separately in different languages to overcome the language barrier; the fact that the Model Law is already available in many languages would obviously be of assistance to that idea.

G. Evaluation

The excellent opportunity of adopting the UNCITRAL Model Law now must not be wasted by the Federal Republic of Germany. The Model Law must be adopted to build up confidence in Germany as a place for arbitration and German international commercial arbitration law abroad. The Model Law is able to terminate all obstacles that presently suppress international arbitration in Germany, namely language barriers, historical feelings of mistrust against Germany's legal system, and the lacking knowledge of German law in general within the international business community. This termination depends largely on how fast Germany adopts the Model Law and on how many changes the German legislature decides to make to the original UNCITRAL document.

With an early adoption, Germany will draw much attention from the interested foreign clientele of commercial arbitrants. By taking over the Model Law with only a few necessary modifications, Germany will build up confidence in its international commercial arbitration law since the Model Law is well known and respected world-wide. The more changes Germany decides to make to the Model Law, however, the greater the reservations of the foreign parties will be when deciding whether to arbitrate in Germany or not. At the same time, an adoption without many changes

will achieve a high degree of harmonization in respect to those jurisdictions that have already adopted the Model Law.[124]

Another final comment: except for the articles of the Model Law mentioned above, it does not contain any regulations that are unacceptable to the German legal system.

I. Conclusion

The entire comparative legal analysis between the 10th book of the ZPO (including some supplementary German arbitration provisions) and the UNCITRAL Model Law is the basis for the following conclusions:

The Model Law regulates the process of international commercial arbitration extensively, fitting in with the experiences of the modern practice of international arbitration. It contains many advantages over the current German international arbitration law in the 10th book of the ZPO, the BGB, the HGB and the EGBGB. This does not imply, however, that the current German law is not able to function or to achieve the same or similar results as the Model Law. In order to be as successful as the Model Law though, the German law currently needs help by Courts, jurists, scholars, and it demands many additional party agreements, which is without a doubt a disadvantage compared to the practicability of working with the Model Law:

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124 See *supra* note 19; see also K. Lionnet, *supra* note 31 at p. 346 ,who points out that true harmonization can only be achieved if the Model Law is adopted unchanged.

> German arbitration practice requires reference to case law and scholarly literature and, furthermore, extensive contractual agreements. This is generally considered to be a considerable drawback [but also an argument in favour of] an overdue modernization of German arbitration procedure.[125]

The Model Law contains, however, some provisions that can not be adopted in Germany without modification, and some of the current German provisions have to be incorporated in the implemented Model Law at the same time.[126]

The German legislature now has to decide whether it wants to adopt the UNCITRAL Model Law solely for international commercial arbitration (as a new German International Commercial Arbitration Act), or whether an adaptation or modification of the 10th Book of the ZPO (a completely new Law) might be a better solution. This thesis can only give a suggestion, but I think it is obvious that a new German International Commercial Arbitration Act on the basis of the Model Law is by far the better solution, since it is faster, and since it is able to remove all the obstacles mentioned above that are related to the German language, to the German history, to the complexity of the current German law and to other misgivings foreigners still might have about Germany.

In Chapter #4, this thesis underlines its suggestion by referring to British Columbia and its experiences with the Model Law. British Columbia has also implemented a new Act, whereas the province of Quebec amended its Code of Civil

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125 K. Lionnet, *ibid* at p. 344; and O. Glossner, "Arbitration Law amended in the Federal Republic of Germany", (1986) 3 J.Intl.Arb. 85 at p. 85.

126 See Chapter #3.

Procedure. And whereas British Columbia's experiences are mainly positive, Quebec's experiences are not: Due to Quebec's incorporation of the norms on arbitration in the Civil Code and the Code of Civil Procedure, their dispositive rules are applicable absent a stipulation of the parties to the contrary. Hence, the arbitral tribunal has less freedom to decide certain questions such as the procedure of summons, hearing of witnesses, the language of the arbitral proceedings, and possibly even the place of arbitration,[127] whereas under the Model Law these lie within the discretion of the arbitrators. Quebec also changed the Model Law too much which frequently leads to problems with interpreting Art. 940 C.p.c. correctly. The commentaries to the Model Law are of no use since the Model Law has been broken apart in Quebec. Furthermore, Quebec did not incorporate all of the Model Law's provisions into the Code de procedure civile; e.g. not incorporated by Quebec were Art. 3 UML (Receipt of written communications), Art. 4 UML (Waiver of right to object), Art. 17 UML (Interim Measures), Art 20 UML (Place of arbitration) and Art. 23 (2) UML (changes of claims or defence). In this context, N. Antaki, President of the Centre d'arbitrage commercial national et international du Quebec, stated: "Notre loi est si excellente qu'elle en est dangereuse."[128] The difficulties in Quebec are a result of the different wording, and they clearly show how important it is to adopt the UNCITRAL Model Law as it is -- and not only in parts.

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127 Loi modifiant le Code civil et le Code de procedure civile en matiere d'arbitrage, Gazette officielle du Quebec 1986, p. III, p. 4661; Quebec Statutes: Cf. Act of November 11, 1986, c. 73, Art. 944.6, 944.9, 1986 Quebec Statutes 796.

128 T. Noecker/M. Hentzen, *supra* note 51 at p. 834. See also T. Noecker, supra note 10 at p. 215 where he quotes N. Antaki. For a good summary of Quebec's experiences with the Model Law see T. Noecker, supra note 10 at p. 173 to 216.

It also must be remembered that German domestic arbitration cannot waive special provisions for non-mercantile businesses, which would lead to the need for modification of many provisions of the Model Law. Therefore, this is another reason for a complete adoption of the Model Law as an new GICAA. The same conclusion was reached by a working group of the German Institute for Arbitration, which met in 1987 to discuss a possible adoption with representatives of the German Chamber of Industry and commerce, the German Association of Industry and the German Federal Ministry of Justice. The German Institute for Arbitration already has suggested to the legislation to adopt the Model Law.[129] On the long run, a reform of the ZPO might be necessary as well. For this reform, however, the Model Law can also be a valuable basis.

H. Connection to British Columbia

The new German International Commercial Arbitration Act can largely depend on the experiences of other states that have already implemented the Model Law. This is, however, the only positive aspect of Germany's belated revision of its arbitration law. For my thesis, since I study at the University of British Columbia Law School, I picked Canada, and British Columbia in particular, to assess the experiences of a state that already had implemented the Model Law.

The experiences of these Canadian jurisdictions (which were the first in the world to adopt the Model Law) demonstrate the flexible international character of

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129 K.H. Schwab, *supra* note 78 at p. 445.

the Model Law and prove that it can be accepted by any country and its domestic Courts -- even in Canada where the Courts are much more powerful than in Germany, and where the Courts used to be much more contra arbitration than the Courts of Germany who have accepted it as a mechanism for alternative dispute resolution. In Germany, therefore, no resistance of the Courts against arbitration is to be expected, also because the Courts are very busy since the reunification. The overburdened Courts thus hope to be relieved by arbitration, so to them arbitration can truly be a sanctuary.

Through the following part of my comparative legal analysis I want to enable the German legislature (which currently is working on the revision) to take into account the brilliant changes and modifications of the Model Law made by British Columbia, and to acknowledge that the Model Law has proven to be an excellent set of international arbitration law to work with domestically.

Chapter 4: The Adoption of the Model Law in Canada

Chapter 4: The Adoption of the Model Law in Canada

> ***For years, the law relating to commercial arbitrations in Canada remained in a relatively static state. The situation is, however, changing rapidly in Canada.***[130]

Although international commercial arbitration is still in a developmental phase, it is rapidly becoming an indispensable support system for the global market place. Until 1986, British Columbia statutes contained only one provincial law concerning commercial arbitration.[131] This statute was passed in 1893 and was based on English law, namely the English Arbitration Act of 1889.[132] It was then repealed by the legislature of British Columbia that replaced it with the Commercial Arbitration Act in 1986.[133]

> Generally, these older laws demonstrated a reluctant tolerance for arbitration, a view that arbitration -- with the exception of labour arbitration -- was a questionable alternative to judicial proceedings.[134]

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130 W.C. Graham, *supra* note 8 at p. 2 to 3.

131 Arbitration Act, R.S.B.C. 1979, c. 18.

132 Arbitration Act, 1889 (52 & 53 Vict.), c. 49.

133 R.K. Paterson, "International Commercial Arbitration Act: An Overview", in: UNCITRAL Model Law in Canada, ed: R.K. Paterson and B.J. Johnson, (Carswell 1987), at p. 113, where he refers to the BC-ICAA.

134 R.K. Paterson, *supra* note 23 at p. 30.

The Canadian background to the rapid implementation of the Model Law was one of judicial hostility towards private commercial arbitration by the Canadian Courts.

A. History of Arbitration Law in Canada

The year of 1986 marked a very important point in the history of Canadian or British Columbian arbitration law in general because the traditional conservatism concerning arbitration as a method of alternative dispute resolution has been overcome, and in both legislatures tradition gave way to new legislation:

> No federal law of arbitration and no special category for "international" or "commercial" arbitration existed in Canada prior to 1986. In this respect, the adoption of the New York Convention and the Model Law have made significant changes to the law applicable to these types of transactions and created a class of transactions subject to discrete rules.[135]

The Canadian approach to international arbitration has changed substantially in the past nine years. Until 1986, Canada was not even a member or a signatory of the New York Convention on the Acknowledgment and Enforcement of Foreign Arbitral Awards.[136]

> What might appear as hostility to international arbitration had its origin in the conflict between federal and provincial jurisdiction in

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135 S. Jarvin, "Canada's Determined Move towards International Commercial Arbitration", (1986) 3 J.Intl.Arb. 111 at p. 112.

136 E.C. Chiasson, *supra* note 1, referring to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards in New York (the "New York Convention of 1958").

> Canada. As the legislative body of the federal parliament merely has the power to implement a treaty, if it is vested with the competence to enact laws on such matter. Similar to the US Constitution, the Canadian Constitution leaves the federal government with only the power to legislate on enumerated subject matters. While navigation and shipping partly rest with the federal government, civil procedure, property, and civil rights, meaning private law, are left to the provinces exclusively.[137]

The situation for Canada changed in 1986, one might say dramatically, when the federal government and most of the provinces agreed to take over the UNCITRAL Model Law, and when Canada decided in favour of an accession to the New York Convention.[138] Canada became a signatory to the New York Convention on May 12, 1986, and the Convention became binding for this country on August 10, 1986. Consequently, arbitral awards made outside of Canada in another state that is also a party to the New York Convention will be enforced in Canada, and Canadian arbitral awards will also be reciprocally enforced abroad.

In summary, the federal Canadian law provides two new statutes: The United Nations Foreign Arbitral Awards Act of 1986 that enacts the New York Convention of 1958 in Canada at the level of federal jurisdiction,[139] and the Commercial Arbitration Act of 1986 that transfers the UNCITRAL Model Law into federal Canadian law for different special situations, like e.g. maritime disputes or foreign

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137 T. Noecker/M. Hentzen, *supra* note 51 at p. 830; they refer to the Labour Convention Case, *Attorney General for Canada v. Attorney General for Ontario*, [1937], A.C. 326 (P.C.-Can.); see also the Canadian Constitution, Can.Const., Art. 91(10), 92(13), 92(14).

138 In Canada, federal-provincial cooperation was thus needed to achieve the comprehensive coverage of international arbitration; in the summer of 1985, an agreement was finally reached. Previous attempts have not succeeded, mainly because of Quebec's opposition.

139 Not only the Canadian federal parliament (Ottawa), but also all provinces and territories of Canada have enacted the New York Convention into domestic law since 1986.

investment disputes. Since Canada's law is, however, divided into federal and provincial law, and since the regulation of civil law is left to the provinces,[140] it is necessary to critically analyze especially the new provincial arbitration law of Canada. In this thesis, I want to focus my attention on the BC-ICAA that almost resembles the UNCITRAL Model Law word for word. The law of British Columbia contains only few substantive amendments to the Model Law, and these amendments do not have a restricting effect on the principles of the Model Law but carry on its ideas in a reasonable and ingenious way.[141]

The UNCITRAL Model Law has now been adopted in all 13 Canadian jurisdictions.[142] Therefore, the former international commercial arbitration law of British Columbia and Canada that was valid until 1986 has become obsolete in the federal as well as in the provincial sector.[143]

B. The Purpose of this Chapter

The UNCITRAL Model Law is an internationally drafted document, since it was created by an international organization.[144] Canada took on an internationally created law for the area of international commercial arbitration, and in 1986, the

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140 Canadian Constitution, *supra* note 137.

141 T. Noecker, *supra* note 10 at p. 145.

142 See Chapter #4.

143 For further details on the arbitration law of Canada before 1986, see H.C. Alvarez, "The Role of Arbitration in Canada -- New Perspectives", (1987) 21 UBC L.R. 247 at p. 247.

144 See Chapter #2.

adoption of an international Model Law was quite a challenge and a big historic but risky step into the future. In this chapter, I analyze how an internationally developed law is accepted into a domestic jurisdiction,[145] focusing especially on how the Courts of this jurisdiction reacted to it. As a result, I hope to prove that the Canadian Courts have fully accepted the Model Law. The scope of this thesis, however, does not permit me to analyze every aspect concerning the implementation of the Model Law. Therefore, I selected three representative points that were of special importance to me in analyzing the acceptance of the Model Law by the Canadian Courts: enforcement of arbitral awards, stays of proceedings, and interim measures of protection. In order to develop a genuine "Canadian" picture in general, I have thereby not limited my research to federal Courts or to the Courts of British Columbia.

The purpose of this chapter is not to evaluate all achievements or problems of the implementation of the Model Law in Canada and British Columbia. It is rather to demonstrate that the Canadian Courts have accepted the internationally drafted UNCITRAL Model Law, and that they promote arbitration as a sincere method of alternative dispute resolution today.

C. The Expert Opinion of 1986/87

Not even ten years ago it would have been impossible to speak of Canadian acceptance of international commercial arbitration.[146] When Canada and British

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145 This jurisdiction is Canada, including the jurisdiction of its territories and provinces, especially British Columbia, and the federal jurisdiction.

Columbia implemented the Model Law in 1986, its domestic acceptance was neither a given nor a logical consequence of the adoption because of three reasons:

a. the strong emphasis on party autonomy by the Model Law that allows private parties to chose their own judges in the form of arbitrators; hereby, the Model Law takes away many jurisdictional powers from the Courts and breaks a long tradition of strong powers of Canadian Courts,

b. Canada and its provinces are common law jurisdictions (except for Quebec), so judges "discover" the law instead of leaving decisions about disputes to the parties themselves or to privately appointed arbitrators,

   and

c. Canadian Courts traditionally preferred an application of their own or foreign (mainly English) common law over the application of internationally prepared statutes.[147]

In the relatively brief period since the implementation of the Model Law in Canada, its Courts have had several opportunities to assess their relationship to arbitrations conducted under the Model Law.[148] Therefore, in order to be able to fully understand the Courts' approaches, this chapter descriptively analyzes how the Courts have dealt with the provisions of the Model Law, and whether or not they have taken a favourable approach to it.

To begin my investigation, I want to quote four expert opinions of 1986/87 or earlier on the budding stages of the Canadian implementation of the UNCITRAL

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146 J.E.C. Brierly, *supra* note 24 at p. 291, who refers to the facts that Canada had not adhered to any international Convention on arbitration before 1985, that Canadian legislation did not specifically regulate arbitration in commercial dealings, and that there was no federal enactment on the subject.

147 T. Noecker, *supra* note 10 at p. 56.

148 R.K. Paterson, *supra* note 23 at p. 29.

Model Law. These expert opinions point out why Court acceptance of the internationally drafted Model Law was a particularly important part of the complete implementation process in Canada.

I. William C. Graham

In his essay "International Commercial Arbitration: The Developing Canadian Profile" of 1987, Professor Graham made the following statement:

> The Courts' approach to applying the BC-ICAA, and their willingness to recognize that the new Act represents a significant departure from the previous Canadian arbitration law and judicial attitudes, will ultimately determine British Columbia's success or failure as a hospitable forum for international commercial arbitration. It is to be hoped that the Act will be applied and interpreted with recognition of the specific needs of this type of arbitration and a desire to develop British Columbia's role in a world in which there are many attractive alternatives.[149]

Professor Graham refers to British Columbia's desire to play an important role in the global business of international commercial arbitration. In this context, he determines that British Columbia's success or failure in satisfying this desire will largely depend on the judicial attitude towards arbitration.

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149 W.C. Graham, "International Commercial Arbitration: The Developing Canada Profile", in: UNCITRAL Model Law in Canada, ed: R.K. Paterson and B.J. Johnson (Carswell 1987), p. 77 at p. 103.

II. Henri C. Alvarez

In his paper, "The Role of Arbitration in Canada -- New Perspectives" of 1987, Henri C. Alvarez introduced his topic like this:

> To date [until 1987] comparatively little use has been made of arbitration to settle commercial disputes in Canada. One major reason for this has been the rigid legal regime to which arbitration in this country has traditionally been subjected. Governed by statutes which have scarcely changed since the nineteenth century, arbitration has been closely controlled by the Courts and restricted to a narrow role in the resolution of disputes.[150]
>
> [...]
>
> Provincial arbitration legislation traditionally reflected an outdated, narrow approach to arbitration. These statutes were initially adopted at a time when the Courts viewed arbitration with mistrust and treated it more as an inferior court with limited jurisdiction than as an alternate method of dispute resolution. Consequently, under these acts, the Courts retained broad powers of assistance, intervention and supervision.[151]

Alvarez mentions a broad traditional power of the Canadian Courts to assist, intervene and supervise arbitration before the new legislation in 1985. It is thus an interesting point to observe to what extent the Courts have been able to cope with their sudden loss of power since then.

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150 H.C. Alvarez, *supra* note 143 at p. 247.

151 *Ibid* at p. 249.

III. Errol P. Mendes

In his article "Canada: A New Forum to Develop the Cultural Psychology of International Commercial Arbitration" of 1986, Errol P. Mendes made the following statement containing conditions concerning the future of arbitration in Canada:

> This enormous legislative reform across Canada both federally and provincially, qualifies Canada as a potentially major player in the international commercial arbitration area. Whether Canada will now become a unique and promising forum for international commercial arbitration depends upon whether the various possible arbitration forums in Canada can reconcile the often conflicting objectives which motivate business entities to consider this type of dispute settlement option.[152]

According to Errol P. Mendes, the motivation for business entities to choose arbitration as a way to resolute their disputes is largely based on the concept of party autonomy:

> The primary motivations behind this Party Autonomy are as follows:
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> [...]
>
> (3) the desire to initiate and proceed with the arbitration free from substantial intervention by a foreign legal system and its courts, while still ensuring a pluralistic concept of procedural fairness.
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> [...]
>
> (5) the parties' desire to save time and costs by resorting to international arbitration rather than litigation in a particular foreign legal system.
>
> (6) the desire for limited or no judicial review of the arbitration

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152 E.P. Mendes, *supra* note 2 at p. 74.

award and speedy enforcement of such award.[153]

These three motivations mentioned by Mendes clearly demonstrate that any Court intervention, any extensive judicial review or any other powers of the Courts to assist, intervene or supervise an arbitration proceeding are undesired by the private parties of an arbitration.[154] Therefore, it will be interesting to see whether or not the Courts in Canada have been able to satisfy these motivations, and whether or not they have used a favourable approach in doing so.

IV. John E.C. Brierly

In his essay "International Trade Arbitration: The Canadian Viewpoint" of 1974, John E.C. Brierly mentioned that:

> Canadian business interests and Canadian governments appear to have little interest in the subject of international trade arbitration.[155]

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153 *Ibid* at p. 75 to 76, with further references.

154 When it comes to saving time and money as a reason for choosing arbitration as a method of alternative dispute resolution, arbitration is generally regarded as the right tool. However, empirical research conducted by E.P. Mendes concerning the attitudes of major Canadian corporations towards international commercial arbitration indicates that only the time factor was a major concern in disputes involving large amounts of money: in such disputes, the cost of arbitral process was less important than making sure that the most appropriate individuals were chosen to sit on the tribunal and that the arbitration was properly conducted and with sufficient administrative support; see E.P. Mendes *supra* note 2 at p. 89. With regard to such "administrative support", Canada now possesses regional international arbitration centres (in British Columbia, Quebec and Ottawa, see Chapter #4) which accommodate the support staff needed by the parties, their counsel and the arbitrators.

155 J.E.C. Brierly, "International Trade Arbitration: The Canadian Viewpoint", in: Canadian Prospectives on International Law and Organizations, ed: Macdonald, (1974), at p. 826.

The reluctance to use arbitration to settle international disputes existed due to two main difficulties which (until 1986) existed in Canada. The first difficulty was the high degree of Court intervention and control of the arbitral process which conflicted with one of the main arguments for using international commercial arbitration, namely to avoid using any domestic Court systems or litigation. The second difficulty was the problem of enforcing a foreign arbitral award in Canada. Double exequatur, meaning a review by the Courts of that country where the arbitration took place as well as by a Canadian Court was the rule, providing very limited means of enforcement but extensive delays and additional costs.[156]

And it was the same John E.C. Brierly who, on 6 May 1988, in his speech delivered to the Conference on Alternative Dispute Resolution in Canada-United States Trade Relations,[157] " The Canadian Acceptance of International Commercial Arbitration", remarked that:

> The future of international commercial arbitration practice in Canada, [...] remains to be determined. Canadian legislators, [...], have sent a clear signal that such arbitrations are now favoured within the Canadian legal system.[158]

Earlier, in the introductory words to his speech, however, Brierly admitted improvements in the way international commercial arbitration is treated in Canada, by its Courts, clients, lawyers and legislature:

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156 P.J. Davidson, *supra* note 9 at p. 98.

157 The Conference was held at the University of Maine School of Law, Portland, Maine.

158 J.E.C. Brierly, *supra* note 24 at p. 294.

> Since 1986 its [Canada's] position has evolved to the point where it is, indeed, appropriate to speak of a Canadian acceptance of international commercial arbitration.[159]

This remark by Brierly somewhat preconcludes the results of this chapter -- but I do not want to go too far ahead. Instead, I will explain why and how Canadian Courts have accepted arbitration as a indisputable mechanism of alternative dispute settlement and the UNCITRAL Model Law that govern these arbitrations. Before I begin the actual investigation, however, it is important to take a closer look at the recent changes of arbitration law in Canada and provide some necessary background information in order for everyone to better understand the Courts' position of today.

B. The Changes of Arbitration Law in Canada since 1986

In 1986, Canada has experienced a " revolution in arbitration practice" .[160] The New York Convention was acceded to by the federal government in Ottawa, and it has now been implemented across Canada in all 13 jurisdictions.[161] The Federal government, the provinces of British Columbia, Saskatchewan and the Yukon Territory have separate acts implementing the Convention. The other Canadian jurisdictions have implemented the New York Convention together with the UNCITRAL Model Law in one act, the " International Commercial Arbitration Act", based upon a uniform act created by the Uniform Law Conference. This

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159 *Ibid* at p. 287.

160 P.J. Davidson, *supra* note 9 at p. 97, who refers to the opening remarks by B. Smith at the Conference " East meets West: Resolution of International Commercial Disputes in the Pacific Rim", held in Vancouver, B.C., on May 12, 1986; see also B.J. Thompson, *supra* note 63 at p. 70.

161 See Chapter #4.

uniform act provides for minor amendments necessary for the implementation of the Convention and the Model Law, with certain substantive amendments to the latter.[162] It appends both instruments as schedules. The province of Ontario, which had originally implemented the New York Convention by way of a separate act (the Foreign Arbitral Awards Act of 1986) has now repealed that act and provides for the implementation of the New York Convention under the enforcement provisions of its International Commercial Arbitration Act. The province of Quebec has implemented the necessary changes to its law by amending its Civil Code and Code of Civil Procedure.[163] The Federal government and all the Canadian jurisdictions except Quebec have made the "commercial reservation" to the New York Convention. As a result, only those foreign arbitral awards considered "commercial" under the law of the relevant enforcing jurisdiction will be enforced under the Convention. In Quebec, all foreign arbitral awards are enforceable under the Convention. None of the Canadian jurisdictions have made the "reciprocity reservation". Therefore, all foreign commercial arbitral awards, whether or not the state in which they were rendered are parties to the Convention, are enforceable in Canada under the New York Convention.[164]

In addition to the New York Convention, the UNCITRAL Model Law was adopted in two basic forms across Canada: two provinces have drafted statutes in their own legislative form and style, and the other 11 jurisdictions have appended the Model Law as a schedule to the short enacting statute mentioned above.[165]

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162 R.K. Paterson, *supra* note 133 at p. 114.

163 T. Noecker, *supra* note 10 at p. 166.

164 H.C. Alvarez, "International Commercial Arbitration under NAFTA, Dispute Resolution in North America and Beyond", (Russell & DuMoulin 1994), at p. 1.

British Columbia, the first jurisdiction to adopt the Model Law, incorporated its provisions, with some amendments, into the text of its new statute, the BC-ICAA. Quebec, as usual, adapted the text of the Model Law to fit the style of its Civil Code and Code of Civil Procedure. The federal government and the remainder of Canadian jurisdictions appended the entire Model Law as a schedule to the short statute according to the uniform act created by the Uniform Law Conference.

The federal legislation, the Commercial Arbitration Act, applies to all arbitrations in which one party is either a federal department or a Crown corporation. Unlike the Model Law, Art. 5(2) of the Federal Commercial Arbitration Act[166] furthermore limits the applicability of the law to arbitration on maritime or admiralty matters. No distinction is made between "domestic" and "international" arbitrations whereas the statutes in the other Canadian jurisdictions deal only with "international commercial arbitration" as defined in the Model Law. The federal Commercial Arbitration Act adopts the Model Law with virtually no changes.

> The Canadian federal government and the provinces have substantially adopted the Model Law; therefore, they have recognized the need for a globally uniform law on international commercial arbitration which accommodates diverse cultural and legal perspectives at every stage of the arbitral process.[167]

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165 These 11 common law provinces have used a special technique to enact the Model Law; the procedure involved introducing norms, which precede the Model Law. Only British Columbia has deviated from this procedure by enacting a comprehensive statute.

166 Federal Commercial Arbitration Act, Can.S. 1986, c. 22.

167 E.P. Mendes, *supra* note 2 at p. 77.

Although the form in which the British Columbia and the other common law jurisdictions adopted the Model Law is different, the content is very similar. Except for the federal act, most of the other common law jurisdictions followed British Columbia's example with regards to amendments to the text of the Model Law. However, there are some distinctions between the BC-ICAA and the International Commercial Arbitration Acts of the other common law jurisdictions.

I. Why did Canada and British Columbia need a Reform?

As mentioned earlier, Canada and British Columbia in particular wanted to take part in the international commercial arbitration business that started to increase considerably in the 1980s.[168] And Canada has much to offer to the international business community in terms of providing the desired neutral venue for international commercial arbitrations since Canada enjoys the reputation of an " honest broker in international relations" :[169] its legal system and judiciary are well respected, and it has often played an international mediation and peace-keeping role.[170]

1. Canada's Geographical Location

One point in favour of Canada as a place for international commercial arbitration is its geographical location: Canada is geographically located between the

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168 See B.J. Thompson, *supra* note 63 at p. 71, and E.C. Chiasson, *supra* note 1 at p. 67.

169 E.P. Mendes, *supra* note 2 at p. 80.

170 B.J. Thompson, *supra* note 63 at p. 74.

United States of America, Europe and Asia -- major forces in commerce which are apprehensive about each other's traditional approaches to arbitration procedures.[171] For trade with the United States,[172] Canada is close at hand, and for trade involving parties from opposite ends of the globe, Canada is somewhat of a mid-point. Therefore, Canada's unique geopolitical, legal and cultural environment makes Canada a promising forum for international commercial arbitration. Just before 1986, there was a growing realization in Canada, particularly in British Columbia, of the opportunities offered to Canadian business by the expanding economies of East Asia and the Pacific Rim region.[173] As a developed nation, Canada's geographical location is an asset which had to be used,[174] and Canada finally realized that it is "good business law" to have the appropriate legislation in place so that Canadian trading interests are not disadvantaged in the international marketplace.[175]

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171 E.P. Mendes, *supra* note 2 at p. 88.

172 The Courts of the United States have not only recognized and extolled arbitration, but influential judges have also actively promoted to resort to its process as one solution to an overburdened Court calendar; in this context, see *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth Inc.*, 24 Int.Reg.Mat. 1065, or: (1985) 105 S.Ct. 3346; see also the comments of Chief Justice Burger of the United States Supreme Court that are quoted in P.J. Davidson, "Dispute Settlement in Commercial Law Matters", (1982-83) 7 Can.Bus.L.J. 197 at p. 197 to 198.

173 *Ibid.*

174 E.C. Chiasson, *supra* note 1 at p. 68.

175 J.E.C. Brierly, *supra* note 24 at p. 290, where he refers to the 1958 New York Convention: " Canadian interests carrying on business abroad which decide to include an arbitration agreement as the mode of settlement of disputes are thus on an equal footing with their trading partners whose countries have also adhered to the Convention"; the same is true for countries who adopt the UNCITRAL Model Law.

2. Canada's Diversity

Additionally, Canada offers a large pool of potential arbitrators with a demonstrated ability to appreciate cultural diversity; Canada is one of the world's true cultural melting pots, and it is also one of the few jurisdictions in the world where common law and civil law traditions have grown and live together within the framework of a single, national legal system. Due to the ability of providing neutral and respected arbitrators for tribunals and of being a neutral venue for the arbitration, Canada promises to be an excellent forum for international commercial arbitration.[176]

3. The Attempt to Render Canada a Hospitable Forum

Other jurisdictions have worked significantly to create welcome environments for commercial arbitration. Canada, too, has worked significantly and has invited the world to arbitration in Canada, especially to Vancouver, British Columbia, where the B.C. International Commercial Arbitration Centre is located.[177] International commercial arbitration is often said to be the predominant form of dispute resolution in international trade and business. The reasons given for this include the following: Unfamiliarity with the Courts and legal systems of other countries; perceived bias of national Courts against foreign parties; the need for flexible, confidential and expeditious procedure adapted to the needs of international business; and the finality

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176 E.P. Mendes, *supra* note 2 at p. 83.

177 The B.C. International Commercial Arbitration Centre is abbreviated "BC-ICAC" throughout this thesis. See also B.J. Thompson, *supra* note 63 at p. 71.

and ready enforceability of a binding decision.[178] Canada today wants to be one of the leading states in the world when it comes to international commercial arbitration. This was clearly underlined by Canada's decision to become the first state in the world that adopted the UNCITRAL Model Law. Before 1986, however, few countries had arbitration regimes as underdeveloped as Canada's.[179] The almost unqualified enthusiasm with which Canada adopted the Model Law was largely explicable by the primitive state of its arbitration law and the attraction to reformers of a comprehensive modern code.[180] Therefore, Canada was not traditionally involved in international commercial arbitration:

> The treaty making power rests with the federal authority. Generally, commercial law and litigious procedural matters are provincial. The constitutional overlap of legislative capacity has added weight to the apathy which, until recently, has left Canada behind in arbitration both domestically and internationally.[181]

This same apathy was discovered by John E.C. Brierly who made the following statement, without using the term "apathy" though:

> Canadian lawyers [and Courts] had the misfortune of enjoying the general reputation of being hostile to arbitration as a process, even if provision for it is included in many contracts more or less as a matter of routine. This hostility existed due to a number of reasons, namely the difficulty of naming suitable arbitrators, the high cost of arbitration, and the risk that some aspect of the arbitration, or the award itself, may ultimately or even inevitably lead the parties into a

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178 H.C. Alvarez, *supra* note 164 at p. 1.

179 R.K. Paterson, *supra* note 23 at p. 29.

180 *Ibid.*

181 E.C. Chiasson, *supra* note 1 at p. 69.

court of law -- a likely possibility in the state of the Canadian arbitration law prior to 1986.[182]

The Canadian jurisdictions attempted to make possible and even to draw into Canada itself the actual practice of arbitration, very much like Germany, in the realm for which the legislation reproducing the Model Law is specifically designed.[183] In summary, Canada was anxious to obtain and to facilitate international commercial arbitration which could only be achieved by adopting the UNCITRAL Model Law and the New York Convention. But there were more reasons why Canada and British Columbia needed a reform of their arbitration laws.

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182 J.E.C. Brierly, *supra* note 155 at p. 834; according to J.D. Gregory, *supra* note 8 at p. 56, the reason for the unwillingness of many lawyers to recommend arbitration to their clients was unfamiliarity with the procedure rather than defects in the procedure itself. In this context, see also B.J. Thompson, *supra* note 63 at p. 81, who commented on why Canadian lawyers used to ignore arbitration clauses: "It may be due to a lack of familiarity with the arbitral process compared with a significant comfort level with the judicial process." May I add with respect to B.J. Thompson's suggestion on the same page (*ibid*), that Canadian and German law schools have taken great interest in arbitration, mediation and conciliation to which they devote many courses -- at least at the University of British Columbia and at the Universities of Heidelberg and Muenster (Germany), there is no shortage of teaching materials or qualified instructors for these procedures. Prof. O. Sandrock of Muenster University conducted a yearly week-long Moot International Commercial Arbitration (a Mock Arbitration) that was received by students with great interest, and that was of great help. This might be a good idea for Canadian law schools, too, instead of merely focusing on Moot Courts. It must be noted, however, that, in the excellent introductory seminar "International Commercial Arbitration", held at the University of British Columbia Law School by H.C. Alvarez of Russell & DuMoulin, only eight students were interested enough to participate.

183 J.E.C. Brierly, *supra* note 24 at p. 291, with further references to remarks of J. Crosbie, Minister of Justice and Attorney General of Canada, moving the federal enactment of the enforcement of foreign arbitral awards (Bill C-107) in the Canadian House of Commons on 7 May 1986, 9 Parl.Deb., Can.H.C. 13060 (1986; official report).

4. The Extensive Power of the Courts prior to 1986

The extensive powers of the Canadian Courts to review, supervise and intervene arbitration proceedings were already mentioned earlier. Such extensive powers of the Courts, largely relying on the old English law, were able to turn arbitration into a rather costly prelude to litigation without any guarantees for enforcement of the arbitration agreement or the award -- depriving both of any considerable but necessary final effect.[184] Therefore, the arbitration process in Canada was not a healthy one but limped instead.

5. Judicial Review and Supervision

Another reason why a reform was needed was the judicial supervision and the judicial review of arbitration awards. According to the old Arbitration Act, the Courts had wide powers of supervision and review under the doctrine of misconduct and for error of law on the face of the award.[185] While the former guarantees the Courts' power to intervene to ensure the respect of certain fundamental principles, the latter has permitted abusive recourse to the courts and has had an unfortunate effect on arbitration in general.[186] The Courts were able to set aside an award where it was shown that the arbitrator had made a mistake on a legal point on the

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184 See H.C. Alvarez, *supra* note 143, for details on "the stated case" and "the special case" and the old Canadian and English arbitration law.

185 *Ibid.*

186 M. Kerr, "Arbitration and the Courts: The UNCITRAL Model Law", (1985) 34 Intl. & Comparative L.Q. 1 at p. 5.

face of the award; this, of course, nullified the major advantage of arbitration -- a final and enforceable decision rendered outside the Court system.

These problems of the outdated law as well as Canada's and British Columbia's new worldly goals concerning the arbitration business explain why these two jurisdictions needed and wanted a reform of their international commercial arbitration laws.

II. The BC-ICAA (International Commercial Arbitration Act)

British Columbia did not adopt the UNCITRAL Model Law without any changes. In fact, there are some principal substantive changes to the Model Law made in the BC-ICAA. Therefore, this new legislation presents a number of interesting modifications and improvements to the Model Law.[187] The BC-ICAA implements a comprehensive, liberal regime for international commercial arbitration, and it finally favours the freedom of the parties to organize their own rules of procedure with a minimum of judicial intervention, while still providing a basic framework of mandatory rules and time limits to ensure efficiency.[188] It is, without a doubt, a very progressive approach to arbitration and a radical change in British Columbian law. After explaining the most important modifications made by the legislature of British Columbia, I will explain how the Courts have dealt with this radical change.

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187 S. Jarvin, *supra* note 135 at p. 114.

188 H.C. Alvarez, *supra* note 143 at p. 259.

1. The Preamble

The addition of an uniquely worded preamble[189] sets out the purpose for the enactment of the International Commercial Arbitration Act. The preamble reflects the intent to pursue the policies implicit in the UNCITRAL Model Law, namely party autonomy, minimum Court intervention, and the unification of international commercial arbitration laws throughout the world. It was part of an deliberate attempt by the British Columbia legislation to make clear to the judiciary that it regards arbitration as an attractive method of dispute resolution for business people:

> The preamble was included in the international arbitration Bill -- a technique rarely used in British Columbia -- to emphasize to the judges that a significant change in the law was intended.[190]

Pointing out the increasing popularity and significance of international commercial arbitration and the previous inhospitality of British Columbia as a site for international commercial arbitration, the background and objectives of the BC-ICAA are articulated in its preamble and are intended to assist in interpreting its

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189 See Chapter #1 and the BC-ICAA in Appendix I.

190 B.J. Thompson, *supra* note 63 at p. 80 to 81, who also mentions three other signposts made by the B.C. government for the judges to assist them to understand the legislative intent and to ensure that commercial arbitration, particularly at the international level, will be allowed to proceed with a minimum of judicial intervention:

a. the domestic and international commercial arbitration Bills were introduced within days of each other to make clear that there was a distinct difference in legislative intent between the two Bills;
b. in the [international] Bill, the Court referred to the UNCITRAL *travaux preparatoires* to ensure that the legislation is interpreted from an international rather than a domestic perspective; and
c. the "privative clause" used in the model Bill was expanded to reinforce the legislative intent to restrict the judiciary's involvement in international arbitration matters.

meaning and objectives.[191] For the same purpose, this preamble may be incorporated into the new German law on the subject, even though Germany's Courts have been quite favourable in their approach to arbitration.[192]

2. Definition of "International Commercial Arbitration"

There is an expansion and incorporation of the legal definition of the term "commercial" into the body of the statute at s.1(6) BC-ICAA. In the new legislation, the term "commercial" is very widely defined with regard to an illustrative list of examples of commercial matters found in a footnote to the Model Law. This official footnote suggests that the term "commercial" should be given a wide interpretation. Under the definition of this term are included e.g. trade transactions for the supply or exchange of goods, joint ventures or other related forms of industrial or business co-operation, the construction of works and consulting, and even engineering contracts.[193]

> Although this is not an exhaustive definition, it does give a clear idea of types of activity which will be considered "commercial" within British Columbia.[194]

The official footnote thus gives much help for interpreting the Model Law correctly and uniformly in every new legislation where it might be adopted. Section

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191 R.K. Paterson, *supra* note 133 at p. 115.

192 BGH and OLGs Karlsruhe and Koblenz, *supra* notes 94 and 95.

193 See the official UNCITRAL footnote to Art. 1 UML in Appendix II.

194 P.J. Davidson, *supra* note 9 at p. 110.

1(6) BC-ICAA achieves the same effect for British Columbia where no footnote was implemented. For reasons mentioned in Chapter #3 of this thesis, Germany must incorporate a similar definition based on the UNCITRAL footnote to clarify who will be subject to arbitration under the Model Law and who will not.

Section 1(5) BC-ICAA has also been added which provides that for the purposes of determining whether an arbitration agreement is international as defined in s. 1(3) BC-ICAA, "the provinces and territories of Canada shall be considered one state." This provision establishes that the law does not apply to interprovincial statutes. Without it, each province and territory in Canada -- under the light of the *Morguard* case[195] -- could have arguably been considered a "state" as they each are considered as separate jurisdictions within Canada.[196] This problem. however, will not arise in Germany. Even though Germany is a "Federal Republic" with 16 states and 1 federal government, Germany is considered to be one jurisdiction, at least for civil matters including arbitration.[197] Hence Germany does not have to incorporate this subsection.

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195 The *Morguard* case, *supra* note 40, regarding the enforcement of default judgments from other Canadian provinces.

196 P.J. Davidson, *supra* note 9 at p. 109.

197 See Art. 72 and 74 GG that make the German federal government very strong within the Federal Republic, and which give it more competencies than the Canadian federal government has in Canada with respect to legislative competencies.

3. Definition of an "Arbitral Award"

Thirdly, in s. 2(1) BC-ICAA there is an amendment to the definition of an "arbitral award" to include an interim arbitral award, including an interim award made for the preservation of property, and any award of interest or costs. This provision is helpful, of practical importance and also similar to s. 285 BGB; it should, therefore, be considered for implementation in Germany.

4. Exclusion of Court Intervention

The International Commercial Arbitration Act of British Columbia contains an expansion of the exclusion of Court intervention by way of specific language in s. 5 BC-ICAA:

> (a) no court shall intervene except where so provided in this Act,
>
> and
>
> (b) no arbitral proceedings of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal shall be questioned, reviewed or restrained by a proceeding under the Judicial Review Procedure Act or otherwise except to the extent provided in this Act.

The implementation of the Model Law has thus changed the procedure through which the Courts have had the traditional power to participate in the arbitral process and which were much criticized in practice: the stated case procedure and the grounds for setting aside an award for error of law on the face of the award.[198]

This provision emphasizes the respect of party autonomy by the Courts today. Judicial intervention is thoroughly limited to well defined instances in Canada and British Columbia. It must be limited in Germany, too; therefore this provision should be incorporated in Germany as well.

5. Use of UNCITRAL Documents for Interpretation

Art. 6 UML has been omitted, because the relevant Court or other authority for certain functions of arbitration assistance and supervision has been specified in the relevant sections of the Act.[199] In Germany, however, Art. 6 UML must be incorporated to assure the proper jurisdiction of the competent German State Supreme Court (OLG),[200] since it is necessary to provide what Courts are to carry out certain functions in relation to assistance and supervision as regards the conduct of arbitration.

There is a new s. 6 BC-ICAA in British Columbia, permitting reference by the Court to the documents of UNCITRAL and its working group for the interpretation and application of the Model Law. This section allows a Court or an arbitral tribunal to refer to the work undertaken by UNCITRAL and its working group in the preparation of the Model Law.[201] The weight of the directive in s. 6 BC-ICAA

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198 H.C. Alvarez, *supra* note 143 at p. 248.

199 In Germany, the State Supreme Court (OLG) of competent jurisdiction will be the authority for those functions. This must be codified within Germany. See Chapter #7, s. 2 and s. 6 of the suggested new German Act regarding the "Supreme Court".

200 *Ibid.*

201 S. Jarvin, *supra* note 135 at p. 114.

opposes the conservative tradition of Anglo-Canadian common law regarding the use of extrinsic interpretative aids:[202]

> Given the previous reluctance of Canadian common law judges to refer to such material in the absence of ambiguity in the legislation, s. 6 BC-ICAA is a very significant value to arbitrants, as it is the first time that a statute in Canada makes express reference to *travaux preparatoires*.[203]

This significant value is demonstrated by Schreter v. Gasmac[204] where Justice Feldman rejected the argument that because the foreign award provided for the acceleration of future royalty payments, its enforcement was contrary to the public policy of Ontario. In arriving at his judgment, Justice Feldman relied on the UNCITRAL Model Law Working Papers to develop a test of whether the foreign award " offends [Ontario's] local principles of justice and fairness in a fundamental way [...]".[205] The same method of interpretation has also been used in Trade Fortune v. Amalgamated Mill Supplies.[206] Both cases will be discussed at a later point of this paper. The *travaux preparatoires* interpretation of s. 6 BC-ICAA may well become a new legislative technique for incorporating rules developed for the interpretation of treaties in public international law.[207] It is not necessary, however, to codify this technique of interpretation in Germany. The German law is based on civil law, and it frequently uses extrinsic interpretative aids. Interpreting statutes is

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202 R.K. Paterson, *supra* note 23 at p. 31, with further references.

203 W.C. Graham, *supra* note 149 at p. 99.

204 *Schreter v. Gasmac Inc.*, (1992), 7 O.R. (3d) 608; 6 B.L.R. (2d) 71 (Ont.C.J.).

205 *Ibid* at p. 623.

206 *Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd.*, (1994), 89 B.C.L.R. (2nd) 132 (S.C.).

207 W.C. Graham, *supra* note 149 at p. 99.

what the German Courts do most, and it would be considered an insult to the judges to tell them what they might use or not to interpret a law.

6. Nationality of Arbitrators

In s. 11(9) BC-ICAA, there is another addition of a specific clause prohibiting the appointment by the Court of a sole or third arbitrator of the same nationality as any of the parties unless the parties have previously agreed otherwise. As a result of the very lengthy *Quintette* arbitration[208] and the concerns it brought up, a new amendment to the Act was introduced on August 18, 1988, which provided that, unless the parties agree on a person as a sole or third arbitrator who is the same nationality as either side, the Court must not appoint a person who is of the same nationality as any of the parties.[209] This provision makes sense since it ensures the impartiality and independence of arbitrators; it can therefore be approved for implementation in Germany.

7. Challenge of Arbitrators

According to s. 13 (5) BC-ICAA the Supreme Court is given the discretion to refuse to adjudicate on the challenge itself where the parties have agreed to a challenge procedure for arbitrators which would allow the challenge to be decided

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208 See C. Neilson, "Price Adjustments in Long-Term Supply Contracts: The Saga of the Quintette Coal Arbitration", (1991) 18 Can.Bus.L.J. 76 for further details of that arbitration.

209 See the Miscellaneous Statutes Amendment Act (No. 2), S.B.C. 1988, c. 46, s. 35.

upon by a party other than the tribunal itself. This section makes a welcome distinction between cases where parties have agreed that the challenge of an arbitrator may be decided by an institution (or someone other than the arbitrator) and other cases where there is no such agreement. If a challenge is not successful, and the challenging party requests the Supreme Court to decide the challenge, then the Supreme Court may refuse to decide on the challenge if it is satisfied that under the procedure agreed upon between the parties, the challenging party had an opportunity to have the challenge decided upon "by [someone] other than the arbitral tribunal".[210] This is acceptable and should become part of the new German law on this matter, bearing in mind the above mentioned constitutional problems of Art. 13 UML.

8. Repetition of Hearings

In British Columbia a special rule governs the replacement of an arbitrator; there is new legislation concerning the appointment of substitute arbitrators. Where the sole or presiding arbitrator is replaced, any hearings previously held shall be repeated and where an arbitrator other than the sole or presiding arbitrator is replaced, hearings previously held may be repeated at the discretion of the arbitral tribunal unless the parties agree otherwise.[211] Specific provision is also made that rulings made prior to the replacement of an arbitrator are not invalid solely because there has been a change in the composition of the tribunal.[212] This section contains

210 S. Jarvin, *supra* note 135 at p. 115.

211 See s. 15 (3) BC-ICAA.

212 See s. 15 (4) BC-ICAA.

some provisions of great practical importance and must therefore be considered for adoption in Germany.

When an arbitrator is replaced in the middle of an arbitration the question often arises whether the hearings must be repeated or not. The withdrawal of an arbitrator intervening at the end of a long and laborious arbitration may entail important costs and delay if the hearings must be taken over again. In practice it is not excluded that an arbitrator appointed by one of the parties who is dissatisfied with the development of the case withdraws *mala fide* in order to delay an award that may not be welcome to the party that appointed him. The uncertainty as to the risks involved of not repeating the hearings is dispelled in sub-sections 15(3) and 15(4) BC-ICAA which create guiding principles both where a sole or presiding arbitrator is replaced and where it is the case with an co-arbitrator.[213] These rules supplement the Model Law in a sensible way; they generally allow for continuation of the arbitration even for cases in which the parties cannot agree upon it.[214] Unfortunately, the laws of the other provinces and the law of Germany provide that the proceedings must be repeated whenever the arbitrator is replaced. This can, however, be changed for Germany by implementing British Columbia's idea.

9. Documents of Experts

In addition to this, a specific provision has been added in s. 26(3) BC-ICAA to the effect that -- unless the parties agree otherwise -- an expert shall, at the request

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213 *Ibid.*

214 T. Noecker/M. Hentzen, *supra* note 51 at p. 833.

of a party, make available to that party for examination all documents, goods or other property in his possession which he was provided in order to prepare his report. As a result, the availability of such information enables the parties to question experts more efficiently.[215] However, a provision like this is not necessary in Germany, since the ZPO already provides for the duty to make all documents or goods available that experts might have used.

10. Consolidation

In s. 27(2) and 27(3) BC-ICAA, a voluntary consolidation provision has been added. This section has wisely made it a condition for any consolidation of arbitrations that the parties have agreed upon this possibility. The practice in some other places seems to be that the Courts consider it their right to consolidate arbitrations without the parties' consent (usually against the intention of the parties). Such a practice seems dangerous since it may be ruled -- by the time of enforcement of the award -- that such a procedure was not in accordance with the agreement of the parties.[216] The BC-ICAA, however, does not give the Supreme Court freedom to order consolidation in all cases. In any way, this provision will facilitate the more efficient resolution of a dispute involving the same subject matter but perhaps involving more than two partners or different issues arising between the same parties.[217] But consolidation is not known in Germany. To encourage settlements

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215 R.K. Paterson, *supra* note 133 at p. 120.

216 S. Jarvin, *supra* note 135 at p. 115, who refers to Art. V1(d) of the 1958 New York Convention.

217 R.K. Paterson, *supra* note 133 at p. 121.

and to promote international harmony, however, s.30 BC-ICAA should be considered for implementation in Germany.[218]

11. The Applicable Law

According to s. 28(3) BC-ICAA, the tribunal is not required to apply the conflict of laws rules which it considers applicable -- as suggested in the UNCITRAL Model Law. Failing a designation of the applicable law by the parties, the arbitral tribunal rather is empowered to apply the rules of law it considers appropriate in all the circumstances surrounding the dispute. This section on the applicable law has picked up the latest development in international practice by avoiding the deviation over a conflict of law reasoning in order to arrive at the proper law.[219] It thus gives the arbitrators in British Columbia the same latitude as that afforded the parties: the right to apply generally applicable international rules rather than tying the reciprocal rights and obligations of the parties to one or more specific jurisdictions and their conflict of laws rules.[220]

> [This subsection] decides that those operating under the British Columbia law will have to familiarize themselves with the developing notion of *lex mercatoria*, and consider the way in which the rules of more than one legal system, including truly international rules, may

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218 T. Noecker/M. Hentzen, *supra* note 51 at p. 832, who mention that consolidation is only known in Hong Kong and in the Netherlands; for a discussion going along with consolidation, see D.J. Branson/E. Wallace, "Court-Ordered Consolidated Arbitrations in the United States: Recent Authority assures Parties the Choice", (1988) 5 J.Intl.Arb. 91 (footnote 1); see also D.T. Hascher, "Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration?", (1984) 1 J.Intl.Arb. 127.

219 S. Jarvin, *supra* note 135 at p. 116.

220 W.C. Graham, *supra* note 149 at p. 101.

> be applied to a given dispute. The importance of this decision also lies in the fact that it shows to the international community that the rules that govern arbitrations in British Columbia are completely modern in the sense that they recognize that an "attractive" legal regime for the purposes of international arbitration allows the arbitral process to operate with the greatest possible degree of freedom; freedom from any but the imperative provisions of local law.[221]

As Professor Graham stated above, the decision to draft the BC-ICAA in such a manner was extremely important in order to facilitate the needs of the international business community. It provides a solution that corresponds with today's arbitral practice, since the arbitrators are free to determine for themselves the rules they consider best to resolve the conflict if the parties have not reached an agreement as to which law applies; they are no longer bound to follow the appropriate national provisions of conflict of laws. The BC-ICAA therefore gives the tribunal wider discretion than the Model Law in determining the applicable law.

> This offers a wide variety of new approaches: the arbitral tribunal can choose to apply national legal systems as a whole, a combination of provisions out of different national legal systems, general commercial principles, known under the notion of *lex mercatoria*, or any other combination thereof.[222]

This new development by the B.C. legislation can be an exemplary model for Germany where an outdated determination of the applicable law still is the rule. In Germany, the parties are free to designate the law to be applied by the arbitrators with regard to the substance of the dispute. Failing such a choice of law, the applicable law will be determined on the basis of the conflict of laws rules of

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221 *Ibid.*

222 T. Noecker/M. Hentzen, *supra* note 51 at p. 833.

German law (similar to the replaced provision of the Model Law). The application of any foreign law, however, must not violate German public policy, as do, for example, punitive damages.[223] It is unquestionable that this modern provision has to be incorporated in a new German arbitration law.

12. Conciliation and Mediation

The legislature of British Columbia has also made a specific reference to conciliation and mediation in s. 30(1) BC-ICAA. It is clarified that an arbitration tribunal may encourage settlement of the dispute and, with the agreement of the parties, may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage a settlement. The arbitrators may take an active role in trying to really " settle" the dispute between the parties. Thus, by containing this provision, the BC-ICAA encourages and facilitates the actual settlement of international commercial disputes by any means acceptable to the parties (in recognition of the fact that certain jurisdictions around the world have traditionally preferred these other methods of alternative dispute resolution over arbitration).[224] This solution avoids any unnecessary uncertainty since Court intervention is

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223 O. Glossner, *supra* note 13 at p. 15.

224 R.K. Paterson, *supra* note 133 at p. 122, who refers to e.g. the Chinese disputants who have traditionally preferred conciliation over arbitration; P.J. Davidson, however, is of the opinion that the use of mediation or conciliation to encourage a settlement endangers the arbitral tribunal: " Where the arbitrators act in such capacity during the course of the arbitration and the attempt at settlement fails, the arbitrators may have lost the independence and impartiality required for continuing the arbitral proceedings and may no longer enjoy the confidence of the parties. This would then require the complete rearbitration of the matter. If arbitrators use such procedures, it is suggested that they take good care to avoid such disqualification, and, in particular, that the arbitrators participate in such procedures only if the parties agree in advance to it [...]."; see P.J. Davidson, *supra* note 9 at p. 114.

minimized and the enforcement of arbitral awards in countries that do not recognize consolidation is not jeopardized.

13. Award of Interest and Costs

The BC-ICAA makes further provisions with regard to the form and contents of the awards than contained in the Model law. Specific provision is made for the award of interest and costs in s. 31(7) and 31(8) BC-ICAA which provide for the arbitral tribunal to be able to make an order as to the amount of these additional amounts of money. These powers of the tribunal definitely increase the efficacy of the proceedings in British Columbia.[225] In the light of s. 91 and 91a ZPO which provide similar rules for litigation, these subsections fit perfectly into the German scheme of regulation.

14. Recognition and Enforcement of Arbitral Awards

For matters relating to the recognition and enforcement of (foreign) arbitral awards, s.35 (2) BC-ICAA has allowed for the possibility of less onerous provisions than those contained in the Model Law by incorporating the phrase "Unless the Court orders otherwise [...]" before the provisions contained in the first sentence of Art. 35 (2) UML. This change is in coordination with the footnote to that paragraph contained in the Model Law,[226] and can therefore be incorporated in Germany.

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225 R.K. Paterson, *supra* note 133 at p. 120.

15. Summary

These changes and modifications have to be taken into account when analyzing the Courts' acceptance of the BC-ICAA (or the UNCITRAL Model Law) in British Columbia, since they are in fact improvements to the Model Law and to arbitration in general. Therefore, these changes may well be the possible reasons for a Court to approach the new Canadian or British Columbian arbitration law favourably. Most of these changes must also be taken into account by the German legislature, since these amendments illustrate that the Model Law is able to provide a promising basis for the harmonization of national arbitration laws. In summary, the Model Law is flexible and modern enough to be amended and incorporated into different legal systems.

III. The B.C. International Commercial Arbitration Centre

Experience elsewhere, however, suggests that more than modern and sympathetic legislation is needed to stimulate the actual practice of arbitration.[227] Arbitration also needs public encouragement.[228] This is why the British Columbia government has funded the establishment of an International Commercial Arbitration

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226 P.J. Davidson, *supra* note 9 at p. 115, who refers to the official UNCITRAL footnote to s. 35 UML: "The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the Model Law if a State retained even less onerous conditions."

227 J.E.C. Brierly, *supra* note 24 at p. 294 to 295.

228 J.D. Gregory, *supra* note 8 at p. 56.

Centre, an institution where arbitrations may be held.[229] British Columbia is a province where the cause of international commercial arbitration has been enthusiastically taken up. The B.C. government committed itself to supporting the new BC-ICAC for a start up period of 5 years, in order to encourage the use of arbitration in British Columbia and to complement its new international (and domestic) arbitration statutes.

On May 12, 1986 the BC-ICAC was opened officially.[230] The facilities are designed to accommodate the needs of businesses, arbitrators and counsel.[231] The centre provides specialized administrative services that may be desirable in the conduct of an arbitration, whether domestic or international.[232] British Columbia now hopes to attract not only Pacific Rim arbitrations but also proceedings from Europe and elsewhere.[233]

The centre has drafted specific rules for international and domestic arbitration as well as mediation. In preparing its rules on international commercial arbitration, the centre paid close attention to the provisions of the Model Law as well as the 1976 UNCITRAL Arbitration Rules and the 1980 UNCITRAL Conciliation Rules.

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229 S. Jarvin, *supra* note 135 at p. 111.

230 The Canadian Arbitration, Conciliation and Amicable Composition Centre in Ottawa, however, was already established on November 12, 1980; on January 15, 1987, the Quebec National and International Commercial Arbitration Centre was inaugurated in Quebec City.

231 Simultaneous translation, storage, hearing rooms, witness rooms, counsel rooms and all modern communication facilities, etc. are available at the BC-ICAC.

232 J.E.C. Brierly, *supra* note 24 at p. 286.

233 Much has been written about the BC-ICAC (extensively) already; therefore, I will not give another broad introduction to the centre and its facilities or possibilities at this point. For an excellent discussion and description of the centre and all important points related to it, see the complete article by B.J. Thompson, *supra* note 63, beginning at p. 70.

While the centre's international rules are not identical to those of UNCITRAL, they are similar and drafted so as to be compatible with the UNCITRAL Rules.[234] In order to assist those who are familiar with these rules, the centre has cross-referenced its rules to those of UNCITRAL. The use of its facilities, however, will not require that any specific rules be followed; rather, party autonomy permits the selection of any of the known rules, e.g. AAA, ICC, or London Court Rules. Lists of arbitrators are maintained by the appointing authority of the centre, or the method of appointment will depend upon the selection of the given rules by the parties.[235] The centre also publishes a legal periodical entitled "Arbitration Canada".

Germany also needs such a centre for promotion, to be established either in Hamburg, Berlin, Bonn or Frankfurt. The German government must energetically support such a new centre, since there are many Arbitration Centres developing throughout the world, and there might not be profitable business for all of them.

> Properly run and managed arbitration centres are seen as a significant factor in the increased use of international commercial arbitration. Arbitration centres are marketing their services and creating increased demand for them. Commercial activities, particularly at the international level, require credible, neutral and easily accessible places and processes to ensure the speedy and efficient resolution of commercial disputes.[236]

The success and acceptance of a centre will rest on many factors, based on governmental support, on the economic situation of the location, and on the

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234 The BC-ICAC's model arbitration clause and arbitration rules for international commercial arbitrations and conciliations are also based upon UNCITRAL models.

235 S. Jarvin, *supra* note 135 at p. 111.

236 B.J. Thompson, *supra* note 63 at p. 78.

convenience of the centre to arbitrants, counsel, and arbitrators. Bonita J. Thompson has mentioned 22 very important aspects that become relevant factors in the determination of success of an International Commercial Arbitration Centre. These factors are all worth mentioning:[237]

a. Can an award be easily enforced elsewhere?

b. Is the legislative environment hospitable to international commercial arbitration?

c. Do the institutional rules of the centre meet the needs and expectations of the parties?

d. Do the immigration laws of the country provide easy ingress and egress for counsel, parties and witnesses?

e. Can the parties bring foreign counsel into the jurisdiction?

f. Are there qualified local legal counsel in the forum if it is desirable or necessary to retain them?

g. What kinds of arbitration does the institution or centre contemplate -- *ad hoc*, administered or supervised?

h. How does the institution select arbitrators?

i. Does the forum of the centre have a stable political environment?

j. Is the forum of the centre neutral vis-a-vis the particular parties?

k. How favourable is the foreign exchange rate of the forum of the centre?

l. What are the administrative fees and charges of the centre?

m. What are the costs of legal and expert fees?

n. What is the cost of accommodation, meals, transportation, etc.?

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237 *Ibid* at p. 79 to 80.

o. Is there an ethnic population base to provide translation services?

p. What is or are the principal language or languages of the site of the centre?

q. How accessible is the centre to the parties?

r. Does the time zone of the centre accommodate the needs of the parties?

s. Do the banking facilities meet the needs of the parties?

t. Are the communication needs of the parties met by the centre?

u. How much experience and credibility does the centre or institution have? and

v. What services and facilities does the site provide?

These factors give an idea of how complex the needs for careful planing for a centre are. The German legislature and Institute for International Arbitration that will be in charge of erecting such a centre must weigh these factors carefully and act accordingly to ensure success of a German centre. Such a German centre must be set up at the same time the new legislation is enacted -- or earlier. The BC-ICAC is an excellent institution and an exceptional example of a fine arbitration centre, and I suggest to the German Institute for International Arbitration to take a closer look.

IV. Survey on Achievements of the BC-ICAA (Part II)

Here are all the questions asked in the survey that are relevant for Part II of the survey. This part deals with the advantages and disadvantages of the new legislation and the BC-ICAC in British Columbia.[238] The results are disclosed right after the

238 See Chapter #3.

question as they were returned to me in a multiple choice style. An evaluation of the survey will follow after the last question:

a. What exactly where the advantages that you have seen in the UNCITRAL Model Law?

common knowledge of the Model Law by all parties	94%
high degree of party autonomy	93%
high degree of acceptance by the courts	91%
limited court intervention	89%
independence of the arbitral tribunal	88%
parties are willing to agree upon arbitration	88%
fairness	75%
fast arbitration	69%

b. Were you satisfied with the provisions of the new BC-ICAA of 1986?

very satisfied:	34%
satisfied:	61%
not particularly satisfied:	5%
not satisfied at all:	0%

c. Do you think that the UNCITRAL Model Law is an improvement to the old arbitration law in Canada?

definitely yes:	91%
yes:	9%
not really:	0%
not at all:	0%

d. Has it become easier to make any international arbitration agreements since your foreign partner knew that B.C. had adopted the UNCITRAL Model Law?

very much so:	88%
yes:	8%
a little bit:	4%
no:	0%

e. Do foreign parties have a good knowledge of the UNCITRAL Model Law and do they trust it?

they definitely do:	94%
they do:	6%
they have only heard of it:	0%
they have never heard of it:	0%

f. Have you chosen arbitrators from a list provided by the B.C. International Commercial Arbitration Centre in Vancouver?

yes:	80%
no:	20%

g. Do you find that the B.C. International Commercial Arbitration Centre is a good institution?

definitely yes:	90%
it is helpful:	10%
no:	0%
it is not useful at all:	0%

The results of the survey not only show a high degree of acceptance of the UNCITRAL Model Law (implemented as the BC-ICAA) within the professional clientele of British Columbia, the United States of America and Europe, but also that every party involved in arbitration in British Columbia is satisfied with the way the BC-ICAA governs international commercial arbitration since 1986.

The outcome of the survey mirrors the warm reception being given to the Model Law by arbitrants in general. Therefore, the implementation of the Model Law in British Columbia can be apostrophized as entirely successful when it comes to the acceptance by the professional clientele and the business world.

Since their acceptance has been established, it finally becomes time to look at the acceptance of the Model Law by the Courts of Canada -- focusing on the three points of interest mentioned earlier: enforcement of arbitration awards, stays of proceedings, and interim measures of protection by the Courts. Even though the German Courts have already accepted arbitration, this analysis is important to determine that there are no real problems arising at the borderline between international and domestic law or concerning the application of an internationally drafted law by the domestic Courts of the adopting country.

C. Enforcement of Awards and the Courts

There have been a number of cases, most of them unreported, relating to the enforcement of arbitral awards.[239] The plethora of these cases prove that the enforcement of awards is a very important aspect of international commercial arbitration. Luckily, this important point is covered in all of Canada by the New York Convention today. Until 1986, however, it was fairer to the parties to allow them to arbitrate and enforce abroad rather than compelling them to arbitrate in Canada where the Courts were likely to intervene.[240] The following recent cases seem especially interesting since they show a high degree of efficiency of the BC-ICAA rather than misunderstandings created by the language of its provisions regarding enforcement.

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239 To point out a few more, e.g.: *Compania Maritima Villa Nova S.A. v. Northern Sales Company Limited* (1989), 20 F.T.R. 136 (F.C.T.D.); [1992] 1 F.C. 550 (F.C.A.); or *M.A. Industries Inc. v. Maritime Battery Inc.*, (unreported, New Brunswick Court of Queen's Bench, August 19, 1991) ([1991] N.B.J. No. 717); or *Amco Transmission Inc. v. Kunz* (unreported, Saskatchewan Court of Appeal, September 4, 1991) ([1991] S.J. No. 404).

240 J.D. Gregory, *supra* note 8 at p. 54.

Even though there was not all that much discretion for the Courts to refuse enforcement of foreign awards -- at least if they had the force of a judgment in the foreign country -- prior to 1986, Art. 35 and 36 UML (or: s. 35 and 36 BC-ICAA which are similar) limit judicial powers and discretion not to enforce a foreign arbitration award in Canada considerably. The following cases demonstrate how the Courts have dealt with this radical limitation of their discretionary powers.

I. Kanto Yakin K.K.-Kaisha v. Can-Eng Manufacturing Ltd.

This case[241] dealt with an application by the Japanese claimant for recognition and enforcement in Ontario under the terms of the Ontario International Commercial Arbitration Act of an award rendered in Tokyo under the auspices of the Japan Commercial Arbitration Association.[242] Although duly notified of the arbitration proceedings, the Canadian respondent did not file a Statement of Defence nor did it appear at the arbitration. The Canadian respondent opposed the application for recognition and enforcement on a variety of grounds, including arguments that the dispute was not capable of settlement by arbitration because there had been a fundamental breach of the agreement by the Japanese claimant and, therefore, the dispute could only be decided by a Court of competent jurisdiction. Further, the respondent argued that recognition of the award in favour of a foreign corporation without assets in Ontario would be contrary to public policy since the respondent

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241 *Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd.*, (1992), 7 O.R. (3d) 779; 4 B.L.R. (2d) 108 (Ont.H.C.J.).

242 Ontario International Commercial Arbitration Act, S.O. 1988, c. 30.

would be left with no recourse with respect to its damages allegedly caused by the claimant's fundamental breach.

The Ontario High Court of Justice granted the application for recognition and enforcement. It held that the application properly fell within the scope of the International Commercial Arbitration Act. It then noted that under the terms of this Act,[243] the arbitration clause was seen as a separate and distinct part of the agreement in which it was contained for the purpose of allowing the arbitral tribunal to rule on its own jurisdiction. This ruling on the basis of the doctrine of "*Kompetenz-Kompetenz*"[244] shows a general acceptance by the Court of an arbitral tribunal as another capable "Court" with a certain consensual "jurisdiction" and power to make legally valid and binding decisions. The Court also noted that the International Commercial Arbitration Act further provided for a procedure to challenge the arbitral tribunal's jurisdiction. However, the respondent had not availed itself of that procedure and it could not subsequently apply to have the award set aside by the Court after three months had elapsed from the date of receipt of the award. The Court also dismissed the respondent's public policy argument and noted that the UNCITRAL Model Law (which was implemented by the International Commercial Arbitration Act of Ontario) implemented a specific policy for international commercial arbitration which limited the application of the rules of law which might otherwise apply.[245]

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243 Therefore also under the terms of the UNCITRAL Model Law.

244 See Chapter #3.

245 H.C. Alvarez, "Recent Developments in the Area of Commercial Arbitration", Canadian Bar Association: Joint Meeting of the Alternate Dispute Resolution, Business, and Civil Litigation Sections, December 12, 1994, (Russell & DuMoulin), p. 7 at p. 7 to 8.

II. Dunhill Personell System Inc. v. Dunhill Temps Edmonton Ltd.

This case[246] dealt with an application by a franchisor who had obtained an arbitral award in its favour in New York for enforcement in Alberta pursuant to the International Commercial Arbitration Act.[247] The respondent resisted enforcement on a variety of grounds. It argued that the claimant had repudiated the franchise agreements in question by its own breaches of those agreements and it could not, therefore, rely upon the arbitration clause contained in them. The respondent also claimed that it had challenged the jurisdiction of the arbitral tribunal and that the Alberta Court had jurisdiction to deal with that challenge.

The Alberta Court of Queen's Bench adopted the decision in *Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd.*[248] that an arbitration clause in a terminated contract remained available for the resolution of disputes arising while the agreement was still in force, hereby again promoting arbitration as an acceptable mechanism of alternative dispute resolution. Further, the Court held that the issue of a breach of the agreement by the franchisor was a substantive matter which should have been raised before the arbitral tribunal. With respect to the allegation that the arbitral tribunal had exceeded its jurisdiction, the Court held that, pursuant to Article 16 of the Act, an arbitral tribunal could rule on its own jurisdiction. The Court found that since no challenge had been made to the jurisdiction of the arbitral tribunal in the New York Courts, it would not interfere. It

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246 *Dunhill Personnel System Inc. v. Dunhill Temps Edmonton Ltd.*, (1993) 13 Alta L.R. (3rd) 241 (Q.B.).

247 International Commercial Arbitration Act of Alberta, S.A. 1986, c. I-6.6.

248 *Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd.*, *supra* note 241.

concluded that the basis alleged by the respondent was not a ground for challenge within Article 36 of the Alberta International Commercial Arbitration Act.[249]

III. Schreter v. Gasmac Inc.

This case[250] dealt with an application for recognition and enforcement of an award rendered under the auspices of the American Arbitration Association in the State of Georgia. The applicants, a U.S. corporation and its subsidiary, claimed the payment of commissions and royalties from the respondent, an Ontario corporation. The agreement provided for arbitration in Atlanta and was subject to the law of Georgia. The Canadian party took no objection to the arbitration proceedings. The U.S. claimants were successful at the hearing and an award was issued in their favour. The claimants then filed a motion for confirmation of the award pursuant to the terms of the U.S. Arbitration Act. Although the Canadian party opposed the confirmation on various grounds, the Georgia Court rejected the arguments and confirmed the award. The claimants then sought recognition and enforcement in Ontario under the terms of the Ontario International Commercial Arbitration Act.[251] The Canadian respondents resisted enforcement on a number of grounds, including the following argument: the confirmation of the award by the Georgia court had merged the award in the judgment so that the award could only be enforced as a foreign judgment and not as an arbitration award.

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249 H.C. Alvarez, *supra* note 245 at p. 8 to 9.

250 *Schreter v. Gasmac Inc.*, (1992), 7 O.R. (3d) 608; 6 B.L.R. (2d) 71 (Ont.C.J.).

251 Ontario Statutes, *supra* note 242.

The Ontario Court granted the application for recognition and enforcement of the arbitration award. The Court commenced its judgment by reviewing the relevant provisions of the International Commercial Arbitration Act and noting that where an applicant has complied with the formal requirements set out in this Act, the Court must recognize and enforce an award unless the respondent fulfills its onus to prove that one of a limited number of grounds exist for refusal of recognition and enforcement. The Court also noted that the respondent's argument would be contrary to the purpose of the enforcement provisions of the UNCITRAL Model Law. The Court stated at page 84 of the decision:

> The purpose of enacting the UNCITRAL Model Law in Ontario and in other jurisdictions is to establish a climate where international commercial arbitration can be resorted to with confidence by parties from different countries on the basis that if the arbitration is conducted in accordance with the agreement of the parties, an award will be enforceable if no defences are successfully raised under Articles 35 and 36. Earlier decisions denying direct enforcement of a foreign award and requiring a foreign judgment confirming the award are directly contrary to the UNCITRAL Model Law.[252]

As a result, the award was recognized and leave was given for its enforcement. In this case, the Court demonstrated a particularly favourable approach to the enforcement of a foreign or international arbitral award.[253] This decision confirms that, at least regarding common law concerns, Canadian Courts will treat challenges to foreign arbitral awards on public policy grounds with skepticism.[254] This again implies that the Court has fully accepted Art. 35 and 36 of the UNCITRAL Model

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252 *Schreter v. Gasmac Inc.*, *supra* note 250 at p. 84.

253 H.C. Alvarez, *supra* note 245 at p. 9 to 10.

254 R.K. Paterson, *supra* note 23 at p. 43.

Law, and it introduces a new kind of skepticism within the Canadian Courts against arguments that may challenge the validity of foreign arbitral awards. Consequently, the Courts today support arbitration rather than being hostile to it; the judicial hostility towards private commercial arbitration by the Canadian Courts seems to have decreased extensively until today.

D. Stays of Proceedings

One area where, traditionally, the Courts tended to exercise their own discretionary powers quite freely was in their ability to take jurisdiction over an action despite the fact that the parties to the action had agreed to arbitration. Therefore, the next important point I focused my attention on were the stay of proceedings cases by Canadian and British Columbian Courts. This is a question that uncovers the Courts' attitude towards arbitration and also brings into sharp focus the nature of the important changes that the Model Law makes in British Columbia's law.[255]

Just as a reminder: Under the old Arbitration Act (s. 6 of the Act) the Courts retained a wide discretion to grant a stay of proceedings in a legal action commenced by one party to an arbitration agreement against another.[256] This situation, of course, was contrary to the basic, consensual nature of arbitration:

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255 W.C. Graham, *supra* note 149 at p. 80.

256 Until the recent amendments, the common law provinces followed the English law on arbitration as it was before the Arbitration Act of 1979; Courts could intervene in the arbitral proceedings under the motion of the "stated" or the "special case", and any award was subject to judicial control and could be set aside for various reasons. For further details on the old English law, please see H.C. Alvarez, *supra* note 143 at p. 247.

> Where the parties have chosen to arbitrate their disputes as an alternative to litigation they should be held to their agreement.[257]

The situation in Canada today has changed; the discretion to stay proceedings has been much curtailed by the implementation of the Model Law which very severely limits the Courts' ability to allow such legal actions in front of a Court to continue. Before the adoption of the Model Law in British Columbia, the Arbitration Act and the Rules of Court conferred discretion on judges to stay actions so as to allow arbitrations to proceed.[258] The Model Law, however, requires in Art. 8 (1) UML that the Courts stay proceedings unless they discover one of the specifically mentioned grounds for refusing the stay (e.g. a null and void, or inoperative arbitration agreement).

> One of the key concepts of the Model Law is that of limited and clearly defined instances of Court intervention into the arbitration process, with a curtailed right of appeal from a Court decision sought during the pendency of the arbitral proceedings. A fundamental aim throughout all stages of drafting was to strike a proper balance in the relationship between arbitration and the Courts. As ultimately reflected in the Model Law, the role of the Courts in general is one of assistance supportive of the arbitral process and not of interference with it.[259]

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257 H.C. Alvarez, *supra* note 143 at p. 250.

258 R.K. Paterson, *supra* note 23 at p. 38.

259 M.F. Hoellering, *supra* note 15 at p. 330, who makes reference to the "US Government Comments on the UNCITRAL Working Group Draft Text of a Model Law on International Commercial Arbitration", reproduced in American Arbitration Association (AAA), Arbitration & The Law 1984, at p. 195.

There have been a number of cases applying the new provision of s. 15 of the British Columbia Arbitration Act,[260] not all of which are sympathetic to the goals of the BC-ICAA that incorporates the same provision of s. 15 and a similar provision of Art. 8 (1) UML in s. 8 BC-ICAA.

I. Stays of Proceedings in British Columbia

Applications to stay legal proceedings because of the existence of an arbitration agreement have been the most addressed requests by the applicants in front of the British Columbian Courts. In *Stancroft Trust Ltd.* v. *Can-Asia Capital*,[261] and in *Gulf Canada Resources Ltd.* v. *Arochem International Ltd.*,[262] the British Columbia Court of Appeal has held that, pursuant to s.15 of the Commercial Arbitration Act, once a party to an arbitration agreement has shown that another party to the arbitration agreement has commenced legal proceedings in respect of a matter to be submitted to arbitration and the applicable time limits have been met, the Court must stay legal proceedings unless the arbitration agreement is found to be "null and void, inoperative, or incapable of being performed".

In the *Stancroft Trust Ltd.* case, the Court of Appeal also ruled that no other set of rules (like e.g. the Supreme Court Rules) can be used alternatively to the

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260 Commercial Arbitration Act, S.B.C. 1986, c. 3.

261 *Stancroft Trust Ltd. v. Can-Asia Capital*, (1990), 43 B.C.L.R. (2d) 241 (C.A.).

262 *Gulf Canada Resources Ltd. v. Arochem International Ltd.*, (1992), 66 B.C.L.R. (2d) 113 (C.A.).

provisions of s.15 of the Act to receive a new right to stay if the right to a stay under s.15 has been lost, e.g. due to expired time limits.

> While the Rules of Court would otherwise govern, as part of the lex fori, the Court of Appeal was clearly unwilling to allow them to be used to undermine the specificity of the Model Law.[263]

This result is consistent with the philosophy of the Model Law not to let the Courts intervene or supervise the arbitration by applying other grounds than those contained in Art. 8 UML to refuse an order for a stay of proceedings. Therefore, the Courts do not try to use any other statutes that might give a ground for refusal of a stay of proceedings than the reasons contained in Art. 8 UML. As this case shows, Canadian Courts obey the philosophy behind the idea of non-judicial intervention of the Model Law. They have recognized that Art. 8 UML, its similar provisions of s. 15 of the Commercial Arbitration Act and of s. 8 BC-ICAA are exclusive and obligatory rules which can not be substituted by other acts or statutes that may refuse the applicant the right for a stay of legal proceedings in front of a Court. In general, therefore, the Courts have been supportive of the arbitral process and have not refused many applications for stays of proceedings since 1986.[264]

In *No. 363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd.* and *Afton Operating Corporation v. Canadian National Railway et al.*,[265] the Courts have held that serving a demand for discovery of documents in an action does not necessarily

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263 R.K. Paterson, *supra* note 23 at p. 39.

264 H.C. Alvarez, *supra* note 245 at p. 2.

265 *No. 363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd.*, (1993), 81 B.C.L.R. (2d) 359 (C.A.); *Afton Operating Corporation v. Canadian National Railway et al.*, unreported, Vancouver Registry, January 13, 1994.

indicate taking " any other step in the proceedings", and that participation in a pre-trial conference does not necessarily amount to taking a step in the proceedings so as to disentitle the applicant from obtaining a stay of proceedings. Even if these decisions depend on the specific facts in question, and even if parties in British Columbia should still be aware that their right to arbitrate can be waived -- the relevant sections of British Columbia's (International) Commercial Arbitration Act mentioned above oblige the Courts to enforce any clause which meets the very broad definition of an " arbitration agreement" and take away most of the historical judicial discretion to grant a stay of proceedings.

II. Century 21 v. Royal LePage

Commenting on the arbitration process, Madam Justice Proudfoot, in *Century 21 v. Royal LePage* at page 2, talking generally about the Arbitration Act, stated:

> Finally, the most compelling reason why the Court should not intervene is simply that the legislation sets up a mechanism to expediently and inexpensively resolve these types of disputes which occur from time to time. This process should be allowed to continue. If the Courts are to become involved by way of granting leave each time an Award is made and a party is not happy, the objectives and intentions of the legislation will never be fulfilled. Everyone talks today of mechanisms for " alternate dispute resolutions"; here is just such a mechanism; that scheme should be allowed to flourish.[266]

Madam Justice Proudfoot was commenting on the purpose of the Commercial Arbitration Act. This attitude towards the Act and her Ladyship's thoughts on the

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266 *Century 21 v. Royal LePage*, unreported, Vancouver Registry #C865798, (October 20, 1987), at p. 2.

arbitration process found favour with the Court of Appeal in Domtar Inc. v. Belkin Inc.[267] in the decision rendered by Justice Lambert, and it shows a great deal of confidence in arbitration as an alternative method to resolute disputed that "everybody" talks about and that "should be allowed to flourish" to expediently and inexpensively resolve disputes. Madam Justice Proudfoot's decision is clear proof of the fact that the Courts today regard arbitration as a modern mechanism for alternative dispute resolution, and that they are currently on the verge of actually promoting arbitration.

III. Roy v. Boyce

In Roy v. Boyce[268] the respondents had applied pursuant to s. 15 of the Commercial Arbitration Act for an order staying the arbitration as inoperative on the basis that, since the agreement between the parties had been terminated, the arbitration clause could not now be invoked because it did not survive the agreement. With regard to s. 15 of the Act, Justice Fraser stated at page 190 of his decision:

> With the passage of the Commercial Arbitration Act, British Columbia adopted standard form legislative language in place in many jurisdictions. The wording of s. 15 [of the Act] appears to take away the discretion of a superior Court of plenary jurisdiction to deflect an arbitration to which the parties have agreed.
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> [...]

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267 *Domtar Inc. v. Belkin Inc.*, (1991), 39 B.C.L.R. (2d) 257.

268 *Roy v. Boyce*, (1991), 57 B.C.L.R. (2d) 187.

> In this case, it is common ground that an agreement was made. The petitioners wish to block arbitration on the basis that a condition precedent to the continuing existence of the contract [clause 11.01(b)] was not met. Whether this allegation is sound is a matter of evidence. It and the other claims made by the petitioners appear to me to be controversies or claims arising out of or in relation to the agreement [...]. Even if the respondents had conceded that the argument was at an end, for one reason or another, it seems to me that the arbitration clause is not dead on the expiry date but only dormant, with respect to matters which occurred while the agreement was in effect.[269]

Madam Justice Saunders in the subsequent case of Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.,[270] reached a similar conclusion to that of Justice Fraser with regard to the functioning of s.15 of the Commercial Arbitration Act. Both the Sandbar Construction Ltd. and the Roy cases support the defendant's contention that the arbitration clauses can be separated from the remainder of an invalid agreement in order to be kept alive. This method of making arbitration agreements survive invalid contracts that they are a part of clearly underlines the fact that the Courts approach arbitration favourably and try to promote arbitration by denying legal proceedings in front of a Court if a contractual arbitration agreement was made. Arbitration agreements are hence regarded as valid and worth every assistance and support by the Courts, even if there has been a breach of contract. The Courts hereby follow the teleological idea of Art. 16 (1)(a) UML where arbitral tribunals are obliged to make similar decisions.[271] Thus, the Canadian Courts'

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269 *Ibid* at p. 192.

270 *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.*, (1992), 66 B.C.L.R. (2d) 255; this case was, however, appealed for another issue, see (1994) 87 B.C.L.R. (2d) 45 (C.A.).

271 See Chapter #3, where I recommend to incorporate this provision into Art. 7 UML which covers the definition of arbitration agreements. This incorporation will finally allow German Courts to apply the doctrine of separability by statute. See also Chapter #7, s.7 of the suggested new German Act.

attitude towards arbitration as a means of dispute settlement is very supportive. Keeping in mind the law until 1985, the current reform makes a "U turn" in the general approach to arbitration; substantial autonomy of the parties has replaced vast governmental control.[272]

IV. Hebdo Mag. Inc. v. 125646 Canada Inc. et al.

Another good example of how opportunely stays of proceedings cases are treated by Canadian Courts in favour of a referral to arbitration today is the *Hebdo Mag. Inc.* case.[273] In this case, the plaintiff applied for an order staying the arbitration, and the defendant applied for an order staying this legal proceeding in front of the British Columbia Supreme Court. In arriving at his judgment that the legal proceedings be stayed pursuant to s. 15 (1) and (2) of the British Columbia Arbitration Act, Justice Blair reflected on the direction given to him with regard to arbitration proceedings generally by the previous decisions mentioned above:

> I conclude that this Court has an obligation under the Commercial Arbitration Act to encourage and assist the carrying out of the arbitration process as envisaged by the Act, particularly in a situation such as this in which the parties have agreed to the process in such an explicit and obvious fashion. I conclude that s. 15 of the Commercial Arbitration Act should and will be invoked, and I direct a stay of proceedings in [this] legal action.[274]

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272 T. Noecker/M. Hentzen, *supra* note 51 at p. 834.

273 *Hebdo Mag. Inc. v. 125646 Canada Inc. and Royal Trust Corporation of Canada,* unreported, Vancouver Registry, Action #C924230, Supreme Court of British Columbia; August 14, 1992.

274 *Ibid* at p. 9.

This decision is of great importance because it not only reflects the Courts' favourable and supportive approach to arbitration, but also -- for the first time -- mentions an obligation of a Canadian Court to " encourage and assist the carrying out of the arbitration process" . The fact that the Supreme Court of British Columbia has recognized an obligation to promote arbitration proceedings goes hand in hand with the principles of the Model Law that hence must be regarded as fully accepted by the Canadian Courts. This acceptance can also be discovered by taking a closer look at interim measures of protection by the Courts.

E. Interim Measures of Protection by the Courts

The other important point I focused my attention on were the interim measures of protection by the Courts. The recent favourable approach to arbitration by the Canadian Courts can also be discovered when it comes to questions concerning interim measures of protection, as the following cases will show.

I. Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd.

This case[275] concerned a charter party agreement which contained an arbitration clause referring disputes to arbitration in London under English law. All the steps had been taken to establish an arbitral tribunal, the plaintiffs brought an action in British Columbia and issued a garnishing order before judgment. They were successful in having $97,946 paid into Court pursuant to the garnishing order.

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275 *Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd.*, (1994), 89 B.C.L.R. (2nd) 132 (S.C.).

The defendant applied for a stay of proceedings pending the outcome of the arbitration and applied to set the garnishing order aside. The plaintiff took the position that the action should be stayed, although the garnishing order should remain in place.

The Court stayed the action, but maintained the garnishing order. The Court held that s. 9 BC-ICAA permitted a party to an arbitration to seek "an interim measure of protection" from a court. Although s. 17 BC-ICAA also allowed an arbitral tribunal to take interim measures of protection, s. 9 BC-ICAA was held to prevail since s. 17 BC-ICAA clearly stated that it was not incompatible with arbitral proceedings for a party to seek interim protection from the court. The words "interim measure of protection" in s. 9 BC-ICAA include the issuance of a garnishing order. In reaching its decision, the court examined the documents of UNCITRAL and its working group regarding the preparation of the Model Law -- as it is allowed by s. 6 BC-ICAA (see above: *travaux preparatoires*). Amongst those materials, the Court noted that working group reports of UNCITRAL referred to "pre-award attachments to secure an eventual award" as being included within the scope of Article 9 of the UNCITRAL Model Law. This raises some interesting questions as to the nature of the attachment proceedings before the courts, particularly where, as in the case of garnishment before judgment, there is no consideration of the merits of an application by the courts.[276] The scope of this paper, however, does not permit an answer to these questions at this point.

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276 H.C. Alvarez, *supra* note 245 at p. 11.

II. Delphi Petroleum Inc. v. Derin Shipping and Trading Ltd.

In this interesting case,[277] one party applied to the Federal Court pursuant to Article 9 of the Commercial Arbitration Code (Interim Measure for Protection) for an order for the taking of evidence from a third party. The Court held that such an application could be brought pursuant to Article 9 as a request for an interim measure of protection. The Court went on to refuse the request for the taking of evidence on the basis that the applicant had not demonstrated that the person in question had information with respect to an issue in the arbitration. Throughout its reasons, the Court showed great concerns that it not be involved in " dilatory tactics of a party", and that it seek to ensure the efficiency of the arbitration.[278] This case again shows a high degree of acceptance of arbitration by the Court and its concern " not to get involved" in a consensual arbitration agreement (as it would be contrary to the parties intention). Thus, Canadian Courts actually try to stay away from private arbitration today as long as they can; they use a new approach to the subject of arbitration, really emphasizing party autonomy for the first time.

F. Kvaerner Enviropower Inc. v. Tanner Industries Ltd.

The above mentioned cases show the Canadian Court's intention to give emphasis and importance to the parties' decision to go to arbitration. Canadian Courts, therefore, have not only accepted the UNCITRAL Model Law, but also or

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277 *Delphi Petroleum Inc. v. Derin Shipping and Trading Ltd.*, [1993], F.C.J. No. 1270; 3 December 1993.

278 H.C. Alvarez, *supra* note 245 at p. 11 to 12.

finally, as it seems, arbitration itself as a fully recognized mechanism of alternative dispute resolution. This acceptance is especially underlined by the very recent Kvaerner case.[279] In this case the Alberta Court of Queen's Bench rejected an argument that an arbitration agreement impaired a party's right to remedies under the Builder's Lien Act and, as a result, was void as contrary to public policy.

The Court ruled that arbitration of the part of the price of the work or material furnished in respect of an improvement that remained due to a lien holder was not contrary to the letter or to the spirit of the Builder's Lien Act. Public policy supported arbitration of disputes as shown by the Alberta legislation on arbitration. The Court went on to find that many, if not most, construction contracts called for arbitration of disputes notwithstanding that the Builder's Lien Act applied to work and materials provided under construction contracts. Therefore, the Court held that the arbitration agreement was valid and that the determination of the amount owing could and should be determined by arbitration. As a result, the parties were referred to arbitration.

This very interesting decision clearly shows that Canadian Courts nowadays are no longer afraid of a referral to arbitration, even if something as delicate and important as public policy is at stake. The Kvaerner case, therefore, mirrors again the general acceptance of the UNCITRAL Model Law (or the BC-ICAA) and, even more, of arbitration as an established way to resolute disputes alternatively. A party seeking to delay arbitration in a Canadian jurisdiction through judicial intervention will likely fail, and the Canadian Courts do not accept such an invitation to frustrate

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279 *Kvaerner Enviropower Inc. v. Tannar Industries Ltd.*, [1994] 9. W.W.R. 228 (Alta. Q.B.).

an arbitration agreement any longer. Rather, such an agreement will be recognized and the arbitration award will be enforced speedily.[280]

G. B.W.V. Investments v. Saskferco Products Inc.

In this case,[281] one party applied for an order staying the action and referring the dispute to arbitration after the other party had commenced legal action in front of a Court. The applying party, a foreign company, was engaged by a domestic corporation to construct a nitrogen fertilizer plant in Saskatchewan. The Saskatchewan Court of Queen's Bench held that an arbitration clause which infringed sections of the Saskatchewan Builders' Lien Act was void as contrary to public policy. Therefore, the order was refused on the ground that the arbitration provisions conflicted with the Builder's Lien Act. The approach taken in this case was diametrically opposed to the approach in the *Kvaerner* case. This decision, however, was appealed, and the Saskatchewan Court of Appeal held that the appeal should be allowed:

> The Courts should give effect to the intention of the parties and to the policy of the legislature in encouraging the settlement of disputes by international arbitration. A settlement by arbitration of a dispute as to the amount owing under a construction contract was not contrary to the Builder's Lien Act.[282]
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> [...]

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280 E.P. Mendes, *supra* note 2 at p. 84.

281 *B.W.V. Investments Ltd. v. Saskferco Products Inc.*, [1993] 4 W.W.R. 553 (Sask. C.Q.B.); see also the appeal Court's judgment, D.L.R Nr. 4, 119, p. 577 (Sask. C.A.).

282 *Ibid* at p. 577 (Sask.C.A.).

> The objectives behind the ICAA/EFAA legislative schemes that have arisen in each province can be succinctly stated:
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> (1) to give effect to the intentions of the parties in choosing to submit to arbitration;
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> (2) to facilitate predictability in the resolution of international commercial disputes;
>
> (3) to foster consistency between jurisdictions in the resolution of international commercial disputes;
>
> and
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> (4) by encouraging the use of international commercial arbitration as a dispute resolution alternative, to encourage international commercial activity.[283]

This very recent case is of great importance because it demonstrates the newly emerged willingness of the Courts to respect the intention of the parties to submit their dispute to arbitration -- even though other legislation would deny it. Concerning other legislation that might circumvent the provisions of the Model Law, a very similar judgment in favour of the obligatory and exclusive character of the new legislation on arbitration was made in the above mentioned *Stancroft* case.[284]

Another point touched by both cases is whether a Court that stays proceedings against a party to the arbitration agreement should also stay claims that are brought against co-defendants who are not parties to the agreement. In the *Stancroft* case

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283 *Ibid* at p. 590 (Sask.C.A.).

284 *Stancroft Trust Ltd. v. Can-Asia Capital, supra* note 261.

the Court seemed to take a narrower view, and, while staying the action against one party, allowed closely related actions to continue against co-defendants who in this case were in fact parties to the arbitration agreement, but who were too late in asking for a stay. In the B.W.V. case, the Court ordered that the actions of the sub-contractors -- even though not parties to the arbitration agreement -- be stayed pending arbitration.

> This will avoid the problem of multiple concurrent proceedings and there is every reason to expect that issues will be clarified through arbitration to the benefit of subsequent proceedings.[285]

In making this order, the Court relied on both the contractual intention of the principal parties and the need to be flexible in accommodating the interests of third parties that rely on the outcome of an arbitration. This issue, too, is an indicator for a favourable approach to arbitration, since it suggests how prepared the Courts are to encourage related claims to be dealt with as part of the arbitration and how receptive judges have become to the concept of commercial arbitration.

The parties' intention, therefore, has become an obligatory measurement for determining whether a stay shall be granted. It seems as what the Courts really want is a settlement of disputes, and not to employ their old traditional power to intervene or supervise. In the light of the legislative intention of the Model Law -- to minimize judicial intervention when reviewing international commercial arbitration proceedings or awards -- this acceptance of the parties' intention by the Courts must be regarded as a major step towards arbitration as an accepted mechanism for dispute resolution in Canada. Therefore, this case also contributes to the fact that

285 *B.W.V. Investments Ltd. v. Saskferco Products Inc.*, *supra* note 281 at p. 596.

Canada's Courts have truly accepted the UNCITRAL Model Law in a favourable way.

H. Conclusion

With the expansion of global commerce, there has been a developing consensus that, in order to facilitate and promote international trade, commercial arbitration at the international level should function more independently of the restraints of national judicial systems. The above mentioned cases of the jurisprudence in Canada and British Columbia in particular, show that the Courts try to ensure the efficiency of arbitration today, and that they do not want to get involved in private arbitration proceedings any more than they have to according to the provisions of the BC-ICAA. Therefore, nowadays arbitration is not only accepted but also promoted by the Courts.

I. Evaluation

The principal means of dispute resolution within the realm of international trade has increasingly been arbitration.[286] The reason for this rapid development in the field of arbitration has been due to the fact that the international trading community has exhibited a reluctance to submit commercial disputes to the national Courts of either party to the transaction. This has necessitated the need for a neutral forum in which both parties have a measure of confidence. My empirical research documents

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286 T. Noecker, *supra* note 10 at p. 56.

the confidence of the parties in the BC-ICAA and the Model Law in general, and as it can be concluded from the above mentioned cases, the Courts of Canada also have this confidence today. The cases discussed in this chapter are uniformly consistent with my thesis that the UNCITRAL Model Law has been fully accepted by Canadian Courts, even though some judges have not been as enthusiastic about the Model Law as others have been.

The recent changes in the Canadian and British Columbian jurisdictions concerning international commercial arbitration have established a more favourable climate for this type of arbitration. It no longer has a status of a rigid, outdated legal regime and has been given the potential to become a flexible and effective method of resoluting disputes. Business people, judges and lawyers have (as shown by the cases discussed above) taken advantage of this opportunity given to them by the BC-ICAA, and they have approached arbitration in a new and favourable light,[287] leaving room for British Columbia and Canada to achieve their goals: to become a well respected and frequently used centre and place for international commercial arbitration.

Furthermore, Anglo-Canadian law used to be different from other legal systems in a substantial way because it had not treated the arbitration of commercial and other types of disputes separately.[288] This has not been the case in most of the civil law countries which have long encouraged arbitration of commercial disputes and which have also achieved a high degree of efficiency involving minimum Court intervention in arbitral proceedings. The new legislation, however, namely the BC-

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287 H.C. Alvarez, *supra* note 143 at p. 275.

288 R.K. Paterson, *supra* note 133 at p. 123.

ICAA, makes the law in British Columbia more uniform as it moves the latter closer to that of most of this province's trading partners, and it also treats commercial and other disputes differently. In the past, Canadian trade and economic relations have been mainly with other Commonwealth countries or with the United States of America.[289] Alternative dispute settlement mechanisms to litigation were unavailable, but that seemed to be less significant since the parties had a similar level of legal development, the same language and similar legal systems. Today, Canadian trade with the rest of the world, especially East Asia, is expanding, and Canadians will definitely be less able to predict the outcome of any disputes arising from such trade. It was a great achievement for Canada to have implemented the Model Law.

> Parties from different legal systems and with different languages are naturally less confident that disputes can be satisfactorily resolved in the Courts of either side. Another aspect seems to be important with respect to arbitration as an alternative option to litigation in Court: Since trade with Asia or Russia or other former Eastern Bloc counties will many times be pursuant to long-term arrangements, litigation can be unappealing and inappropriate to both sides as it costs too much, takes up too much time and as there might be problems with the reciprocal recognition of Court judgments between these sides.[290]

Therefore, arbitration is the ideal solution that is acceptable to businesses from all trading partners of Canada, especially Hong Kong and Russia, who already have adopted the UNCITRAL Model Law, too, and for that matter, it would be acceptable for all of Germany's trading partners as well.[291]

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289 *Ibid.*

290 *Ibid* at p. 124.

291 See Chapter #3 where I make a reference to the states of the "New East".

II. Acceptance of the UNCITRAL Model Law by the Courts

All the above mentioned cases and decisions that relate to the UNCITRAL Model Law or the BC-ICAA show a broad acceptance and a general support by all Canadian Courts, federal or provincial, of the Model Law as it has been implemented in Canada and its provinces or territories, and of arbitration as a recognized mechanism of alternative dispute resolution in general.

The Courts do not seem to have a problem with accepting the Model Law or the different International Commercial Arbitration Acts as a solid part of the Canadian legal system. Such a high degree of acceptance can, of course, not be taken for granted when it comes to a Model Law, written by an international organization rather than by a state's own legislature, especially considering that not even a decade has passed by since this Model Law was implemented in Canada in 1986. But in the years since 1986, the Model Law has become an established statute within the Canadian legal system which is not creating many problems at all, neither for the Courts nor for the arbitrants or arbitration tribunals who have not only accepted it but also seem to have grown quite fond of it. The acceptance by the Canadian Courts is a definite sign for the high degree of efficiency, uniformity and clarity of the Model Law which is a great piece of work by UNCITRAL: it is easy to understand, it creates a uniform arbitration law in the whole world, and, most important of all, it really works. If it did not work, if it had too many problems, would a jurisdiction and its Courts (like Canada) be able to fully accept the UNCITRAL Model Law within just a few years of time? The answer to this question must be " no" ; therefore, the adoption of the Model Law in Canada and in British Columbia has proven to be successful. This can be underlined by the fact that international trade and international commercial arbitration proceedings have

increased in Vancouver, British Columbia and Canada in general since 1986.[292] Business continues apace in Canada's third largest and fastest growing city, much of its prosperity stemming from a port so laden with the raw materials of the Canadian interior that it now outranks New York as North America's largest port, and handles more dry tonnage then the West Coast ports of Seattle, Tacoma, Portland, San Francisco, and San Diego put together.[293] The port in turn owes its prominence to Vancouver's excellent position as a gateway to the Far East, and its increasingly pivotal role in the new global market of the Pacific Rim[294] -- areas that, like Hong Kong, also use the Model Law for their international commercial arbitrations. With this leading role of Vancouver in international trade, international commercial arbitration becomes increasingly more important as a modern mechanism for dispute resolution as an obligatory side-effect. These facts again prove the Canadian need for full acceptance of the UNCITRAL Model Law by the commercial clientele, by foreign parties that are subject to arbitration agreements with Canadian parties, and -- maybe even more importantly -- by the Courts, in order to keep up the international flow of trade in Vancouver.

In this context, recapturing the Canadian needs and achievements for a uniform system of international commercial dispute resolution, Professor Robert K. Paterson

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292 This information was given to me by the BC-ICAC which I called up and asked.

293 B.J. Thompson *supra* note 63 at p. 70: "With the opening of the World Trade Centre in Vancouver and discussions with the federal government about the development of Vancouver as an international banking centre, Vancouver is carefully developing the core services necessary to become an international commercial and financial centre. The development and opening of the B.C. International Commercial Arbitration Centre is consistent with that goal and the centre provides another essential support service."

294 With the Pacific Rim as the fastest growing trading area in the world, there is an excellent opportunity to develop international commercial arbitration in Vancouver. With the "New East" as another newly emerged and fast growing trading area, there is a similar opportunity for Germany.

of the University of British Columbia Law School in Vancouver made the following statement:

> Following implementation of the Model Law, Canada now possesses a uniform system of international commercial arbitration laws which substantially limit judicial interference and provide wide scope for party autonomy. These characteristics are further emphasized by the concurrent enactment of legislation applicable to domestic arbitrations which recognizes a higher tolerance for judicial interference in such cases.[295] This legal framework has been further reinforced by the establishment of autonomous arbitral institutions. Despite these developments, there is a risk that Canadian Courts, especially trial courts, will continue to be influenced by anachronistic skepticisms about the risk to private rights that judicial non-interference presents.[296]

This risk, in my opinion, does no longer exist. That has been proven by all the cases mentioned above, especially the *Kvaerner* and the *B.W.V.* cases.[297] And this is a positive development because judicial interference in international arbitrations clearly violates the parties' intentions and also increases costs, delays and the undermining of confidentiality which can no longer happen in Canada due to the implementation of the UNCITRAL Model Law and the acceptance of its provisions by the Canadian Courts. In this context, Professor Paterson further stated:

> The large number of Canadian cases dealing with international commercial arbitrations also suggests, however, that there is still

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295 It is worth noting that this " higher tolerance for judicial interference" in domestic arbitrations mentioned by Prof. Paterson in 1993 has largely been eliminated since, e.g. by s. 15 of the Commercial Arbitration Act, duplicating the equivalent provision of the ICAA -- a striking example of how international arbitration is changing even the domestic arbitration laws.

296 R.K. Paterson, *supra* note 23 at p. 44.

297 *Supra* notes 279 and 281.

> some level of uncertainty as to what degree of support Canadian Courts will give international commercial arbitration.[298]

And even this uncertainty has been extinguished by the *Kvaerner* case; arbitration now is fully accepted in Canada, and an arbitration award can be easily enforced through the Canadian Courts without any uncertainty. Therefore, in the changing Canadian international trade environment, arbitration becomes more appealing as a tool of dispute resolution. In courageously enacting the UNCITRAL Model Law, almost without amendment, British Columbia has sent a signal to its trading partners that in British Columbia they can take advantage of a set of non-partisan principles of autonomous dispute resolution. As mentioned earlier in this thesis, the BC-ICAA establishes a system of arbitration rules that upholds the freedom of the parties to depart from the rules of law that might otherwise govern their dispute. Moreover, the BC-ICAA modifies the application of its own provisions in accordance with the parties' particular needs.[299]

In this context, Canada's seeming disinterest in international arbitration has disappeared rapidly.[300] Responding to the needs of international trade, British Columbia has now established a special body of law to regulate the arbitral process and in particular its relationship with the overall authority of the superior Courts in a discrete way. Furthermore, British Columbia is on its way to establish a *jus gentium* applicable to international commercial disputes as opposed to ordinary domestic ones.[301] The way in which that distinction has been approached and applied in

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298 R.K. Paterson, *supra* note 23 at p. 45.

299 *Ibid.*

300 E.C. Chiasson, *supra* note 1 at p. 75.

British Columbia clearly determined the success with which this interesting and attractive initiative was received by the international trading community in search for hospitable places in which to resolve disputes. Today, not only the beauty of the city invites businesses to do their arbitrations in Vancouver, but also the British Columbian law and the British Columbian Courts that show respect for the legislative and commercial policy and the concept of private arbitration with no or little judicial intervention.[302]

To date, the new Canadian legislation implementing the Model Law and the New York Convention has been interpreted in a manner very favourable to the interests of international commercial arbitration without leading to a neglect of the Courts. These Courts have responded favourably to the legislative initiative to improve the legal environment for international commercial arbitration in British Columbia and Canada. This favourable trend regarding the use of arbitration and other alternate methods of dispute resolution in Canada, is also mirrored by Article 2022 of NAFTA which deals with the resolution of private commercial disputes within the Free Trade area where the UNCITRAL Model Law (and the UNCITRAL Arbitration Rules) are likely to have a significant impact. This provision recognizes the increase in transnational commercial activity which will result from NAFTA and the importance of providing for an adequate method of dispute resolution. In this regard, arbitration is clearly given the leading role. This role is reflected in the innovative dispute resolution mechanisms of NAFTA which reserve a privileged status for international commercial arbitration. Arbitration has frequently been used in the resolution of transborder disputes between the United States and Canada,

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301 W.C. Graham, *supra* note 149 at p. 104.

302 S. Jarvin, "London as a Place for International Arbitration", (1984) 1 J.Intl.Arb. 59.

both at the state level and between private parties. International commercial arbitration has a lengthy and well-established history in the United States. As this paper has shown, in Canada the interest in arbitration has arisen more recently, and it has been enthusiastic. Therefore, Canada took a big step forward into the direction of an internationally uniform commercial arbitration law.

> Canada has experienced a revolutionary change in the field of international commercial arbitration since 1986.[303]
>
> [...]
>
> Canada has gone from being an unfavourable situs for international commercial arbitrations to being one of the most favourable, with easy enforcement and the most modern of international commercial arbitration laws.[304]

In addition, the Courts have adopted a favourable approach to arbitration by minimizing judicial intervention, by maximizing enforcement of the arbitral process, and by becoming very reluctant not to stay legal proceedings in front of a Court in favour of arbitration. As a result, arbitration can be expected to play an important role in the resolution of disputes arising out of the increasing business transactions. Consequently, there are two very favourable points about the adoption of the UNCITRAL Model Law by British Columbia, and these points are the welcome unification of international commercial arbitration laws and all the positive effects the implementation of the Model Law has had on the trade and on the international arbitration business in British Columbia, especially in the city of Vancouver. By embracing the Model Law, Canada has given a clear signal to the international

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303 P.J. Davidson, *supra* note 9 at p. 122.

304 *Ibid* at p. 123.

business community that it anxiously welcomes international commercial arbitration. The business community has accepted this invitation, and the Canadian Courts are far from spoiling the party.

At this point I want to summarize the results of this chapter with Professor Paterson's very appropriate conclusion on this matter that "there is a lot of considerable evidence that the Canadian implementation of the UNCITRAL Model Law has generally been a successful undertaking."[305]

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305 R.K. Paterson, *supra* note 23 at p. 45.

Chapter 5: Is the Model Law the Ideal Arbitration Law?

Chapter 5: Is the Model Law the Ideal Arbitration Law?

Nobody is perfect[306]

In the course of my research I was not able to find many articles, essays or comments that made negative statements about the Model Law. The Model Law has in fact been enthusiastically received, and since its elaboration in 1985 it has earned much respect and appreciation.[307] To provide a three-dimensional approach, however, I have looked intensively at the literature available -- at some time, however, with a slight feeling of antipathy since I am admittedly biased, and since I want this thesis to be persuasive. But I also want it to be substantive, so I researched in order to find what I was afraid of: that there is something wrong with the Model Law. And of course it was; no complex instrument like this can possibly be perfect. The Model Law contains two kinds of problems, buy they were hard to find.

A. Problems Relating to an Adoption by a State

The Model Law may contain problems relating to an adoption by a state that was used to different rules on arbitration before, e.g. constitutional or historical

306 This is an old English Saying.

307 See Chapters #2 to #4.

problems as I described them above for Germany. These problems can easily be eliminated by changing, adapting or modifying either the domestic law (if possible) or the Model Law itself, e.g. Art. 8, 12 or 13 UML. Anyway, these are not really problems with the Model Law but problems that arise due to conflicting norms in the adopting state. Since I have discussed these problems for Canada and especially for Germany,[308] I will not harp on them again at this point.

One point I have to harp on, however, is the fact that the idea of a law-harmonizing Model Law has not been unanimously accepted throughout the legal literature. Some commentators have argued that there was no need for a Model Law at all since it will only add to the present confusion engendered by the multiplicity of already existing bilateral and multilateral international arbitration agreements.[309] This opinion has been proven wrong by my thesis that has demonstrated the advantages of uniform international commercial arbitration laws. UNCITRAL did, however, at first consider preparing a protocol to supplement and clarify the New York Convention of 1958, but this approach was dropped in favour of a Model Uniform Law to serve as a basis for national arbitration laws.[310]

> Recognizing that some states may find it easier to adopt the Model Law rather than adhere to a multilateral convention, the Model Law thus represents a further means of creating, in addition to the

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308 See Chapter #3.

309 G. Herrmann, "The International Arbitration Congress in Lausanne, Doubts over the UNCITRAL Model Law", (1984) 3 Business Law Brief 3 at p. 4.

310 M.E. McNerney/C.A. Esplugues, *supra* note 24 at p. 48, with further reference to the UNCITRAL Report of 1977: UN Document A/CN/127, at p. 1 to 3.

> multilateral and bilateral network, a unilateral system of recognition and enforcement of foreign arbitral awards.[311]

Through a Model Law, rather than a Convention or a protocol, the need for flexibility concerning domestic law and for the different specific needs of the nations are recognized.

> This approach makes the legal principles in the Model Law more palatable to individual states, allowing these states either to adopt the entire unmodified model or tailor it to fit the specific domestic legal system. A protocol to the 1958 New York Convention on the other hand, would lack the flexibility inherent in the Model Law approach, decreasing the likelihood of widespread international acceptance.[312]

This thesis has made reference to the flexibility of the Model Law that can easily be incorporated into the framework of the domestic law of any state; the Model Law therefore provides for the harmonization and unification of the national laws regulating international commercial arbitration. Through the Model Law, it has become the exception that individual procedural rules must be agreed on by either the parties or the tribunal.[313] Unfortunately, though, the need for a special (separate) and harmonized law for international commercial arbitration is not recognized in all countries, like e.g. the Netherlands.[314]

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311 M.F. Hoellering, *supra* note 15 at p. 338.

312 M.E. McNerney/C.A. Esplugues, *supra* note 24 at p. 48, who refer to the European Uniform Law of 1966 in the European Convention on Arbitration (1966 Europ.T.S. No. 56) which was signed only by Belgium and Austria.

313 K. Lionnet, *supra* note 17 at p. 16.

314 The Netherlands passed the new Dutch Arbitration Act on July 2, 1986. This new Act deals not only with national arbitration proceedings but also with international proceedings taking place in the Netherlands. Even though the Dutch Act is fairly young and of the same age as the Model Law, it gives little consideration to the latter. Regrettably, the harmonization object has been ignored by the Netherlands in 1986.

B. Problems within the Model Law Itself

There have been reported difficulties in fitting the Model Law provisions into the common law and practice, experienced before by the provinces of British Columbia and Alberta.

I. Problems with Art. 5, 34, 35 and 36 UML

Art. 5 UML prohibits Court intervention other than as provided in the Model Law "in matters governed by this Law". A Court might well hold that a purported arbitration which is really a nullity is not a matter governed by a law which deals with arbitrations. If a fatally defective arbitration is not governed by the Model Law, the Courts' inherent powers with respect to it will survive Art. 5 UML.

> This is not, however, clear, and we think that something needs to be done to fit the Model Law into the surrounding common law for the purposes of domestic arbitrations.[315]

Another problem might occur with Art. 34 and 36 UML. Art. 34 UML allows the Court to set aside an award on grounds which make the arbitration a nullity, and Art. 36 UML excuses the Court from enforcing an award on the same grounds. It is not clear, however, whether the right to apply to set aside and the right to resist enforcement would survive the waiver of a jurisdictional objection under Art. 16 UML.[316] In this context, some of the discussion in the UNCITRAL Report

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315 Institute of Law Research and Reform (Edmonton, Alberta), "Proposals for a new Alberta Arbitration Act", Report No. 51, October 1988, at p. 32.

316 *Ibid.*

suggests that "instant control" by the Court (under a party's right to request the Court to decide the question of jurisdiction) is an exclusive remedy, but the discussion is not conclusive.[317] Some of the discussion (at p. 2930 - 2931) suggests that a party could raise the same objection at four different stages. Either Art. 16 UML or Art. 34 and 36 UML could be read as controlling. This is a difficulty in the Model Law itself. Herrmann, too, raises criticism in regard to this parallelism of grounds.[318] By adopting similar grounds for Art. 34 and 36 UML, though, the Model Law wants to elude the dilemma of "split validity" which enables an award to be found invalid in the state of origin but valid and enforceable abroad.

> The overall objective of Art. 35 and 36 UML which deal with the recognition and enforcement of awards, is to attain uniform treatment of all international commercial arbitration awards, irrespective of their country of origin. Art. 35 UML states that all arbitral awards shall be recognized as binding, and establishes uniform conditions for the recognition and enforcement of awards, wherever made. Art. 36 UML specifies the exclusive criteria on which recognition and enforcement may be refused. These criteria are to apply to all international commercial arbitration awards, whether domestic or foreign.[319]

These above mentioned difficulties -- if they are any -- are not likely to have a great impact in Germany, however, since Germany is not based on common law but on civil law, and the German civil law applies statutes as they are phrased even if they are similar.

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317 *Ibid*, with reference to the UNCITRAL Report of 1984.

318 G. Herrmann, "The Role of the Courts under the UNCITRAL Model Law", unpublished manuscript; cited by M.E. McNerney/C.A. Esplugues, *supra* note 24 at p. 49, and by G. Herrmann, *supra* note 43 at p. 14 to 17.

319 M.E. McNeary/C.A. Esplugues, *supra* note 24 at p. 58, with further references to UN Documents on Art. 35 UML that leaves procedural details of recognition and enforcement to be determined by national laws, since there is no practical need for uniformity in this area.

II. Other General Problems with Model Law-Provisions

There are more problems that arise with the adoption of the Model Law: it leaves some questions and issues unresolved, it contains some inadequate and imprecise definitions of fundamental terms, and it contains some provisions where the benefits are debatable or that might be detrimental.

1. Unresolved Issues

Unresolved issues are, for instance, questions as to whether or not the arbitral tribunal should have the power to adapt a contract for changed circumstances, whether or not it should have the power to fill gaps in these contracts, and how the concept of sovereign immunity will be applied under the Model Law.[320] Another important question the Model Law leaves unanswered is whether the law of the forum state should govern the arbitrability,[321] or whether this matter should better be governed by the law of the main contract.[322]

2. Insufficient Provisions

Imprecise or inadequate definitions have been noted within the Model Law itself, for fundamental terms. Herrmann observed the Model Law to potentially fail

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320 M.E. McNeary/C.A. Esplugues, *supra* note 24 at p. 59.

321 See Art. 34 (2)(b)(i) UML.

322 G. Herrmann, *supra* note 43 at p. 13.

in defining fundamental terms through its open-ended approach, leaving the text in a state where it can be given almost any meaning in some of its critical passages, and has no meaning in others.[323]

> In effect, this could leave important provisions in the Model Law subject to disparate interpretations, rendering it unacceptable in a number of national legal systems.[324]

Definitions, however, can easily be improved by national legislation that adopts the Model Law if necessary. These problems are also only potential, and they did not stop the Model Law from being well-received by governments and international arbitration organizations, and the majority of comments emanating from conferences and symposia on the subject have been favourable.[325]

3. Debatable or Detrimental Provisions

The characterization of Model Law-provisions as debatable or detrimental depends largely on the expectations of and the legal situation in the implementing state. It is impossible to classify any provisions of the Model Law as completely deleterious because they might be well received in one state whereas they might cause substantial damage to arbitration proceedings in another. In accordance with the subject of my thesis, I now summarize my findings in relation to those articles of the Model Law which appear likely to have some impact on the existing law and

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323 *Ibid.*

324 M.E. McNeary/C.A. Esplugues, *supra* note 320.

325 *Ibid.*

practice in Germany. These problems, however, are not be seen as major deficiencies of the Model Law; rather I want to give the German legislature a complete picture and some more ideas as to what other problems might occur and as to what other legislative adjustments may have to be made. The German revision may or may not pay attention to these difficulties, but it certainly should be informed about them.

(a) Art. 7 UML

The requirement that the arbitration agreement must be signed may introduce an unwelcome distinction between those arbitration agreements in international commerce which are recognized as binding even though they are not signed by both parties (e.g. those in bills of lading or broker's contracts) and those where the agreement is formally signed as part of a document (e.g. construction contracts, loan agreements or charter contracts).

(b) Art. 12 and 13 UML

Keeping in mind the changes I have suggested above, it has to be made clear that not all arbitration laws include regulations for formal challenges of arbitrators, because they can be an open invitation to delaying tactics by the respondent. Since I suggested making s. 12a of the new German Act (for quality arbitrations) subject to the parties' consent, this will have a substantial effect on Art. 13 as well: available grounds for a challenge are likely to decrease if s. 12a is contracted out. There should, however, be a general possibility to challenge arbitrators to guarantee fair

and due process of law, and that is why Art. 12 UML must be implemented in Germany for all other arbitrations but quality arbitrations. My suggested German version of Art. 13 UML is that approaches to State Supreme Courts (OLGs) directly will quickly deal with any dilatory tactics of the respondent; the OLGs will likely set up a special chamber for arbitration and will therefore be able to decide upon a challenge quite quickly.

(c) Art. 16 UML

This article would establish the doctrine of separability concerning an arbitration agreement and its invalid mother contract (together with the new s. 7 of the German law for the Courts), but at the same time it could in practice impose undesirable time and cost constraints due to the procedure for challenging the jurisdiction of arbitrators. The doctrine of separability is, however, already law in Germany -- it is just not codified yet. See (b) above for more reasons why challenge procedures are necessary and not expected to be delayed too long in Germany.

(d) Art. 26 UML

The power to appoint an expert, while leaving the parties free to question that expert and to present their own expert evidence may be of some benefit, where, as it is more often the case abroad than in Germany, the tribunal consists entirely of lawyers. There are risks of confusion, delay and extra expense involved in such measure. But, after all, according to the concept of party autonomy, the question of experts should really be left to the arbitrants.

C. Conclusion

As difficult as it is for me, I have to acknowledge that the Model Law has its imperfections, and I indicated what some of those are. However, the Model Law still is a great piece of suggested legislative work that will support to increase the much appreciated uniformity of international arbitration laws. It is also a capital accomplishment in the area of international commercial arbitration, especially for Canada, British Columbia and Germany. Nobody is perfect, and since no instrument can be perfect, the Model Law is the least imperfect one available. The Model Law does a brilliant chore regulating arbitration in British Columbia, and it will do so in Germany since it is by far more advanced and modern than the arbitration provisions of the ZPO. It truly consists of many compromises due to its and civil (Continental European) and common (Anglo-Saxon legal tradition) law influences and the different international attitudes to arbitration that had to be incorporated; its drafting involved experts from a number of countries, both Eastern and Western, both from highly industrialized and from developing countries. The Model Law was thus not easy to draft, but once adopted, it takes away and regulates most of the obstacles that might be encountered within international commercial arbitration without it.

The Model Law still is the best choice for arbitration today, because it not only represents the common denominator for international arbitration proceedings, but also brings about a much desired harmonization and unification of national arbitration procedural law systems.[326]

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326 K. Lionnet, *supra* note 17 at p. 15.

Chapter 6: Evaluation and Recommendation

Chapter 6: Evaluation and Recommendation

> ***May the Canadian move be a catalyst for Germany and other countries to follow.***[327]

The transformation of the Model Law into the German arbitration law must be strongly recommended. Nevertheless, the German legislature has to keep in mind all the clarifications and modifications mentioned in Chapter #3 of this thesis that become necessary before it can implement the Model Law into the German law.

Undoubtedly, Canada is a much more hospitable place for commercial arbitrations than Germany and than Canada itself was a decade ago. As the result of my research, taking into account the positive experiences of Canada, and its province British Columbia in particular, with the Model Law, I hereby strongly recommend to the German legislature to implement the UNCITRAL Model Law into the German arbitration law. This implementation should take place in the form of an entirely and independent new German International Commercial Arbitration Act, based on the Model Law and on most of the modifications made by British Columbia in the BC-ICAA.[328] The German legislature and the German Institute for International Arbitration must refer to British Columbia's experiences and learn from it, if they do not want to waste a great opportunity. They have to accept British

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327 T. Noecker/M. Hentzen, *supra* note 15 at p. 834.

328 See Chapter #7 for the suggested English version of the new German Act.

Columbia, its new legislation on the subject (the BC-ICAA) and the BC-ICAC as excellent models or example for modern achievements in international commercial arbitration. Canada, and British Columbia in particular, today can be viewed as being capable of creating a viable international adjudicative system which is truly supranational and multicultural in character. Therefore, Canada meets the needs of international business community in this area of alternative dispute resolution -- due to the implementation of the UNCITRAL Model Law.

Conclusively, I believe to have proven my (biased) hypothesis that the Federal Republic of Germany must adopt the Model Law as soon as possible. The implantation of a modern Model Law on International Commercial Arbitration has served as an effective mode for stimulating the practice of arbitration within Canada and, bearing in mind the similar needs of Germany, will serve as an effective mode for the same reason within Germany.

Chapter 7: The New German Legislation

Chapter 7: The New German Legislation

Der Worte sind genug gewechselt, lasst uns auch endlich Taten sehen.[329]

As the final result of my research, I have drafted the following suggested version of the new German International Commercial Arbitration Act. This version of the new German Act is based on the Model Law and on the British Columbia International Arbitration Act of 1986. I hope it will contribute something to the discussion presently taking place in Germany.

A. Introduction to the Draft

In this thesis, I have carefully considered each of the Model Law articles to see whether the changes which they would bring are beneficial for Germany or otherwise. In the following suggested version I summarize my findings in relation to those articles which appear likely to have a substantial impact on the existing law and practice in Germany. Major changes are printed in *italics,* minor changes, like e.g. "British Columbia" to "Germany" are, however, not.

329 Goethe, Johann Wolfgang von, (he lived from 1749 to 1832), "Urfaust", Frankfurt 1776, (today: Reclam Verlag), 542nd Edition 1995, at p. 27.

B. The New Law

VORSCHLAG (RECOMMENDATION):
NEUES GESETZ ZUR REGELUNG DER INTERNATIONALEN HANDELSSCHIEDSGERICHTSBARKEIT

THE NEW GERMAN INTERNATIONAL COMMERCIAL ARBITRATION ACT*

*as suggested by the author in respect to the results of this thesis

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Preamble

WHEREAS Germany,* and in particular the Cities of Hamburg, Berlin, Bonn and Frankfurt, are becoming international financial and commercial centres;

*Germany stands for "The Federal Republic of Germany"

AND WHEREAS disputes in international commercial agreements are often resolved by means of arbitration;

AND WHEREAS Germany has not previously enjoyed a hospitable legal environment for international commercial arbitrations;

AND WHEREAS there are divergent views in the international commercial and legal communities respecting the conduct of, and the degree and nature of judicial intervention in, international commercial arbitrations;

AND WHEREAS other Nations have already recognized the need for harmonization of international commercial arbitration laws;

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

THEREFORE the Legislative Assembly of Germany enacts as follows:

PART 1

Application and Interpretation

Scope of application

1. (1) This Act applies to international commercial arbitration, subject to any agreement which is in force between Germany and any other state or states and which applies in Germany.

(2) This Act, except sections 8, 9, 35 and 36, applies only if the place of arbitration is in Germany.

(3) An arbitration is international if

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states,

(b) one of the following places is situated outside the state in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed;

(iii) the place with which the subject matter of the dispute is most closely connected, or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.

(4) For the purposes of subsection (3),

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement, and

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) *For the purposes of this Act, the term "commercial" is not only defined by s. 1 to 5 HGB, but also by this subsection.* An arbitration is commercial if it arises out of a relationship of a commercial nature including, but not limited to, the following:

(a) a trade transaction for the supply or exchange of goods or services;

(b) a distribution agreement;

(c) a commercial representation or agency;

(d) an exploitation agreement or concession;

(e) a joint venture or other related form of industrial or business cooperation;

(f) the carriage of goods or passengers by air, sea, rail or road;

(g) the construction of works;

(h) insurance;

(i) licensing;

(j) factoring;

(k) leasing;

(l) consulting;

(m) engineering;

(n) financing;

(o) banking;

(p) investing.

(6) Where an arbitration agreement respecting an international commercial arbitration contains a reference to the Arbitration Act, that reference shall be deemed to be a reference to this Act.

(7) This Act shall not affect any other law in force in Germany by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only in accordance with provisions other than those of this Act.

Interpretation

2. (1) For the purposes of this Act

"arbitral award" means any decision of the arbitral tribunal on the substance of the dispute submitted to it and includes

(a) an interim arbitral award, including an interim award made for the preservation of property, and

(b) any award of interest or costs;

"arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

"arbitration" means any arbitration whether or not administered by a German Arbitration Centre or any other permanent arbitral institution;

"German Arbitration Centre" means the German International Commercial Arbitration Centre situated in Bonn, Berlin, Hamburg or Frankfurt, Germany;

"Chief Justice" means the Chief Justice of a German State Supreme Court (OLG) or his designate;

"court" means a body or an organ of the judicial system of a state;

"party" means a party to an arbitration agreement and includes a person claiming through or under a party;

"Supreme Court" means the German State Supreme Court (OLG) of that German state in which the main part of the arbitration takes place.

(2) Where this Act, except section 28, leaves the parties free to determine a certain issue, that freedom includes the right of the parties to authorize a third party, including the German Arbitration Centre or any other institution, to make that determination.

(3) Where this Act

(a) refers to the fact that the parties have agreed or that they may agree, or

(b) in any other way refers to an agreement of the parties,

that agreement includes any arbitration rules referred to in that agreement.

(4) Where this Act, other than section 25 (1) or 32 (2) (a), refers to a claim, it also applies to a counterclaim, and where it refers to a defence, it also applies to a defence to that counterclaim.

Receipt of written communications

3. (1) Unless otherwise agreed by the parties,

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of

business, habitual residence or mailing address, and

(b) the communication is deemed to have been received on the day it is so delivered.

(2) If none of the places referred to in subsection (1) (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered mail or by any other means which provides a record of the attempt to deliver it.

(3) This section does not apply to written communications in respect of court proceedings.

Waiver of right to object

4. (1) A party who knows that

(a) any provision of this Act, or

(b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to noncompliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to object.

(2) In subsection (1) (a) "any provision of this Act" means any provision of this Act in respect of which the parties may otherwise agree.

Extent of judicial intervention

5. In matters governed by this Act,

(a) no court shall intervene except where so provided in this Act, and

(b) no arbitral proceedings of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal shall be questioned, reviewed or restrained by a proceeding under the ZPO or otherwise except to the extent provided in this Act.

Court for certain functions of arbitration assistance and supervision

6. *The functions referred to in articles 11 (3), 11 (4), 13 (3), 14, 16 (3) and 34 (2) shall be performed by the Supreme Court.*

PART 2

Arbitration Agreement

Definition of arbitration agreement

7. (1) In this Act "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. [*An agreement to arbitrate future disputes is not valid in law, unless it refers to definite legal obligation and to disputes arising therefrom.*]

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

(4) An arbitration agreement shall be in writing.

(5) An arbitration agreement is in writing if it is contained in

(a) a document signed by the parties,

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or

(c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

(7) *An arbitration agreement is not valid if one of the parties has used any superiority it possesses by virtue of economic or social position in order to constrain the other party to make this agreement or to accept conditions therein, resulting in the one party having an advantage over the other in the procedure, and more especially in regard to the nomination or the non-acceptance of the arbitrator.*

(8) *The agreement by which the settlement of a dispute is submitted to one or more arbitrators is legally valid when the parties have the right to enter into a settlement on the subject matter of the dispute as defined in the ZPO.*

(9) *An agreement to arbitrate disputes on the existence of a contract referring to renting rooms is null and void. This does not apply when reference is made to section 556a (8) ZPO.*

(10) *An agreement to arbitrate disputes which may arise in the future in connection with restrictive trade practices is null and void, unless such an arbitral clause allows the parties to choose between arbitration and Court litigation at the time the dispute has actually arisen.*

Stay of legal proceedings

8. *If court proceedings are initiated in a case where the parties have concluded an arbitration agreement, the court has to dismiss the action when one of the parties invokes the arbitration agreement.*

Interim measures by court

9. It is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant that measure.

PART 3

Composition of Arbitral Tribunal

Number of arbitrators

10. (1) The parties are free to determine the number of arbitrators.

(2) Failing the determination referred to in subsection (1), the number of arbitrators shall be 3.

Appointment of arbitrators

11. (1) A person of any nationality may be an arbitrator.

(2) Subject to subsections (6) and (7), the parties are free to agree on a procedure for appointing the arbitral tribunal.

(3) Failing any agreement referred to in subsection (2), in an arbitration with 3 arbitrators, each party shall appoint one arbitrator, and the 2 appointed arbitrators shall appoint the third arbitrator.

(4) If the appointment procedure in subsection (3) applies and

(a) a party fails to appoint an arbitrator within 30 days after receipt of a request to do so from the other party, or

(b) the 2 appointed arbitrators fail to agree on the third arbitrator within 30 days after their appointment,

the appointment shall be made, upon request of a party, by the Chief Justice.

(5) Failing any agreement referred to in subsection (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator, the appointment shall be made, upon request of a party, by the Chief Justice.

(6) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under that procedure,

(b) the parties, or 2 appointed arbitrators, fail to reach an agreement expected of them under that procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by subsection (4), (5) or (6) to the Chief Justice is final and is not subject to appeal.

(8) The Chief Justice, in appointing an arbitrator, shall have due regard to

(a) any qualifications required of the arbitrator by the agreement of the parties, and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) Unless the parties have previously agreed to the appointment of a sole or third arbitrator who is of the same nationality as any of the parties, the Chief Justice shall not appoint a sole or third arbitrator who is of the same nationality as that of any of the parties.

Grounds for challenge

12. (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties any circumstances referred to in subsection (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Grounds for challenge in quality arbitrations

12a. (1) When a person is approached in connection with his possible appointment as a *quality* arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) A *quality* arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties any circumstances referred to in subsection (1) unless they have already been informed of them by him.

(3) *The application of this section is subject to the parties' consent.*

(4) A *quality* arbitrator may be challenged only if

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties, and

(c) *the parties have agreed upon the application of this section.*

(5) A party may challenge a *quality* arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Challenge procedure

13. (1) *The parties are free to agree on a procedure for challenging an arbitrator. The challenged arbitrator may not decide upon his own challenge.*

(2) *Failing any agreement referred to in subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in section 12 (3), send a written statement of the reasons for the challenge to the arbitral tribunal. The challenged arbitrator may withdraw from his office or the other party may agree to the challenge.*

(3) *The challenging party may request the Supreme Court, within 30 days after having received notice of the decision of the arbitrator not to withdraw or of the other party not to agree, to decide on the challenge.*

(4) Where a request is made under subsection (3), the Supreme Court may refuse to decide on the challenge, if it is satisfied that, under the procedure agreed upon by the parties according to subsection (1), the party making the request had an opportunity to have the challenge decided upon fairly by other than the arbitral tribunal.

(5) The decision of the Supreme Court under subsection (3) is final and is not subject to appeal.

(6) While a request under subsection (3) is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an arbitral award.

Failure or impossibility to act

14. (1) The mandate of an arbitrator terminates if

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in subsection (1) (a), a party may request the Supreme Court to decide on the termination of the mandate.

(3) A decision of the Supreme Court under subsection (2) is final and is not subject to appeal.

(4) If, under this section or section 13 (3), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this section or section 12 (3).

Termination of mandate and substitution of arbitrator

15. (1) In addition to the circumstances referred to under section 13 or 14, the mandate of an arbitrator terminates

(a) where he withdraws from office for any reason, or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties,

(a) where the sole or presiding arbitrator is replaced, any hearings previously held shall be repeated, and

(b) where an arbitrator, other than the sole or presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section is not invalid solely because there has been a change in the composition of the tribunal.

PART 4

Jurisdiction of Arbitral Tribunal

Competence of arbitral tribunal to rule on its jurisdiction

16. (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in subsection (2) or (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal may rule on a plea referred to in subsections (2) and (3) either as a preliminary question or in an award on the merits.

(6) If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request the Supreme Court, within 30 days after having received notice of that ruling, to decide the matter.

(7) The decision of the Supreme Court under subsection (6) is final and is not subject to appeal.

(8) While a request under subsection (6) is pending, the arbitral tribunal may continue the arbitral proceedings and make an arbitral award.

Interim measures ordered by arbitral tribunal

17. (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.

(2) *The order of interim measure of protection mentioned in subsection (1) shall be enforceable like an arbitral award.*

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under subsection (1).

PART 5

Conduct of Arbitral Proceedings

Equal treatment of parties

18. The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

Determination of rules of procedure

19. (1) Subject to this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing any agreement referred to in subsection (1), the arbitral tribunal may, subject to this Act, conduct the arbitration in the manner it considers appropriate.

(3) The power of the arbitral tribunal under subsection (2) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Place of arbitration

20. (1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in subsection (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding subsection (1), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

Commencement of arbitral proceedings

21. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Language

22. (1) The parties are free to agree upon the language or languages to be used in the arbitral proceedings.

(2) Failing any agreement referred to in subsection (1), the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

(3) The agreement or determination, unless otherwise specified, shall apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal.

(4) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Statements of claim and defence

23. (1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

Hearings and written proceedings

24. (1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials.

(2) Unless the parties have agreed that no oral hearings shall be held, the arbitral tribunal shall hold oral hearings at an appropriate stage of the proceedings, if so requested by a party.

(3) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of documents, goods or other property.

(4) All statements, documents or other information supplied to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

(5) Unless otherwise agreed by the parties, all oral hearings and meetings in arbitral proceedings are to be held in camera.

Default of a party

25. (1) Unless otherwise agreed by the parties, where, without showing sufficient cause, the claimant fails to communicate his statement of claim in accordance with section 23 (1), the arbitral tribunal shall terminate the proceedings.

(2) Unless otherwise agreed by the parties, where, without showing sufficient cause, the respondent fails to communicate his statement of defence in accordance with section 23 (1), the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the claimant's allegations.

(3) Unless otherwise agreed by the parties, where, without showing sufficient cause, a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

Expert appointed by arbitral tribunal

26. (1) Unless otherwise agreed by the parties, the arbitral tribunal may

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report,

participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the expert's possession with which he was provided in order to prepare his report.

Court assistance in taking evidence and consolidating arbitrations

27. (1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the Supreme Court assistance in taking evidence and the court may execute the request within its competence and according to its rules on taking evidence.

(2) Where the parties to 2 or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, the Supreme Court may, on application by one party with the consent of all the other parties to those arbitration agreements, do one or more of the following:

(a) order the arbitrations to be consolidated on terms the court considers just and necessary;

(b) where all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with section 11 (8);

(c) where all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.

(3) Nothing in this section shall be construed as preventing the parties to 2 or more arbitrations from agreeing to consolidate those arbitrations and taking any steps that are necessary to effect that consolidation.

PART 6

Making of Arbitral Award and Termination of Proceedings

Rules applicable to substance of dispute

28. (1) The arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute.

(2) Any designation by the parties of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules.

(3) Failing any designation of the law under subsection (1) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(4) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur if the parties have expressly authorized it to do so.

(5) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Decision making by panel of arbitrators

29. (1) Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.

(2) Notwithstanding subsection (1), if authorized by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by a presiding arbitrator.

Settlement

30. (1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms has the same status and effect as any other arbitral award on the substance of the dispute.

Form and content of arbitral award

31. (1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of subsection (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7) Unless otherwise agreed by the parties, the arbitral tribunal may award interest.

(8) Unless otherwise agreed by the parties, the costs of an arbitration shall be in the discretion of the arbitral tribunal which may, in making an order for costs,

(a) include as costs,

(i) the fees and expenses of the arbitrators and expert witnesses,

(ii) legal fees and expenses,

(iii) any administration fees of the German Arbitration Centre or any other institution, and

(iv) any other expenses incurred in connection with the arbitral proceedings, and

(b) specify

(i) the party entitled to costs,

(ii) the party who shall pay the costs,

(iii) the amount of costs or method of determining that amount, and

(iv) the manner in which the costs shall be paid.

Termination of proceedings

32. (1) The arbitral proceedings are terminated by the final arbitral award or by an order of the arbitral tribunal under subsection (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to sections 33 and 34 (4), the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings.

Correction and interpretation of award; additional award

33. (1) Within 30 days after receipt of the arbitral award, unless another period of time has been agreed upon by the parties,

(a) a party may request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature, and

(b) a party may, if agreed by the parties, request the arbitral tribunal to give an interpretation of a specific point or part of the arbitral award.

(2) If the arbitral tribunal considers the request made under subsection (1) to be justified, it shall make the correction or give the interpretation within 30 days after receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in subsection (1) (a), on its own initiative, within 30 days after the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party may request, within 30 days after receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under subsection (4) to be justified, it shall make the additional arbitral award within 60 days.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under subsection (2) or (4).

(7) Section 31 applies to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

PART 7

Recourse Against Arbitral Award

Application for setting aside arbitral award

34. (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3).

(2) An arbitral award may be set aside by the Supreme Court only if

(a) the party making the application furnishes proof that

(i) a party to the arbitration agreement was under some incapacity,

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the law of Germany,

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case,

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside, or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing any agreement, was not in accordance with this Act, or

(b) the court finds that

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Germany, or

(ii) the arbitral award is in conflict with the public policy in Germany.

(3) *The public policy applied for international commercial arbitration must always resemble the domestic public policy applied for other legal matters within Germany.*

(4) An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal.

(5) When asked to set aside an arbitral award the court may, where it is appropriate and it is requested by a party, adjourn the proceedings to set aside the arbitral award for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside the arbitral award.

PART 8

Recognition and Enforcement of Arbitral Awards

Recognition and enforcement

35. (1) Subject to this section and section 36, an arbitral award, irrespective of the state in which it was made, shall be recognized as binding and, upon application to the Supreme Court, shall be enforced.

(2) Unless the court orders otherwise, the party relying on an arbitral award or applying for its enforcement shall supply

(a) the duly authenticated original arbitral award or a duly certified copy of it, and

(b) the original arbitration agreement or a duly certified copy of it.

(3) If the arbitral award or arbitration agreement is not made in an official language of Canada, the party shall supply a duly certified translation of it into an official language.

Grounds for refusing recognition or enforcement

36. (1) Recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that

(i) a party to the arbitration agreement was under some incapacity,

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made,

(iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case,

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the arbitral award which contains decisions on matters submitted to arbitration may be recognized and enforced,

(v) the composition of the arbitral tribunal or the arbitral procedure was in accordance with the agreement of the parties or, failing any agreement, was not in accordance with the law of the state where the arbitration took place, or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made, or

(b) if the court finds that

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Germany, or

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy in Germany.

(3) *The public policy applied for international commercial arbitration must always resemble the domestic public policy applied for other legal matters within Germany.*

(4) If an application for setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

Enactment Provision

37. *[Enactment provision] making reference to treaties, the ZPO, the BGB, the HGB, the EGBGB and European Community Law.*

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Appendix

Appendix I

BRITISH COLUMBIA
INTERNATIONAL COMMERCIAL ARBITRATION ACT

CHAPTER 14

Assented to June 17, 1986

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Preamble

WHEREAS British Columbia, and in particular the City of Vancouver, is becoming an international financial and commercial centre;

AND WHEREAS disputes in international commercial agreements are often resolved by means of arbitration;

AND WHEREAS British Columbia has not previously enjoyed a hospitable legal environment for international commercial arbitrations;

AND WHEREAS there are divergent views in the international commercial and legal communities respecting the conduct of, and the degree and nature of judicial intervention in, international commercial arbitrations;

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

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

PART 1

Application and Interpretation

Scope of application

1. (1) This Act applies to international commercial arbitration, subject to any agreement which is in force between Canada and any other state or states and which applies in the Province.

(2) This Act, except sections 8, 9, 35 and 36, applies only if the place of arbitration is in the Province.

(3) An arbitration is international if

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states,

(b) one of the following places is situated outside the state in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed;

(iii) the place with which the subject matter of the dispute is most closely connected, or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.

(4) For the purposes of subsection (3),

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement, and

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) For the purposes of subsection (3), the provinces and territories of Canada shall be considered one state.

(6) An arbitration is commercial if it arises out of a relationship of a commercial nature including, but not limited to, the following:

(a) a trade transaction for the supply or exchange of goods or services;

(b) a distribution agreement;

(c) a commercial representation or agency;

(d) an exploitation agreement or concession;

(e) a joint venture or other related form of industrial or business cooperation;

(f) the carriage of goods or passengers by air, sea, rail or road;

(g) the construction of works;

(h) insurance;

(i) licensing;

(j) factoring;

(k) leasing;

(l) consulting;

(m) engineering;

(n) financing;

(o) banking;

(p) investing.

(7) Where an arbitration agreement respecting an international commercial arbitration contains a reference to the Arbitration Act, that reference shall be deemed to be a reference to this Act.

(8) This Act shall not affect any other law in force in the Province by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only in accordance with provisions other than those of this Act.

Historical Note: 1986-14-1; 1988-46-33.

Interpretation

2. (1) For the purposes of this Act

"arbitral award" means any decision of the arbitral tribunal on the substance of the dispute submitted to it and includes

(a) an interim arbitral award, including an interim award made for the preservation of property, and

(b) any award of interest or costs;

"arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

"arbitration" means any arbitration whether or not administered by the B.C. Arbitration Centre or any other permanent arbitral institution;

"B.C. Arbitration Centre" means the British Columbia International Commercial Arbitration Centre situated in Vancouver, British Columbia;

"Chief Justice" means the Chief Justice of the Supreme Court or his designate;

"court" means a body or an organ of the judicial system of a state;

"party" means a party to an arbitration agreement and includes a person claiming through or under a party;

"Supreme Court" means the Supreme Court of British Columbia.

(2) Where this Act, except section 28, leaves the parties free to determine a certain issue, that freedom includes the right of the parties to authorize a third party, including the B.C. Arbitration Centre or any other institution, to make that determination.

(3) Where this Act

(a) refers to the fact that the parties have agreed or that they may agree, or

(b) in any other way refers to an agreement of the parties,

that agreement includes any arbitration rules referred to in that agreement.

(4) Where this Act, other than section 25 (1) or 32 (2) (a), refers to a claim, it also applies to a counterclaim, and where it refers to a defence, it also applies to a defence to that counterclaim.

Historical Note: 1986-14-2; 1988-46-34.

Receipt of written communications

3. (1) Unless otherwise agreed by the parties,

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address, and

(b) the communication is deemed to have been received on the day it is so delivered.

(2) If none of the places referred to in subsection (1) (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered mail or by any other means which provides a record of the attempt to deliver it.

(3) This section does not apply to written communications in respect of court proceedings.

Historical Note: 1986-14-3.

Waiver of right to object

4. (1) A party who knows that

(a) any provision of this Act, or

(b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to noncompliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to object.

(2) In subsection (1) (a) "any provision of this Act" means any provision of this Act in respect of which the parties may otherwise agree.

Historical Note: 1986-14-4.

Extent of judicial intervention

5. In matters governed by this Act,

(a) no court shall intervene except where so provided in this Act, and

(b) no arbitral proceedings of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal shall be questioned, reviewed or restrained by a proceeding under the Judicial Review Procedure Act or otherwise except to the extent provided in this Act.

Historical Note: 1986-14-5.

Construction of Act

6. In construing a provision of this Act, a court or arbitral tribunal may refer to the documents of the United Nations Commission on International Trade Law and its working group respecting the preparation of the UNCITRAL Model Arbitration Law and shall give those documents the weight that is appropriate in the circumstances.

Historical Note: 1986-14-6.

PART 2

Arbitration Agreement

Definition of arbitration agreement

7. (1) In this Act "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in

(a) a document signed by the parties,

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or

(c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Historical Note: 1986-14-7.

Stay of legal proceedings

8. (1) Where a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to that court to stay the proceedings.

(2) In an application under subsection (1), the court shall make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.

(3) Notwithstanding that an application has been brought under subsection (1) and that the issue is pending before the court, an arbitration may be commenced or continued and an arbitral award made.

Historical Note: 1986-14-8.

Interim measures by court

9. It is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant that measure.

Historical Note: 1986-14-9.

PART 3

Composition of Arbitral Tribunal

Number of arbitrators

10. (1) The parties are free to determine the number of arbitrators.

(2) Failing the determination referred to in subsection (1), the number of arbitrators shall be 3.

Historical Note: 1986-14-10.

Appointment of arbitrators

11. (1) A person of any nationality may be an arbitrator.

(2) Subject to subsections (6) and (7), the parties are free to agree on a procedure for appointing the arbitral tribunal.

(3) Failing any agreement referred to in subsection (2), in an arbitration with 3 arbitrators, each party shall appoint one arbitrator, and the 2 appointed arbitrators shall appoint the third arbitrator.

(4) If the appointment procedure in subsection (3) applies and

(a) a party fails to appoint an arbitrator within 30 days after receipt of a request to do so from the other party, or

(b) the 2 appointed arbitrators fail to agree on the third arbitrator within 30 days after their appointment,

the appointment shall be made, upon request of a party, by the Chief Justice.

(5) Failing any agreement referred to in subsection (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator, the appointment shall be made, upon request of a party, by the Chief Justice.

(6) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under that procedure,

(b) the parties, or 2 appointed arbitrators, fail to reach an agreement expected of them under that procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by subsection (4), (5) or (6) to the Chief Justice is final and is not subject to appeal.

(8) The Chief Justice, in appointing an arbitrator, shall have due regard to

(a) any qualifications required of the arbitrator by the agreement of the parties, and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(c) [Repealed 1988-46-35.]

(9) Unless the parties have previously agreed to the appointment of a sole or third arbitrator who is of the same nationality as any of the parties, the Chief Justice shall not appoint a sole or third arbitrator who is of the same nationality as that of any of the parties.

Historical Note: **1986-14-11; 1988-46-35.**

Grounds for challenge

12. (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties any circumstances referred to in subsection (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Historical Note: **1986-14-12.**

Challenge procedure

13. (1) Subject to subsection (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in section 12 (3), send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under subsection (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under subsection (2) is not successful, the challenging party may request the Supreme Court, within 30 days after having received notice of the decision rejecting the challenge, to decide on the challenge.

(5) Where a request is made under subsection (4), the Supreme Court may refuse to decide on the challenge, if it is satisfied that, under the procedure agreed upon by the parties, the party making the request had an opportunity to have the challenge decided upon by other than the arbitral tribunal.

(6) The decision of the Supreme Court under subsection (4) is final and is not subject to appeal.

(7) While a request under subsection (4) is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an arbitral award.

Historical Note: 1986-14-13.

Failure or impossibility to act

14. (1) The mandate of an arbitrator terminates if

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in subsection (1) (a), a party may request the Supreme Court to decide on the termination of the mandate.

(3) A decision of the Supreme Court under subsection (2) is final and is not subject to appeal.

(4) If, under this section or section 13 (3), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this section or section 12 (3).

Historical Note: 1986-14-14.

Termination of mandate and substitution of arbitrator

15. (1) In addition to the circumstances referred to under section 13 or 14, the mandate of an arbitrator terminates

(a) where he withdraws from office for any reason, or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties,

(a) where the sole or presiding arbitrator is replaced, any hearings previously held shall be repeated, and

(b) where an arbitrator, other than the sole or presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section is not invalid solely because there has been a change in the composition of the tribunal.

Historical Note: **1986-14-15.**

PART 4

Jurisdiction of Arbitral Tribunal

Competence of arbitral tribunal to rule on its jurisdiction

16. (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in subsection (2) or (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal may rule on a plea referred to in subsections (2) and (3) either as a preliminary question or in an award on the merits.

(6) If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request the Supreme Court, within 30 days after having received notice of that ruling, to decide the matter.

(7) The decision of the Supreme Court under subsection (6) is final and is not subject to appeal.

(8) While a request under subsection (6) is pending, the arbitral tribunal may continue the arbitral proceedings and make an arbitral award.

Historical Note: 1986-14-16.

Interim measures ordered by arbitral tribunal

17. (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under subsection (1).

Historical Note: 1986-14-17.

PART 5

Conduct of Arbitral Proceedings

Equal treatment of parties

18. The parties shall be treated with equality and each party shall be given a full opportunity to present his case.

Historical Note: 1986-14-18.

Determination of rules of procedure

19. (1) Subject to this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing any agreement referred to in subsection (1), the arbitral tribunal may, subject to this Act, conduct the arbitration in the manner it considers appropriate.

(3) The power of the arbitral tribunal under subsection (2) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Historical Note: 1986-14-19.

Place of arbitration

20. (1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in subsection (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding subsection (1), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

Historical Note: 1986-14-20.

Commencement of arbitral proceedings

21. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Historical Note: 1986-14-21.

Language

22. (1) The parties are free to agree upon the language or languages to be used in the arbitral proceedings.

(2) Failing any agreement referred to in subsection (1), the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

(3) The agreement or determination, unless otherwise specified, shall apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal.

(4) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Historical Note: 1986-14-22.

Statements of claim and defence

23. (1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

Historical Note: 1986-14-23.

Hearings and written proceedings

24. (1) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials.

(2) Unless the parties have agreed that no oral hearings shall be held, the arbitral tribunal shall hold oral hearings at an appropriate stage of the proceedings, if so requested by a party.

(3) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of documents, goods or other property.

(4) All statements, documents or other information supplied to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

(5) Unless otherwise agreed by the parties, all oral hearings and meetings in arbitral proceedings are to be held in camera.

Historical Note: 1986-14-24.

Default of a party

25. (1) Unless otherwise agreed by the parties, where, without showing sufficient cause, the claimant fails to communicate his statement of claim in accordance with section 23 (1), the arbitral tribunal shall terminate the proceedings.

(2) Unless otherwise agreed by the parties, where, without showing sufficient cause, the respondent fails to communicate his statement of defence in accordance with section 23 (1), the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the claimant's allegations.

(3) Unless otherwise agreed by the parties, where, without showing sufficient cause, a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

Historical Note: 1986-14-25.

Expert appointed by arbitral tribunal

26. (1) Unless otherwise agreed by the parties, the arbitral tribunal may

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the expert's possession with which he was provided in order to prepare his report.

Historical Note: 1986-14-26.

Court assistance in taking evidence and consolidating arbitrations

27. (1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the Supreme Court assistance in taking evidence and the court may execute the request within its competence and according to its rules on taking evidence.

(2) Where the parties to 2 or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, the Supreme Court may, on application by one party with the consent of all the other parties to those arbitration agreements, do one or more of the following:

(a) order the arbitrations to be consolidated on terms the court considers just and necessary;

(b) where all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with section 11 (8);

(c) where all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.

(3) Nothing in this section shall be construed as preventing the parties to 2 or more arbitrations from agreeing to consolidate those arbitrations and taking any steps that are necessary to effect that consolidation.

Historical Note: **1986-14-27.**

PART 6

Making of Arbitral Award and Termination of Proceedings

Rules applicable to substance of dispute

28. (1) The arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute.

(2) Any designation by the parties of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules.

(3) Failing any designation of the law under subsection (1) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(4) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur if the parties have expressly authorized it to do so.

(5) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Historical Note: **1986-14-28.**

Decision making by panel of arbitrators

29. (1) Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.

(2) Notwithstanding subsection (1), if authorized by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by a presiding arbitrator.

Historical Note: **1986-14-29.**

Settlement

30. (1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms has the same status and effect as any other arbitral award on the substance of the dispute.

Historical Note: 1986-14-30.

Form and content of arbitral award

31. (1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of subsection (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30.

(4) The arbitral award shall state its date and the place of arbitration as determined in accordance with section 20 and the award shall be deemed to have been made at that place.

(5) After the arbitral award is made, a signed copy shall be delivered to each party.

(6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.

(7) Unless otherwise agreed by the parties, the arbitral tribunal may award interest.

(8) Unless otherwise agreed by the parties, the costs of an arbitration shall be in the discretion of the arbitral tribunal which may, in making an order for costs,

(a) include as costs,

(i) the fees and expenses of the arbitrators and expert witnesses,

(ii) legal fees and expenses,

(iii) any administration fees of the B.C. Arbitration Centre or any other institution, and

(iv) any other expenses incurred in connection with the arbitral proceedings, and

(b) specify

(i) the party entitled to costs,

(ii) the party who shall pay the costs,

(iii) the amount of costs or method of determining that amount, and

(iv) the manner in which the costs shall be paid.

Historical Note: **1986-14-31.**

Termination of proceedings

32. (1) The arbitral proceedings are terminated by the final arbitral award or by an order of the arbitral tribunal under subsection (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to sections 33 and 34 (4), the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings.

Historical Note: **1986-14-32.**

Correction and interpretation of award; additional award

33. (1) Within 30 days after receipt of the arbitral award, unless another period of time has been agreed upon by the parties,

(a) a party may request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature, and

(b) a party may, if agreed by the parties, request the arbitral tribunal to give an interpretation of a specific point or part of the arbitral award.

(2) If the arbitral tribunal considers the request made under subsection (1) to be justified, it shall make the correction or give the interpretation within 30 days after receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in subsection (1) (a), on its own initiative, within 30 days after the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party may request, within 30 days after receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under subsection (4) to be justified, it shall make the additional arbitral award within 60 days.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under subsection (2) or (4).

(7) Section 31 applies to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

Historical Note: 1986-14-33.

PART 7

Recourse Against Arbitral Award

Application for setting aside arbitral award

34. (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3).

(2) An arbitral award may be set aside by the Supreme Court only if

(a) the party making the application furnishes proof that

(i) a party to the arbitration agreement was under some incapacity,

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the law of the Province,

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case,

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside, or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing any agreement, was not in accordance with this Act, or

(b) the court finds that

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of the Province, or

(ii) the arbitral award is in conflict with the public policy in the Province.

(3) An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) When asked to set aside an arbitral award the court may, where it is appropriate and it is requested by a party, adjourn the proceedings to set aside the arbitral award for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside the arbitral award.

Historical Note: **1986-14-34.**

PART 8

Recognition and Enforcement of Arbitral Awards

Recognition and enforcement

35. (1) Subject to this section and section 36, an arbitral award, irrespective of the state in which it was made, shall be recognized as binding and, upon application to the Supreme Court, shall be enforced.

(2) Unless the court orders otherwise, the party relying on an arbitral award or applying for its enforcement shall supply

(a) the duly authenticated original arbitral award or a duly certified copy of it, and

(b) the original arbitration agreement or a duly certified copy of it.

(3) If the arbitral award or arbitration agreement is not made in an official language of Canada, the party shall supply a duly certified translation of it into an official language.

Historical Note: **1986-14-35.**

Grounds for refusing recognition or enforcement

36. (1) Recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that

(i) a party to the arbitration agreement was under some incapacity,

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made,

(iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case,

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if

the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the arbitral award which contains decisions on matters submitted to arbitration may be recognized and enforced,

(v) the composition of the arbitral tribunal or the arbitral procedure was in accordance with the agreement of the parties or, failing any agreement, was not in accordance with the law of the state where the arbitration took place, or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made, or

(b) if the court finds that

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of the Province, or

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy in the Province.

(2) If an application for setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

Historical Note: **1986-14-36.**

Appropriation

37. In addition to money appropriated under any other Act, $800 000 may be paid out of the consolidated revenue fund on or before March 31, 1987 for expenditures required for the establishment and operation of the B.C. Arbitration Centre.

Historical Note: **1986-14-37.**

Regulations

38. The Lieutenant Governor in Council may make regulations

(a) exempting from an enactment, or any provision of it, a person or class of persons who acts in a professional capacity in an international commercial arbitration and is not entitled under the enactment to practise that profession in the Province, and

(b) imposing different conditions on exemptions granted under paragraph (a) to different persons or classes of persons.

Historical Note: **1986-14-38.**

Offence Act

39. Section 5 of the Offence Act does not apply to this Act.

Historical Note: **1986-14-39.**

NOTE: Section(s) Repealed, Not In Force, Spent

40 to 42. [Consequential amendments. Spent. 1986-14-40 to 42.]

Appendix II

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW: MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION *

* [Reproduced from the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (June 3-21, 1985), U.N. General Assembly, Official Records, Fortieth Session, Supplement No. 17 (A/40/17), Annex I, pp. 81-93.

Adopted, June 21, 1985

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application *

* Article headings are for reference purposes only and are not to be used for purposes of interpretation.

(1) This Law applies to international commercial ** arbitration, subject to any agreement in force between this State and any other State or States.

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

(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25 (a) and 32 (2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual

residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

Article 4. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6. Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11 (3), 11 (4), 13 (3), 14, 16 (3) and 34 (2) shall be performed by . . . [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II. ARBITRATION AGREEMENT

Article 7. Definition and form of arbitration agreement

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9. Arbitration agreement and interim measures court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

(1) The Parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. Challenge procedure

(1) The Parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in

article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14. Failure or impossibility to act

(1) If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13 (2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12 (2).

Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral

tribunal may continue the arbitral proceedings and make an award.

Article 17. Power of arbitral tribunal to order interim measures

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20. Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22. Language

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to

any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29. Decision-making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a

majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20 (1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34 (4).

Article 33. Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1) (a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in Art. 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language. ***

*** The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.