COURT INTERVENTION IN ARBITRAL PROCEEDINGS IN COUNTRIES ADOPTING THE UNCITAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: AN IMPACT OF LEGAL CULTURE ON RECEPTION (CASE STUDIES OF CANADA, HONG KONG AND RUSSIA)

by

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ABSTRACT

This thesis explores problems regarding the reception the UNCITRAL Model Law on International Commercial Arbitration (ML) in Canada, Hong Kong and Russia. Focusing on the relationship between national courts and arbitrators, it argues that the ML fosters gradual harmonization of law on international arbitration, while accommodating the particular needs of the legal cultures and traditions of Canada, Hong Kong and Russia. The importance of this study derives from the fact that the experience of these three countries has been, and it still is, a guide for a number of other countries considering the adoption of the ML and modification of their arbitration laws.

First, the thesis explores the implementation of the ML at the national level, in each of the countries of adoption in order determine the legal changes, if any, brought about by the adoption. The hypothesis is that legal borrowing can lead to different results in countries with different legal traditions, different levels of economic development and different political structures. At this level the analysis focuses on statutory frameworks and judicial practice in these countries. Second, the thesis compares the results from the study at the national level in order to explore the ways in which the same pattern (that is, the ML) has been modified to reflect the socio-economic environment and principles of old systems, and to determine changes to the original model. The hypothesis is that arbitral tribunals are promoters of a new "internationalized" legal culture and that national judges and courts, in comparison, are more likely to reflect local or national legal cultures.

The thesis concludes that variations in the application and interpretation of the ML in the three countries does not mean that the ML cannot bring about the harmonization of laws. However, the ML is not a transplantation or duplication of foreign law, but a project of reception. In that way, the ML serves as a basis for creativity, rather than representing the imposition of a new, and perhaps, inappropriate, legal culture.
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Arbitration is an optional private process for settling international commercial disputes often favoured by parties reluctant to litigate in national courts. It is a "creation" of the parties to a dispute.¹ Since arbitration can only function within the framework of a particular legal system, the law on international commercial arbitration first emerged as a patchwork of diverse national laws on arbitration. The growth of international trade, the increasing complexity of international transactions and the disappointment with the regulation of international trade by these various national laws fostered a climate conducive to unification and harmonization of these laws under the auspices of various international organisations, including the United Nations. On 17 December 1966 the United Nations established the Commission on International Trade Law [hereinafter UNCITRAL].² UNCITRAL is a body of world experts which has as its main purpose the progressive harmonization and unification of the national laws governing international trade. Its approach to harmonization has been to rely on model laws rather than on


international conventions.\(^3\)

Briefly, model laws are flexible and informal proposals drafted by experts for the use of national legislators. Model laws may be initiated by national bodies, by international intergovernmental or non-governmental organisations or by specialist agencies. Unlike international conventions, internationally drafted model laws do not have the force of international law. There is no need for a formal diplomatic conference to adopt model laws or to amend them. There is no obligation for states to ratify and enforce such drafts in their territories. More importantly, model laws may be adopted in their entirety, or in part, or they may simply be taken as general ideas from which to create national laws. In other words, only when they are adopted at a national level (or by departmental governments in a federal state) do model laws acquire the force of law.

The UNCITRAL Model Law on International Commercial Arbitration [hereinafter the ML] was adopted in 1985.\(^4\) It was drafted by a Working Group of UNCITRAL consisting of world experts in the field of international commercial

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\(^3\) Model laws had been used by various international organisations at least three decades before UNCITRAL drafted its first model law in 1985. For example, in 1951 Red Cross International Committee drafted a model law for the protection of the Red Cross emblem and title. Yet, it is important to notice that previously drafted model laws were legislative directions for developing countries. In 1965 the United International Bureaux for the Protection of Intellectual Property drafted a model law for developing countries on inventions. The same agency proposed in 1967 a model law for developing countries on marks, trade names and acts of unfair competitions. The World Intellectual Property Organisation drafted two model laws for developing countries. In 1970 it prepared a model law on industrial design and in 1975 on appellations of origin and indications of source.

arbitration on the initiative of the Asian-African Legal Consultative Committee [hereinafter the AALCC]. The policy objectives of the ML are as follows:

"[a] the liberalisation of international commercial arbitration by limiting the role of national courts, and by giving effect to the doctrine of the 'autonomy of the will', allowing the parties freedom to choose how their disputes should be determined;

[b] the establishment of a certain defined core of mandatory provisions to ensure fairness and due process;

c] the provision of a framework for the conduct of international commercial arbitration, so that in the event of the parties being unable to agree on procedural matters, the arbitration would nevertheless be capable of being completed; and

[d] the establishment of other provisions to aid the enforceability of awards and to clarify certain controversial practical issues."

The General Assembly of the United Nations pointed out in 1985 that legal uniformity governing arbitral procedures was desirable and recommended that "all States give due consideration to the UNCITRAL Model Law on International Commercial Arbitration." At the time of completion of this dissertation, over 30 states had enacted legislation based on the ML.

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6 Resolution 40/72 (11 December 1985).

Based on the number of countries which have adopted the ML, one can conclude that it is the most successful of the several UNCITRAL model laws. However, the extent to which progressive harmonization of laws based on it has been achieved is yet to be evaluated. This thesis proposes one of the possible methods for such an evaluation—investigation of the reception of the ML in Canada, Hong Kong and Russia and the impact which the ML made on the local legal cultures in these three countries. This thesis focuses, on one hand, on the nature of changes that have occurred in national laws after the adoption of the ML and, on the other hand, on those changes made to the ML itself upon its adoption by the various countries. The thesis takes the view that the most important issue concerning the ML is the relationship between national courts and


Other UNCITRAL model laws are the 1987 model law on international credit transfer (re-drafted in 1992 and used as a model for the EU Directive on credit transfer), the 1993 model law on the procurement of goods, construction and services (adopted by Albania, Kyrgyzstan, Poland and Slovakia), the 1996 model law on electronic commerce (adopted by the Republic of Korea, Singapore and Illinois) and the 1997 model law on cross border insolvency. See the report of the International Trade Law Branch of the United Nations Office of Legal Affairs, Status of Conventions and Model Laws, last updated on 18 May 1999 at 14-15. Also available online: UN homepage <http://www.uncitral.org/en-index.htm> (data accessed 23 July 1999).


Hong Kong adopted the ML in 1989 but it came into effect in 1990 as the Arbitration Ordinance (Cap. 341), amended by the Arbitration (Amendment)(No.2) Ordinance (No. 64 of 1989), effective 6 April 1990.

The Russian Federation adopted the ML in 1993 as the Law on International Commercial Arbitration [hereinafter the LIC] on 7 July 1993, VSND&VS RF No. 32 (1993), item
international arbitration tribunals. Accordingly, this thesis investigates several aspects of court intervention in arbitral proceedings under the parameters of the ML in Canada, Hong Kong and Russia; enforcement of the agreement to arbitrate by stay of proceedings, the ordering of interim measures, judicial review of awards and, finally, recognition and enforcement of foreign arbitral awards. This thesis arrives at two conclusions. First, it finds that the ML, by fostering gradual harmonization of the law on international arbitration, is a flexible model for stabilization. Then, it concludes that the ML, despite its inevitable standardization, actually accommodates the particular needs of the legal cultures and traditions of adopting countries.

This dissertation is based on the premise that research into the ML on International Commercial Arbitration is important for several reasons related both to the nature of the ML and to its reception. The first reason for looking into the ML is because arbitration in general has been an efficient alternative to litigation for international business. Indeed, arbitration was the subject of numerous international conferences and treaties long before the UNCITRAL projects. Secondly, there is a need to examine the reception of the ML in the context of concerns that harmonization and unification of laws jeopardise national identity and legal culture. This issue is particularly important in the

1240; Rossiiskaia Gazeta of August 1993.

case of developing countries. For this reason, the origins of the ML need to be explored and its basic principles analysed. Also, the way the ML has been received in a particular country, including any changes to local legal systems caused by its reception, should be identified. The third reason for this research is that interest in the ML has grown remarkably over the past decade. Many countries which needed to up-date or establish dispute resolution mechanisms looked into it as a suitable standard. The importance of a study of the reception of the ML in Canada, Hong Kong and Russia derives from the fact that the experience of these three countries has been, and still is, a guide for a significant number of other countries considering the adoption of the ML. Fourth, the reception of the ML has made the business of arbitration more competitive. Although the extent to which mere adoption of the ML can transform any country or city into an important international venue is debatable, arbitration centres established or reorganised in adopting countries at least gained the advantage of having a transparent, user-friendly law written in the official languages of the United Nations, and approved by leading world experts. Several countries, which did not adopt the ML changed their laws to meet the ML standards or even went beyond the ML. These countries assumed that a liberal approach

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12 Japan, South Korea, Thailand and Greece have been considering the possibility of adopting the ML.
13 For example, England passed a new law on arbitration in 1996 which in many ways follows the solutions provided for in the ML (Arbitration Act 1996, 1996 c.23) See a discussion on new English Arbitration Act in Chapter Four of the thesis. On the other hand Belgian Judicial Code (Code judiciaire) of 27 March 1985, Sixth Part: Arbitration, went beyond the ML providing that there would be no right to appeal for setting aside award made in Belgium if both parties are foreigners. Ironically, this unprecedented solution did improve the popularity of Belgium as a arbitration venue.
to arbitration would encourage foreign parties to arbitrate in their centres. Finally, the ML is significant because, by limiting the courts’ involvement in arbitral proceedings, it places limits on a state’s sovereignty. Accordingly, it is important to investigate how ML adopting countries, such as Canada, Hong Kong and Russia, balanced the need to protect state sovereignty against the private interests of the parties involved in arbitration.

A. Scholarly Context

Many scholars have addressed some of the questions raised by this study, but not in the same context. As a general matter, arbitration has been studied by anthropologists, sociologists, lawyers and political scientists. Even though anthropologists and sociologists do not address the ML itself, their impressive studies of dispute resolution mechanisms in different societies offer a meaningful historical background to research on arbitration. Richard Abel and Laura Nader, for example, deal with comparative research into dispute resolution methods in different societies.\(^{14}\) They suggest that different societies or different cultures prefer different dispute resolution mechanisms. Indeed, the field work of sociologists and anthropologists reveals that in Western legal culture litigation is the method of dispute resolution most frequently employed, while traditional

Latin American, Asian and African cultures have always preferred conciliation, mediation and customary arbitration. The last mentioned is a type of arbitration in which the parties voluntarily agree to submit their dispute to the family head or elders in the community and agree in advance to be bound by the resulting decision.\textsuperscript{15}

Some sociologists, such as Lawrence Friedman, argue that the development of law correlates to the development of a special type of culture which he calls the legal culture.\textsuperscript{16} He then defines legal culture as ideas, values, knowledge, behaviour and attitudes and opinions people in each society hold with regard to their laws and legal system.\textsuperscript{17} Friedman assumes that most of the failures in legal development come as a result of the unqualified export of the Western legal traditions worldwide.\textsuperscript{18} Following the idea of exportation of Western laws, Alan Watson develops a theory of legal transplantation explaining the development of law as a series of borrowings of laws or


\textsuperscript{18} L. Friedman, "On Legal Development"; \textit{supra} note 16 at 28.
legal norms from one legal system into another. John Merryman argues that after the spread of Roman law across Europe, the French model of codification and the American model of a constitution are the widest distributed legal transplants in modern history.

Sandra Burman and Barbara Harrel-Bond are concerned with the concept of imposition of foreign laws, arguing that the reception of Western laws by non-Western cultures took place in the form of formal enforcement. In other words, they talk about voluntary and involuntary reception. Professor Masaji Chiba analyses the interaction of six Asian cultures and indigenous laws with received Western laws. He concludes that the whole structure of law in a non-Western country consists of three levels. These are: official laws sanctioned by the legitimate authority, unofficial laws sanctioned in practice by the general consensus of the population, and a legal postulate as a value principle or system connected with a particular official or unofficial law. Reception of law starts at the first level but impacts the second and third levels.

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19 A. Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974) [hereinafter *Legal Transplants*]. Watson examines the phenomenon of transplantation by considering, for example, the reception of Roman Law in medieval Europe, the spread of English law through the countries of the Commonwealth, and the influence of the French *Code civil* on the codification of civil laws on the European continent.


22 M Chiba, ed., *Asian Indigenous Law in Interaction with Received Law* (London: KPI, 1986). Authors of this project examine the reception of Western laws in Hindu, Buddhist, Sunni-Islamic, Islamic, Shinto and multi-religious societies.
Gianmaria Ajani, Thomas Waelde and James Gunderson investigate legislative reforms in the transition economies of Central and Eastern Europe [hereinafter CEE] in the light of the theory of legal transplantation. They argue that CEE countries adopted (or borrowed or imported or transplanted) Western laws to make the short-cut to market economy status. Wolfgang Wiegand explores the reception of American Law in Western Europe, comparing its reception with that of the Roman law in medieval Europe. In summary, it is important to notice that all these studies point to some kind of conflict between the indigenous or pre-existing law and the foreign law which is received or borrowed or imported by one country from one or more other countries (not from an international organisation or agency).

Many legal scholars from developing countries, such as Professor M. Sornarajah, ICJ Judge Keba Mbaye, dr. Amazu Asouzu and Samson Sempasa have debated that the reception of the ML imposes a standard-setting foreign to the tradition of the borrower. Professor Sornarajah is concerned with the substantive rules applicable in arbitration of foreign investment contracts. The freedom of choice of these rules as defined in the ML,

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says Sornarajah, usually results in application of Western legal principles. This leads to better protection of foreign (Western) investors. Judge Mbaye explains that for countries in Africa, Asia and Latin America international commercial arbitration means arbitration before European or American tribunals. Samson Sempasa emphasises that the European laws have always dictated trends in international business law. On the other hand, African countries followed these trends first directly applying European laws imposed in former colonial days and then modelling their new laws upon the European patterns. Both Sempasa and Sornarajah conclude that the ML will be successful in developing countries only if it remains sufficiently neutral and thus avoids the charge of being weighted in favour of developed countries. Even though most of these authors disregard the importance of the origins of the ML and the fact that the reception of the ML is a purely voluntary act of a state, they rightly stressed that the mere adoption of the ML will not ensure development of arbitration in developing countries. Education of local lawyers, better organisation of courts and establishment of arbitration centres should also be a part of the legal reform.

A number of sociologists and political scientists have demonstrated that the harmonization of rules on international commercial arbitration can also be discussed within the broader context of globalisation. Notwithstanding the ambiguity of the

38 S. Sempasa, *supra* note 26 at 390 and 408.
40 See, for example, A. Asouzu, *supra* note 11 at 380.
concept, globalisation has become an analytical framework for numerous studies concerned with the different ways in which domestic legislation reflects change in the international context. Although providing valuable information on harmonization and globalisation these studies usually fail to distinguish the ML, with its unique features, from other international treaties. To reiterate, the ML is not an international convention which must be ratified by member-states within certain period of time and without any changes (expect where provided for by the convention itself). It is not enforceable as international law. The ML attempts to standardize a great number of rules and principles on international commercial arbitration, but it also fails to define many important terms and institutions of arbitration.

Legal scholars are usually more focused on the ways in which arbitration operates within the legal system and with the basic principles of arbitral proceedings rather than on the social context of law. It is difficult to find any book on commercial arbitration written


since 1985 which does not comment on the ML. Alan Redfren and Martin Hunter deal with the ML extensively, so do Sir Michael Mustill, M. Sornarajah, Rubino Mauro-Samartano, Rene David and Mark Huleatt-James to name but a few authors. The body of literature on the UNCITRAL ML is growing. The classic volume is Harold Holtzmann’s and Joseph Neuhaus’s historical guide to the ML which gathers all the reports, discussions and commentaries of the Working Group in an attempt to reveal the nature of the ML. Isaak Dore offers a useful overview of the framework of international commercial arbitration created by UNCITRAL, while, in a recent publication, Christian Bühring-Uhle examines a combination of arbitration, the ML and mediation in his effort

39 A useful sources of such type of bibliography is recently provided by Derek Roebuck in his article “Sources For the History of Arbitration” (1998) 14 Arb. Int’l 239.
to find the best method for resolution of international commercial disputes.\textsuperscript{42} Neil Kaplan, Jill Spruce, Theresa Cheng and Michael Moser provide an insight into Hong Kong practice after the acceptance of the ML.\textsuperscript{43}

Over the past three decades, however, some legal scholars have also addressed the importance of considering elements of legal culture in the context of international arbitration. There are several aspects of arbitration proceedings on which legal culture can impact. The parties to international commercial arbitrations are often of different nationalities. They usually speak different languages. They are represented by lawyers from different countries and with different approaches to arbitration. For example, some are more litigious, while others rely more on mediation. Arbitration proceeding may take place in a third country, and thus, may link parties to an additional legal culture, that of the forum. This means that the procedural rules can be determined by legislation which is a part of the particular legal tradition of the place of arbitration. For example, there are differences between the procedural rules of the civil law and the common law systems. The place of arbitration will also determine the relationship between the courts and tribunals.\textsuperscript{44} The cultural origins of the arbitrators are also of considerable concern to the parties. Regardless of the strict requirements for impartiality and neutrality, many parties to arbitration proceedings find that the legal culture of the arbitrators' origins is an


\textsuperscript{44} For further discussion on this issue see B.M. Cremedas, "Overcoming the Clash of
important element in their decision-making. Finally, international commercial arbitration is affected by the particular culture of the country or countries in whose court recognition and enforcement of an award is sought. All these elements were discussed at the 1996 international arbitration conference "International Dispute Resolution: Towards an International Arbitration Culture." This was a gathering of international arbitrators to discuss strategies for overcoming the influence of a particular national legal culture in international disputes. At this conference, some speakers suggested that international arbitrators have to accept the ideas, values and principles of a wider international legal culture. Gerold Herrmann, Secretary of UNCITRAL, discussed reception of the ML as a means of creating such a culture. However, Herrmann does not clarify what would be the culture of the ML, nor did other participants at the conference offer any sort of definition of an international arbitration culture.


45 See ICCA Congress Series No. 8 available as A.J. Van den Berg, ed., International Dispute Resolution: Towards an International Arbitration Culture (The Hague: Kluwer Law International, 1998)[hereinafter International Arbitration Culture]. The conference dealt with the following issues:
- Is there a growing international arbitration culture?
- Is there an expanding culture that favours combining arbitration, conciliation or other dispute resolution procedures?
- To what extent do arbitrators in international cases disregard the bag and baggage of national systems? and
- When and where do national courts reflect an international culture when deciding issues relating to international commercial arbitration?


47 G. Herrmann, "UNCITRAL's Basic Contribution to the International Arbitration Culture in International Arbitration Culture" (The Hague: Kluwer Law International,
Another perspective on arbitration culture is provided by Yves Dezelay and Bryant Garth.\textsuperscript{48} They argue that the process of internationalization has transformed both the market for international commercial arbitration and the legal profession in various Western countries. They find that competition for the arbitration business has become very intense since American law firms established offices in Europe. In the past, the market for arbitration was influenced solely by the European legal culture of so-called "grand old gentlemen." However, explain Dezelay and Garth, the arrival of the American practitioners to the major European cities has brought about a new legal culture and a new generation of arbitrators—so-called young "technocrats." At this point, Dezelay and Garth opine, two legal cultures and two generations of arbitrators are in conflict.

It is notable that the authors mentioned above use different terminology to talk about the relationship between domestic law and foreign law which is brought into the domestic legal system. This thesis, however, does not discuss terminology problems. It uses the term "reception" to mean the interaction between the received law and the pre-existing legal framework. It thus focuses on the adoption of the law at a law-making level, on implementation and interpretation of the received law by the legal profession and on structural and institutional changes caused by such interaction. The most important general point this dissertation draws from the above presented socio-historical, political and legal surveys is that a slavish devotion to voluntarily adopted or imposed

foreign laws has not always proven effective and effective for recipients. International models were not created to deal with problems native to a particular adopting country. From this point the dissertation moves on to explore what can occur when the agreed-upon standard itself allows for modification and specialization at the hands of its recipients.

B. Conceptual Framework

This thesis attempts to create a new direction by combining various aspects of the analytical approaches discussed in the previous section. Based on the assumption that legal culture is an important component of its corresponding legal system, the argument will be made that such culture is a significant determinant of the way in which the ML is implemented in a particular country. This thesis, therefore, makes a thorough exploration of the pre-existing legal cultures in each of three representative adopting countries: Canada, Hong Kong and Russia, and then identifies changes caused by acceptance of the ML. Recognizing that the ML is accompanied by elements of a new arbitration culture, which it attempts to define broadly as a unique balance of the ML’s basic principles of party autonomy, limited court intervention, independence of the arbitral tribunal and procedural fairness, the thesis then investigates the existence of these elements within the framework of the three systems under examination. All theoretical arguments are tested
through a detailed case study on the reception of the ML at the legislative level and at that of application and implementation. Thus this thesis examines the ML in the light of socio-legal theories about legal culture and the reception of law.

In order to illustrate that the ML is a flexible and suitable pattern for changing the regime of arbitration in countries with different legal systems this thesis asks and attempts to answer five groups of research questions. As already mentioned, the first group of questions is related specifically to the pre-existing legal cultures in Canada, Hong Kong and Russia. In this context, the thesis attempts to find out if, and how, arbitration was previously used in these countries for resolution of commercial disputes and, if so, what were the characteristics of the previous legal framework of arbitration. The question is also asked as to whether any of the basic principles of the ML formed part of the previous legal systems, particularly with respect to the way arbitration was treated by the courts. The second group of questions concerns the relationship between domestic laws on arbitration and international conventions before adoption of the ML. For example, the thesis analyses the impact of the Geneva Protocol on Arbitration Clauses 1923, the Geneva Convention on the Execution of Foreign Awards 1927 and the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 on arbitration laws in Canada, Hong Kong and Russia. The main legislative goals behind adoption of the ML in the three countries are the third object of focus. In this

51 The 1958 New York Convention, supra note 10.
context, the thesis also investigates why these countries chose to accept the assistance of UNCITRAL and to import the UNCITRAL model and why they rejected drafting their own laws. The fourth question then is how the ML was adopted in each of the three countries. More specifically, the thesis examines whether the particular adopting country modified the ML original text and the extent to which any such modification reflect the legal culture of the adopting country. It also looks at whether these modifications have changed the unique balance among the ML's four basic principles. Finally, the thesis attempts to determine how the national courts responded to the legislative changes and what the practical consequences were of limiting the jurisdiction of the courts and extending the powers of arbitrators.

This thesis focuses on only three adopting countries—Canada, Hong Kong and the Russian Federation—for a number of reasons. First, since the thesis discusses the influence of legal borrowing on the legal culture of the borrower, it is important to choose adopting countries that represent different legal cultures. Canada, which was the first country to adopt the ML, has been included as representative of the legal traditions of the Western developed countries. Furthermore, it is a unique example of mixed common law and civil law legal cultures. Hong Kong has been chosen because it is an important Pacific Rim centre where Asian and European (British) cultures converge and where a new legal system can be expected to emerge from the synthesis of the English colonial legal system and the Chinese legal system. Of all the major trading states of the

52 Y. Dezaley & B. Garth, Dealing In Virtue, supra note 48.
European civil law tradition only Russia and Germany\textsuperscript{53} have accepted the ML.\textsuperscript{54} Russia has been selected for examination because it represents the culture of the emerging markets of Central and Eastern Europe, as well as the civil law countries.

The second reason to focus on these three countries is the timing with which they adopted the ML—Canada in 1986,\textsuperscript{55} Hong Kong in 1990,\textsuperscript{56} and Russia in 1993.\textsuperscript{57} Thus, it is possible to evaluate the capacity of the original text to meet the diverse needs of borrowers over what is almost an entire decade from the mid-eighties to the mid-nineties.

The third reason for thus limiting the field of research is a practical one—the financial and time constraints of doctoral studies. An examination of all adopting countries would be a task for an institution rather than for an individual.

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\textsuperscript{54} However, the ML influenced their modification of arbitration laws. See P. Sanders, P. Sanders, "Unity and Diversity", \textit{supra} note 7. Indeed, Pieter Sanders writes that "the impact of the ML is such that no State, modernizing its arbitration law will do so without taking it \textit{inter alia} into account". See \textit{ibid.} at 1.

\textsuperscript{55} S.C. 1986, Chapter 22.

\textsuperscript{56} To repeat, the Hong Kong \textit{Arbitration Ordinance (Cap. 341)} as amended by the \textit{Arbitration (Amendment)(No.2) Ordinance (No. 64 of 1989)}, effective 6 April 1990.

\textsuperscript{57} To repeat, the \textit{LICA}, VSND&VS RF No. 32 (1993), item 1240; \textit{Rossiiskaia Gazeta} of August 1993.
C. The Structure of the Thesis

This thesis is organised in six chapters. Chapter One establishes the basic hypothesis of the research and explains the concept and methodology. Chapter Two explores the origins of the ML. It analyses the drafting process, defines the basic principles of the ML and compares them with the principles of various international conventions on dispute resolution. The conclusion drawn in this chapter is twofold. First, that the ML is an international instrument of a unique nature aimed primarily at helping states to modernise their national laws and only indirectly at harmonization of the rules of international commercial arbitration. Second, that evaluation of the ML harmonization mission, based solely on the analysis of a textual adoption, is premature and would, even at a later date, be incomplete. Chapter Two suggests that such an evaluation would have to include, in particular, an analysis of court decisions on arbitration. In this context, it hypothesises that the extent to which the ML is currently replicated in adopting countries depends on their legal cultures. In other words, it depends on the ways in which pre-existing laws defined the relationship between the courts and arbitration tribunals and on the ways in which the courts have interpreted their function in relation to arbitral proceedings. Chapter Three tests this hypothesis by exploring legal cultures in the pre-adoption period in Canada, Hong Kong and Russia. This descriptive, historical approach helps to show the extent of legal changes initiated by adoption of the ML. A further test is provided in Chapter Four. It opens case studies on the implementation of specific
principles of the ML in Canada, Hong Kong and Russia. Then, it underlines the basic changes at the law-making level and concludes that not only was the ML introduced in three different ways but it was also modified differently to meet the distinctive needs of each adopting country. In Chapter Five, the impact which these legal reforms have had on the courts is scrutinised through a comparative study of court decisions in Canada, Hong Kong and Russia. The analysis is limited to the issues of enforcing an arbitral agreement and ordering a stay of proceedings, ordering interim measures, and enforcing arbitral awards. On the basis of arguments established in the previous chapters, Chapter Six concludes that the ML is not only a flexible way to standardise law, but it is also a method to achieve subsequent harmonization of laws, which benefits both adopting and non-adopting countries.

D. Methodology

The methodology of this thesis is determined by its basic research interest—which is, as stated above, the impact of the reception of the ML on the legal cultures in the adopting counties. The purpose of the research is to determine the ways in which the same pattern functions in the legal frameworks of the different countries. Such an evaluation is based on the comparative study of three legal systems—Canadian, Hong Kong and Russian. Indeed, the comparative approach facilitates the study of particular
phenomena, such as international commercial arbitration and the adoption of the ML, in the light of their political, social or economic purpose.\textsuperscript{58} The advantage of the comparative method is that it produces a better understanding of national laws\textsuperscript{59} and of harmonised laws.\textsuperscript{60}

The need for a comparative approach is also predetermined by the nature of international arbitration itself. Such arbitration involves parties and arbitrators from different countries and legal systems, who usually use different languages to communicate. Moreover, the meaning of legal terms is dependent on the legal culture in which the person using them normally works.\textsuperscript{61} Consequently, differences may be encountered with respect to all aspects of commercial arbitration, starting from drafting the arbitration agreement to the determination of material and procedural rules and, finally, to enforcement of the award itself. In addition, national courts use comparative methods not only to interpret and to apply foreign laws but also to fill in gaps which might exist in the domestic legal system.\textsuperscript{62} For all these reasons, this thesis uses the comparative method to assist in understanding better the differences and similarities in


\textsuperscript{60} M. Bogdan, \textit{Comparative Law} (Tano: Kluwer Law & Taxation Publishers, 1994) at 30-32.

\textsuperscript{61} P. Hercog, "The Need For a Comparative Perspective" in T. Carboneau, ed., \textit{Resolving Transnational Disputes Through International Arbitration} (Charlottesville: University of Virginia Press, 1984) 75 at 76.

\textsuperscript{62} M. Bogdan, \textit{Comparative Law, supra} note 60 at 32-33.
interpretation and application of the ML in the adopting countries.

The comparative method is applied to the legal history and traditions of formal discourse of the three countries of adoption. This serves to emphasise the significance of the wide differences in historical background and to overcome possible bias of a purely Western perspective in evaluating the changes in legal culture initiated by reception of the ML.

Specifically, the thesis examines primary and secondary legislation: statutes on arbitration and related case studies, and then articles, books and experts' opinions on the topic. This leads to both contractive and integrative comparisons— that is, comparison of both differences and similarities. Here, the attention is paid to the differences, since it is these which cause the ML to be modified or re-defined.

This thesis also applies comparative legal history as a method to better understand the inner logic of the legal system that surrounds arbitration. To that end, legal history is used to examine the genesis of institutions of international commercial dispute resolution in the three countries, and to examine (dis)continuity in the legal behaviour of judges and arbitrators. It is a test of the extent to which legal institutions can maintain the characteristics of an old legal system that has been succeeded by another.

For the case study, the thesis uses a variety of available sources including national gazettes and journals, which publish court decisions on international commercial arbitration. The case study includes analysis of approximately one hundred court

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decisions and reference is made to at least one hundred additional decisions. For clarity of
analysis, cases are categorised under three headings—those in which the important issue
is the arbitration agreement itself and the appointment of arbitrators, those for which
interim measures and the arbitral proceedings themselves are the central issues and those
cases involving the recognition and enforcement and the setting aside of awards. Then,
the thesis also looks at the publications of the International Chamber of Commerce (ICC)
and the International Council of Commercial Arbitration’s (ICCA) *Yearbook
International Arbitration*.

E. Value of the Research

Although there is a surfeit of scholarly literature dealing with international
commercial arbitration, several important benefits can be derived from the further study
this thesis represents. The conceptual benefit will be an argument that it is possible to
create a model law which is a flexible framework for legal reforms in countries which
have different legal cultures and are at different political and economic levels of
development. In this context, the thesis argues that the ML is a good start for such legal
reforms.

The conceptual novelty is that this thesis does not consider the ML as simply a

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*Yearbook International Arbitration* is published by Kluwer and Taxation
piece of legislation, but also sees it as a pattern of social behaviour and an indicator of a particular culture. It implements the traditional legal method of case study which is the analysis of the application of legal rules in particular cases, but also examines the behaviour of courts in the new environment set up by the ML. In this context, the thesis acknowledges that globalisation of laws is an inevitable process which goes along with economic and political globalisation. But, the thesis suggests that this globalisation of laws is likely to manifest itself in a widespread adoption of similar rules for international trade rather than in the duplication of one pattern around the world.

This thesis will provide the first comprehensive study known to this author of international commercial arbitration in countries of different legal cultures which have adopted the ML. So far, only separate studies of Canadian and Hong Kong case law on arbitration have been undertaken and there has been no published study of the Russian experience.

There is also an innovation in the methodology of research. Arbitration and the ML have commonly been analysed in the context of traditional legal discourse, either relying on the positivist study of the statutory framework or on case studies (analysis of court and arbitration decisions, when available). However, the ML has not yet been studied in the context of legal transplantation and theories about the convergence of legal cultures. This thesis debates three existing approaches to the reception of transplanted law—the law and development movement perspective on legal reforms, legal sociology and its concept of legal culture, and the legal anthropology perspective on mixed legal

Publishers (Deventer, The Netherlands).
systems and mixed cultures. In this context, this thesis attempts to reach at better understanding of the impact which legal culture has on the reception of "foreign" patterns of dispute resolution.
CHAPTER TWO: UNCITRAL ML

This chapter reviews some historical aspects of the drafting of the ML in order to provide an introduction to a later discussion of its unificatory effects with respect to national laws. Hence, this chapter elaborates on the four principles which are generally understood to be the foundations of the ML. These are the principles of party autonomy, limited court intervention, independence of arbitral tribunals and procedural fairness. Specifically, this chapter calls attention to their presence or absence outside the ML—that is, in the national laws of the adopting countries and in other international instruments. Then, the chapter discusses the basic paradox of international commercial arbitration that its success ultimately depends on judicial respect for arbitration agreements and awards. The chapter concludes with a debate on two criticisms of the nature of the ML—whether it is just another legal transplant and whether it is a global law.

A. Background

Arbitration as institution of conflict resolution is as old as humankind and older than State courts. From the earliest Egyptian era to Greek and Roman times, through the

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development of merchant laws in medieval Europe and the heydays of laissez-faire, the use of arbitration in commercial disputes has gradually increased among nearly all nations and cultures.66 Ironically, arbitration has been the subject of numerous treaties,


It is possible to argue that the concept of international commercial arbitration is established and developed in Western Europe. But, domestic arbitration as a private dispute resolution outside of courts existed in different forms in all societies. In Moslem Arab countries, in Asia and in Africa traditional arbitration was known in the form which is close to amiable compositor or conciliation in Western Europe. See G. Herrmann, “The Arbitration Agreement as the Foundation of Arbitration and its Recognition by the Courts” [hereinafter “Arbitration Agreement”] in A.J. van den Berg, International Arbitration in Changing World International Arbitration in Changing World: ICCA Bahrain Conference 1993 (Deventer: Kluwer Law and Taxation Publishers, 1993) [hereinafter ICCA Bahrain Conference] 41 at 42.

Traditionally Arab laws were strongly influenced by Islam and its religious law which has some references to arbitration. Significant is that, according to religious law, disputes are to be submitted to sole arbitrator who must be male and Muslim. In a number of countries the ML was a pattern for modernisation of such laws. See an overview in P. Sanders, “Arbitration-Chapter 12” in International Encyclopedia of Comparative Law (Dordrecht: Martinus Nijhoff Publishers, 1996) [hereinafter “Arbitration”] at 43-47. In his address to the First Euro-Arab Arbitration Conference in Tunisia in 1985 Professor Mezghani says that even though Arabs viewed the European-style-arbitration with certain suspicions, they admitted that such arbitration would prove to be a necessity. See Professor Mezhani’s address as cited in G. Herrmann, “Overcoming Regional Differences: Arbitral Practice, Comparative Law and the Approximation of Laws” in P. Sanders, ed., Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Transportation, IX International Arbitration

Traditional Asian legal culture favours negotiation and conciliation over litigation and arbitration. Indeed, court litigation is something that Asians try to avoid whenever possible. Arbitration was influenced by the Western concept in many Asian countries—former European colonies. For example Hong Kong and Singapore were influenced by the English arbitration law, Indonesia by the Dutch law. But see Y. Taniguchi, “Commercial Arbitration in Japan” in P Sanders, ed., Tokyo Congress, ibid., 29 at 29. Taniguchi emphasises that Japanese merchants commonly do not rely on arbitration. Ibid. In many Asian countries conciliation is usually seen as the first step in dispute resolution, and arbitration as the second. See T. Houzhi, “International Commercial Arbitration in the Far East—the PRC Example” in P Sanders, ed., Tokyo Congress, ibid., 43 at 55.

The distrust of Spanish and Portuguese laws and practice in Latin American countries has been for many years the main reason for the hostility vis-à-vis arbitration in the region. See H.A. Gringera Naon, “Arbitration in Latin America: Overcoming Traditional Hostility” (1985) 5 Arb. Int’1 137 at 137. As previously mentioned, information on the use of arbitration in Mexico dates back to the Aztec era. See L. M. Martines, ibid. Indeed, Luis Martinez explains that during the Conquista, the king of Spain established the Consulado de Mexico as a specialised court for commercial matters which was administered by former merchants. The court lasted until 1821. See, ibid. Strongly influenced by the Calvo Doctrine and hostility toward Spanish and Portuguese imported laws, Latin American countries, after gaining independence in the beginning of the 19th century, became very reluctant to submit investment disputes with the foreign element to arbitration. But international arbitration have been subject to numerous regional treaties starting as early as in the late 19th century and the early 1920s. For an overview on international treaties signed by Latin American countries see R. E. Echeverria & J.L.
books and articles, doctoral and master theses, conference and seminar papers, case digest and reports, but none gives a perspective of modern arbitration as a phenomenon of continuous change.

Arbitration is usually referred to as a process of dispute resolution by one or more persons empowered to decide a case outside of the ordinary judicial process on the basis of a private agreement concluded between two or more parties to that dispute.

Many authors, such as Jean Gabriel Castel, Patrick O'Keefe, Alan Redfref and Martin Hunter, argue that arbitration appears to be more effective and attractive method of resolution of trade dispute then litigation? Parties want fair, neutral and universally accepted awards and believe they can obtain such awards from a third party rather than

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68 According to Halsbury’s Laws of England arbitration is: “the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially with binding effect by the application of law by one or more persons (arbitral tribunal) instead of a court of law.” Continental European legal scholars also agree with some elements of the English definition: that arbitration is consensual process of dispute resolution outside the court system. In other words, arbitration is “a device whereby the settlement of a question, which is of interest for one or more persons, is entrusted to one or more other persons—the arbitrator or arbitrators—who derive their powers from a private agreement, not the authority of a State, and who are to proceed and decide the case on the basis of such an agreement.” See R. David, supra note 37 at 5.

Traditionally, the choice of parties to utilise arbitration is understood in negative terms—that is, as a decision to exclude court jurisdiction. So, arbitration allows a party to avoid the unknown, possibly a “non-user-friendly” legal system in the opposing party’s country and protects him or her from “hometown justice” in a foreign court. In addition, arbitration offers the advantage of having independent and impartial arbitrators or experts decide a dispute. It offers confidentiality, voluntariness, speed and flexibility and is a usually low cost procedure which culminates in a final, binding disposition which is sometimes easy to enforce.

What makes arbitration awards easy to enforce is the fact that 120 countries have

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72 Professor Eric Green finds that parties agree to arbitrate because they “fear having to litigate under a different country’s substantive rules, cope with foreign procedures, and rely on legal resources far from home in an alien culture that may favour a domestic party and be biased against the foreigner.” See E. Green, supra note 70 at 176. Green insists that such fear experience both business people from all legal cultures and from all countries involved in international trade: He finds that Europeans and Asians fear the American adversarial system as much as American-based companies may fear the Nigerian courts. Ibid.


signed the *New York Convention*\(^75\) and have thereby agreed on the requirements which arbitration agreements and awards must meet in order to obtain judicial recognition in the signatory countries.\(^76\) This unification of the rules on recognition and enforcement of arbitration awards gives certainty and predictability to international transactions and determines to a great extent the choice of dispute resolution mechanisms. On the other hand, the great diversity of national laws on international commercial arbitration leads to situations in which business people cannot predict court rulings on disputes arising from their transactions. Thus, because business people will have to deal with only one set of rules rather than with a large number of different bodies of rules, the unification of laws on dispute resolution can increase the level of common knowledge of dispute resolution norms.

From the beginning, arbitration has been governed by national laws, which obviously differed from state to state.\(^77\) The need to unify the framework for international

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\(^76\) Possibility to enforce an arbitral award is very important reason for deciding to arbitrate instead to litigate because many countries, including major trading states such as the United States, are not parties to any treaty for enforcement of foreign judgments.

\(^77\) Adam Samuel, for example, writes about three generations of arbitration laws in Europe that have been drafted in Europe starting from the French Revolution in 18\(^{th}\) century which declared arbitration to be the premier form of adjudication. Samuel says that in the 19\(^{th}\) century the first generation of arbitration laws had been drafted as a part of laws of civil procedure (for example, *1854 Common Law Procedure Act* in England and *1879 Code of Civil Procedure* in Germany). Later, as a result of harmonization efforts of international organisation, the second generation of laws was enacted (in France in 1925, in Sweden in 1929, in England in 1934, to name but a few). The third generation of arbitration laws came in the 80-ties after the harmonization and unification within European Union on one hand and development of international trade on the other hand (in
arbitration became evident during the 1920s while ideas were being developed for the unification of rules on international trade in general. The arguments for unification were twofold: inadequate protection of international trade under the national laws and the need to develop a clear, predictable and stable private system of dispute resolution. These unification attempts resulted in the establishment of the International Chamber of Commerce (1919), its Court of Arbitration (1923), and the appearance of two important international treaties—the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Awards. In 1926, German law professor Arthur Nussbaum edited the first yearbook of international arbitration. In Latin America, the 1889 Montevideo Treaty and the 1911 Bolivian Convention provided for the recognition and enforcement of judgments and arbitral awards rendered on civil matters in any of the signatory states when certain procedural and substantive requirements were met.


81 R.E. Echevarria & J.L. Siqueros, supra note 66 at 86-87. The 1889 Montevideo Treaty on International Procedural Law, signed on 11 January 1889 (OEA/Ser.Q/11.8 C/1-14, 1973) was superseded by the Bolivian Convention on the Enforcement of Foreign Awards, signed on 18 July 1911 at Caracas, Venezuela, which practically reproduced the provisions of the 1889 Treaty. Those provisions on recognition and enforcement of foreign judgments or arbitral awards were later replaced by the provisions of the 1928 Bustamante Code (the Convention on Private International Law, 82 L.N.T.S. 120), signed at Havana, Cuba, the most ambitions four book codification of the Latin American private international law. See also L. Kos-Rabczewicz-Zubkowski, “Contributions Which Multilateral Conventions and Model Laws Can make to the Development of Arbitration:
During the past 25 years UNCITRAL, an international body specifically engaged in the progressive harmonization and unification of the law on international trade, has contributed considerably to the process of unification and furthered progressive harmonization and unification of the law on international trade. According to UNCITRAL Resolution 2205/XXI of 17 December 1966, harmonization aims at similarity in laws of two or more states. On the other hand, unification aims at identical laws. It is interesting that Endre Ustor, a member of the International Law Commission in the 1960s, explained that harmonization may be achieved "if legislator of one State follows the example of foreign laws" or, in other words, borrows or transplants foreign laws. Unification, says Ustor, takes place mostly through bilateral or multilateral agreement and the drafting work of international agencies. Unification was also seen as


Resolution 2205/21, Chapter II, par.8 (17 December 1966).


The International Law Commission was established by the General Assembly of the United Nations in 1947 (Resolution 174/2 of 21 November 1947) to promote the progressive development of international law and its codification. The Commission has 34 members who do not act as representatives of their governments but serve in their individual capacity. For more details on the objectives of the Commission, see its website (<http://www.un.org/law/ilc/ilcintro.htm>) (data accessed on 5 October 1999).

unification of interpretation and application. Three pillars of international commercial arbitration (the *New York Convention*, the ML and the UNCITRAL Arbitration Rules are the result of its various strategies for unification. Usually, "[w]here maximum uniformity is important UNCITRAL employs the international treaty or convention." Where there is need for greater adjustment to local conditions, instead of relying on the convention technique, UNCITRAL prepares a model law. Finally, "when even greater flexibility is needed, UNCITRAL prepares standard rules or provisions that the parties can make effective by contract." The UNCITRAL Arbitration Rules are an example of this third technique of unification.

International commercial arbitration is also facilitated by a number of global and regional treaties as a means of resolution of inter-state commercial disputes and private commercial disputes. These include the *Convention of the Settlement on Investment Disputes Between States and Nationals of Other States* (*the ICSID Convention*); the

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87 Thus, although the *New York Convention* was not initiated or drafted by UNCITRAL, UNCITRAL promoted it. As Albert Jan Van Den Berg pointed out, "when UNCITRAL was established in 1967, 31 States were parties to the Convention. Now, 25 years later [in 1992-added] UNCITRAL's promotional efforts have resulted in 85 States being parties to the Convention. See A. J. Van Den Berg, "Some Practical Question Concerning the 1958 New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards" in *UNCITRAL's Proceedings, supra* note 83, 212 at 212.

88 Adopted on 28 April 1976, Resolution 31/98 (15 December 1976), UN Sales No. E77.V.6 App. D.

89 J. Honnold, "Goals of Unification" in *UNCITRAL's Proceedings, supra* note 83, 11 at 12.

90 J. Honnold, *ibid*.

91 J. Honnold, *ibid*.

92 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (*the ICSID Convention*);
General Agreement on Tariffs and Trade (GATT) and, most recently, the WTO documents of the Uruguay Round; the European Convention on International Commercial Arbitration (European Convention), and the Inter-American Convention on International Commercial Arbitration (Panama Convention). Based on the conviction that arbitration promotes and facilitates international trade, the North American Free Trade Agreement (NAFTA) provides for arbitration for the resolution of disputes.

Other States, 18 March 1965, 575 U.N.T.S. 159 [hereinafter ICSID or the Washington Convention]. As the name suggests, the mechanism for dispute resolution—arbitration (and conciliation) through the International Centre for Settlement of Investment Disputes is established only for specific types of cases (those which arise from contracts for investments) and for disputes which involve states and private persons as disputants. That means that ICSID does not deal with purely private disputes (between two private parties). As of 8 April, 1996, the ICSID Convention was signed by 138 countries. See (1995) XX Y.B. Comm. Arb. 853.


94 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Final Act), 15 April 1994, 33 I.L.M. 1143, which in Article I established World Trade Organisation (Agreement Establishing the World Trade Organisation)[hereinafter WTO].

95 European Convention on International Commercial Arbitration, 21 April 1961, 484 U.N.T.S. 364 no. 7041 (entered into force on 7 January 1964)[hereinafter European Convention]. It is applicable to "disputes arising from international trade between physical or legal persons" See Article I(1)(b) of the European Convention.


international investment disputes. Not surprisingly, the most recent draft of the
*Multilateral Agreement on Investment (MAI)*\(^99\) also provides for arbitration in accordance
with ICSID, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or
the Rules of Arbitration of the ICC.\(^100\) Thus, it appears that arbitration is considered the
most suitable mechanism for resolution of the various disputes that may arise from almost
all types of international transactions.

Criticism of changes in the rules for international commercial arbitration usually
arises out of the aforementioned concerns over globalisation, unification and
harmonization of international trade law. Developing countries manifest distrust for the
harmonising character of uniform rules, arguing that most of these rules have been
formulated in Western Europe (with the participation of the United States and Japan in
recent decades) and proposed to the rest of the world “for the sake of the common

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\(^99\) The Council of the Organisation for Economic Co-operation and Development (the
OECD) initiated the most recent negotiations on substantive investment rules in May
1995. MAI is currently under negotiation and, if passed, will regulate investment issues
in twenty-nine OECD countries. The MAI was based on the investment provisions of the
*NAFTA* but sets out some differences, such as the scope of application of the treaty,
possibility of reservations, and basic definitions of investment, to name a few. Draft text
(DAFFE/MAI(97)1/REV2) available online:<http://www.web.net/coc/maitext.html> (data accessed on 20 October, 1999).

\(^100\) MAI Article D.2.c.i.-iv.
good."¹⁰¹ Developing countries claim that such unification does not take their disadvantaged position into consideration. On the other hand, developed countries do not believe that their laws need to be modified for the purpose of modernisation and unification. They argue that their laws are already modern enough to deal with complex international transactions and are sufficiently well known to serve as a ground of reference for businesspeople around the world. In addition, a new awareness which has emerged among arbitration practitioners, that of arbitration as “a direct witness of the interaction among different legal cultures,”¹⁰² has brought a new perspective to the harmonization process. This “cultural” perspective has long been considered in the sociological study of law but only recently has it become the subject of discussion among lawyers and legal scholars.¹⁰³

B. Legislative History of the ML

In the mid-1970s, the AALCC¹⁰⁴ send an important message to the United

¹⁰² B. Cremedas, “Clash of Legal Cultures”, supra note 44 at 160.
¹⁰³ It has been recognised recently by a distinguish arbitrator Mr. Bernardo Cremades, for example, that “when arbitration becomes transnational, the cultural unity is disrupted and the resulting kaleidoscope of different cultural patterns gives rise to a multiplicity of images affecting each stage of the arbitration proceeding.” See B. Cremades, ibid. at 160.
¹⁰⁴ AALCC was established in 1956 as an intergovernmental organization originally with a membership of seven states but it gown later to comprise all the major states in Asia and Africa and a number of observer-delegations from Latin America and Europe.
Nations—that a great number of Asian and African countries were dissatisfied with the international regime of commercial arbitration.\textsuperscript{105} Notwithstanding the fact that the AALCC suggestions for changes focused primarily on the procedural rules of conduct for international arbitration and on the \textit{1958 New York Convention},\textsuperscript{106} it provided the initiative for a new model law which was immediately recognized as one of the UN’s greatest achievements in the field of arbitration.\textsuperscript{107}

First, the AALCC was concerned with ensuring that in arbitral proceedings full effect would be given to the autonomy of the parties. In general, the question of party autonomy arose with respect to the freedom of the parties to choose procedural rules other than those of the place of arbitration and those of the place where it would be necessary for the award to be recognised and enforced. It should be recalled that in the 1970s there was still hostility in Asia and Africa (as well as in Latin America) towards arbitration. Developing countries, many of which were once colonies, saw international

\textsuperscript{105} The AALCC 17th session held of 5 July 1976 at Kuala Lumpur. The Decision of the AALCC on International Commercial Arbitration is reproduced in the Secretariat Note A/CN/127 (20 October 1976).

\textsuperscript{106} For the text of the AALCC’s decision on international commercial arbitration made on 5 July 1976 at Kuala Lumpur see also H. Holtzmann & J. Neuhaus, \textit{A Guide to Model Law}, supra note 40 at 1162.

arbitration as an imposed method of dispute resolution,\textsuperscript{108} one which was governed by old-fashioned European laws and for which their own countries were almost never the venue.\textsuperscript{109} Indeed, because of their weak bargaining position in relation to the companies and businesses of developed countries, they felt compelled to accept London or Paris as a venue. Moreover, Asian and African countries, accustomed to the flexible and informal procedural rules of their own traditional arbitration (or conciliation), feared that the national laws of the place of arbitration would dictate a use of a complicated procedure in which they were not skilled. Furthermore, they feared that even the procedural rules drafted or agreed upon by the parties to arbitration proceedings might be disregarded by both arbitrators and the courts. For these reasons, they wanted stronger protection in place to ensure procedural fairness and due process, not by way of judicial review of the procedure or the award, but through an adequate legislative framework. They wanted a regime of international arbitration designed to protect the freedom of parties to choose the applicable rules and to oblige arbitrators and the courts to take the intention of all the parties more fully into consideration. This suspicion of international commercial arbitration also arose from the involvement of developing countries in arbitrations over oil investment contracts during the 1950s and 1960s. Some arbitrators used the theory of internationalization of oil investment contracts to isolate state contracts from the control of a state party arguing that national laws of developing countries were unsuitable as a


\textsuperscript{109} See S. Sempasa, supra note 26 and S. Asante, supra note 66.
means to regulate international commerce.\footnote{See, for example, the \textit{Abu Dhabi} case (1951) 18 I.L.R. 144 and \textit{Ruler of Qatar} v. \textit{International Maritime Oil Company} (1953) 20 I.L.R. 534.} The AALCC suggested that UNCITRAL should consider the possibility of preparing a protocol to the \textit{New York Convention} which would ensure party autonomy whilst safeguarding fairness in arbitral proceedings.

The second proposal which the AALCC made to UNCITRAL was related to concerns about the misuse of sovereign immunity. There have been a number of situations where state agencies of developing countries, particularly in Latin America, often become involved in arbitration with private parties from developed countries. In general, these agencies could benefit from the ability to rely upon the state immunity privilege. As envisioned by the Calvo Doctrine\footnote{Argentinean diplomat and scholar Carlos Calvo formulated the Calvo Doctrine in the late 19th century as a way of protection of Latin American countries from diplomatic intervention of Western countries seeking remedies for their companies operating in Latin America. The two basic principles of the Calvo Doctrine are: (a) independence and equality of sovereign states which enjoy the right to absolute freedom from interference of other states through force or diplomacy and (b) foreigners should be given equal treatment with nationals, which means foreigners have to seek redress in local courts and not by diplomatic intervention. For more on the Calvo Doctrine see D. Shea: \textit{The Calvo Clause} (Oxford: Oxford University Press, 1955).} and stipulated in the Calvo Clause,\footnote{The Calvo Clause was formulated by the countries which accepted the Calvo Doctrine. It appeared in their constitutions (Mexico and Bolivia, for example) and in foreign investment contracts. There are 3 elements of the Calvo Clause: (1) equal treatment of nationals and foreigners, (2) exclusive jurisdiction of the host country and application of local law, (3) limitation of diplomatic protection. For further discussion on the Calvo Clause see: D. Manning-Cabrol, “The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors” (1995) 26 Law and Policy in Int’l Bus. 1169, K. Dalrymple, “Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause” (1996) 29 Cornell Int’l L.J. 161 and C. Baker & L.J. Yoder, “ICSID and the Calvo Clause; a Hindrance to Foreign Direct Investment in LDC’s” (1989) 5 J. Disp. Resol. 75. See also \textit{North American Dredging Co. of Texas} v. \textit{United Mexican State} (1926) 4 Rev. Int’l Arb. Awards.}
state agencies might rely on the sovereign immunity from any international claim and on the right of the state to resolve (investment) disputes with foreign investors by its courts and in accordance with its laws. The misuse of sovereign immunity in foreign investment transactions had already been addressed in the ICSID Convention to which some of the AALCC countries were signatories. However, the AALCC wanted to go beyond the restriction placed by the ICSID Convention on the use of this privilege. It proposed that a new set of arbitration rules should be created in order to preclude government agencies, which have already entered into agreements requiring the arbitration of disputes, from relying on sovereign immunity as a means of avoiding arbitration proceedings or enforcement of an unfavourable award.\textsuperscript{113} In sum, the AALCC was of the view that the invoking of sovereign immunity would bring in an element of uncertainty to the main transaction and to arbitration. In particular, it might be unclear whether state agencies lack capacity to enter into a valid arbitration agreement or an agreement to arbitrate implies a waiver of the claim to jurisdictional immunity.

In response to the AALCC report, UNCITRAL rejected the idea of developing a protocol to the New York Convention. UNCITRAL concluded that any change to the New York Convention would require agreement by all of the parties, which would be a time consuming and complicated procedure. Instead, it proposed to establish uniform standards of arbitral procedure in the flexible form of a model law which would have

party autonomy as its paramount principle and which would also emphasise the procedural fairness identified by the AALCC as being of major importance.

UNCITRAL also rejected the second AALCC proposal declaring that it would not deal with sovereign immunity. UNCITRAL’s attitude was that the issue was “a part of a more general and complex problem having an obviously political and public international law character.”

It is interesting that UNCITRAL decided to advance party autonomy not only with respect to the rights of the parties to choose (and create) procedural rules but also as to the choice of substantive law. However, this position was considered by scholars from Asia and Africa to be excessive in comparison with the original proposal of the AALCC. The resulting new concerns of the AALCC were based on the premise that arbitrators might use their powers determined in article 28(2) of the ML to go beyond the interest of the parties. The scenario feared by the AALCC was the following. The parties are free to choose the applicable law and they are free to determine the powers of the arbitrators but, if the parties fail to determine the applicable law, then the arbitrators may feel free to take into account trade usage and *lex mercatoria* or any other rules they consider applicable.

At this point a general criticism of broad interpretation of arbitrator’s powers begins. It is based largely on the argument that trade usage and *lex mercatoria* were created by Western European merchants and that a resort to such standards brings parties from

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developing countries into an unfavourable position.\textsuperscript{116} This AALCC criticism highlighted the complexity of UNCITRAL task and the importance of providing for limits to the powers of arbitrators, including the limits provided for in article 28(3) to act \textit{ex aequo et bono} only with the specific agreement of the parties.

The task of drafting the ML was given to the already existing UNCITRAL Working Group on International Contract Practices composed of representatives of 15 states\textsuperscript{117} but experts from very many countries, representing different legal systems and cultures assisted it. To begin with, the Working Group held extensive consultations with the AALCC, with the International Council for Commercial Arbitration (ICCA) and with the Arbitration Commission of the ICC. Then, a great number of individual experts were consulted. In sum, more then fifty states representing all regions and legal and economic systems and more then fifteen international organisations participated in the drafting

\textsuperscript{116} See also A. Rogers, “Contemporary Problems in International Commercial Arbitration” (1989) 17 Int’l Bus. Law. 154 at 158: “It seems to me that this approach equates universality with only the European world. This alleged universal law merchant held no sway in India, or China and even less in the less developed or undiscovered parts of the world.” However, there are some suspicous towards the powers of arbitrators to act \textit{ex aequo et bono} on behalf of developed countries, mainly with common law tradition. For example, see M. J. Mustill, “Contemporary Problems in International Commercial Arbitration: A Response” (1989) 17 Int’l Bus. Law. 161. Lord Mustill asks at 161: “Can parties effectively contract to have their disputes decided by arbitrators who are empowered to apply no defined principles, but merely their own ideas of what is fair? What is the status of any resulting award?”

\textsuperscript{117} The UNCITRAL Working Group on International Contract Practices [hereinafter the Working Group] initially included Austria, Czechoslovakia, France, Ghana, Guatemala, Hungary, India, Japan, Kenya, Philippines, Sierra Leone, Trinidad and Tobago, USSR, United Kingdom of Great Britain and Northern Ireland and United States of America. However, the growing interest of other states resulted in the enlargement of the Working Group in 1983 to include all 36 states members to UNCITRAL.
The UNCITRAL Secretariat did much preparatory work and collected data on national arbitration laws. Finally, during its five sessions in the period 1982-1984, the Working Group prepared a draft model law. After an extraordinary discussion during the 18th session, UNCITRAL established the final text of the ML. The final text had 36 articles divided into eight chapters. The last two chapters incorporated the *New York Convention* almost in its entirety. In that way UNCITRAL accomplished its task and finalised the three-pillar system of international arbitral justice. The United Nations has recommended to its members that the ML should be considered for adoption.

In general, the ML appears as a set of procedural rules which rely on party autonomy and provide a framework for arbitral proceedings when the parties themselves

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120 Chapter I – general provisions (on the scope of application and basic definitions of the ML); Chapter II – arbitration agreement (on form and the substance of the arbitration clause itself); Chapter III – composition of arbitral tribunal; Chapter IV – jurisdiction of arbitral tribunal; Chapter V – conduct of arbitral proceedings; Chapter VI – making of award and termination of proceedings; Chapter VII – recourse against award and Chapter VIII – recognition and enforcement of awards.

121 Note, however, that the ML provides for enforcement of international awards which in the context of the territoriality principle of the *New York Convention* encompasses both foreign and domestic awards.

fail to specify the procedure. The ML is applicable to international commercial arbitration. Even though the ML starts with definitions of “international” and “commercial”, it remains silent on a great number of basic concepts contained in the text (arbitrability, liability of arbitrators, costs and interests, consolidation, to name but a few). The basic principles, even though not stated in the ML itself, can be identified as party autonomy, limited court intervention, independence of the arbitral tribunal and fairness of procedure. All of these principles will be elaborated upon in the next heading.

C. Basic Principles of the ML

Notwithstanding the flexibility of the ML, which allows modification to the original text by the adopting state, the ML, as a framework for dispute resolution, is at its most efficient only if the delicate balance of its four basic principles is preserved. These four principles are not novel to the ML. They have existed in numerous international treaties and conventions and in the laws of various countries. The principles of party autonomy, independence of arbitral tribunals, limited court intervention and procedural fairness were incorporated into the two pillars of the international arbitration system which existed before the ML— the New York Convention and the UNCITRAL

124 For a non-exhaustive list of matters not governed by the ML see the commentary of the Working Group and the Secretariat as reproduced by H. Holtzmann and J.E. Neuhaus,
Arbitration Rules. However, with the ML, all of these principles gained more importance and achieved a unique balance not found within the individual national legal frameworks.

1. Party Autonomy

According to the first report of the UNCITRAL Secretariat, “[p]robably the most important principle on which the ML should be based is the freedom of parties ... to tailor ‘the rule of the game’ to their specific needs.”125 This principle of party autonomy principle is not only a basic principle of contract law of all modern states and economies, but also the fundamental principle of international trade and investment.126 It has been recognised in general principles of law and international treaties such as the 1923 Geneva Protocol on Arbitration Clauses, the 1929 Geneva Convention on the Execution of Foreign Arbitral Awards127 as well as the New York Convention,128 to name but a few.

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127 The 1923 Geneva Protocol, supra note 10, article 2: ”The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.” [emphasis added].
128 Article V(c)(d) of the New York Convention, supra note 10, indirectly says that
Also, even though the UNCITRAL Arbitration Rules do not directly address party autonomy, they make reference to it indirectly—by describing the authorities and duties of the tribunal if the parties fail to determine them.129

Indeed, it should be noted that the ML regulates only voluntary arbitration. Hence, it leaves a broad discretion to the parties to define procedural and substantive rules which will govern the arbitration, providing for minimal requirements as to the form and content of arbitration agreements. Even the requirement for written form in article 7 (2) of the ML is imposed primarily for the purpose of compliance with the provisions of the New York Convention, specifically Article II(2).130 For these reasons, it is correct to say that the ML sees consensus of the parties as the cornerstone of arbitration and the agreement to arbitrate as an expression of the principle of freedom of contract. The ML enables parties to determine practically the whole pattern of arbitration. Namely, the parties have the right to enter into arbitration; to establish the arbitral tribunal; to decide on the place of arbitration; to choose the procedural rules, the rules of evidence, the language, and the rules of law applicable to the merit of their dispute.

Article 1(3)(c) of the ML confers on the parties, if they expressly agree that the recognition and enforcement of award can be refused if the will of the parties was not obeyed by arbitrators in the way that: “(c) the award deals with the difference not contemplated by or not falling within the terms of the submission to arbitration; (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties.” [emphasis added].

129 See in particular articles 5, 7, 12 and 16 of the UNCITRAL Arbitration Rules, supra note 88.

130 Article 7 of the ML uses Article II (2) of the New York Convention, as a guideline, but it extends the list of written means, which can be accepted as being valid arbitration agreements. While the latter refers to an exchange of letters or telegrams, the former lists an exchange of letters, telex, telegrams or other means of telecommunication.
subject matter of their dispute is of an international character, the freedom to opt for the application of the ML. This is a controversial provision. At the first glance, it appears that the parties may choose to apply the ML even in a situation when other requirements for its application are not met. At the time of drafting of the ML, this option was vehemently objected to both the UNCITRAL Working Group and the UNCITRAL Secretariat on the grounds that parties might use this option as a means of escaping from mandatory provisions of the their domestic law that would normally be applicable to their dispute, or even to arbitrate a dispute which would not otherwise be arbitrable.\textsuperscript{131} In order to secure that paragraph (3) would not affect the legislation of states about arbitrability, the Working Group proposed that a new paragraph (article 1(5)) be added expressing the \textit{lex specialis} character of the ML. This paragraph emphasizes that a dispute shall not be submitted to arbitration if any laws of the adopting states define such a dispute as non-arbitrable. In addition, the provisions in the ML articles 34 and 36, respectively, allow national courts to refuse to recognise or enforce an award on the grounds that the dispute to which it relates was not arbitrable under the \textit{lex fori}.

The right of the parties to proceed with arbitration, once written agreement is reached in accordance with article 7, is protected primarily by article 8(1). This article provides that when an action is brought before a court, the court will refer the parties to arbitration whenever the requirements with respect to the validity of an arbitration agreement are met. Clearly, this measure is in accordance with the basic intention of the drafters to utilise the compulsory power of state courts in order to protect private methods

of dispute resolution. Also, it should be noted that article 8(1) explicitly provides that a party can take the initiative to seek such protection.\textsuperscript{132}

The articles which regulate the composition of an arbitral tribunal (articles 10(1), 11(2), 13(1)); those which regulate the conduct of arbitral proceedings (article 19(1), 20(1) and 22(1); and that which determine the law applicable to the substance of the dispute (article 28(1)), prioritise in the most explicit way party autonomy regarding mandatory provisions and judicial intervention. They establish almost exclusive rights for the parties, which are only restricted by the court's right to intervene for the purpose of due process.\textsuperscript{133} According to articles 10(1), 11(2) and 13(1), for example, the parties are free to decide the number of arbitrators and free to determine the procedure for appointment and challenge of arbitrators. Only if the parties fail to decide so, or if their attempt is unsuccessful, will the ML rules be applicable\textsuperscript{134} and will the courts or other authorities (determined by national laws) intervene.\textsuperscript{135} Again, the initiative belongs primarily to the parties, and only subsequently to courts.

As to the conduct of arbitral proceedings, most of the articles also favour freedom of parties, conferring authority to the arbitrators only if the parties fail to act. Article

\textsuperscript{132} Article 8(1): "A court shall ... if a party so request ... refer the parties to arbitration ...".


\textsuperscript{134} Articles 10(2), 11 (3)(4)(5).

\textsuperscript{135} Articles 11(3) and 13(3).
which provides the most liberal framework for arbitral proceedings, allows the
parties to decide freely the procedural rules that will govern the arbitration. Here, they are
limited only by the general conditions of due process accepted by the majority of legal
systems—equal treatment of parties (article 18), the right to a hearing (article 24(1)), and
the right to appoint and question experts (article 26). There have been some objections
that such formalised and detailed requirements are contrary to the right of the parties to
have a quick, uncomplicated resolution of their dispute, and that they lead to the
judiciarization of arbitration proceedings. Obviously, the needs for certainty, fairness,
and equality in arbitration procedures have to be balanced with party autonomy and the
need for flexibility.

Although the parties are limited by due process with respect to the conduct of
arbitral proceeding, they are free to choose the place of arbitration,\textsuperscript{138} the language\textsuperscript{139} and
the rules of law applicable to the substance of the dispute.\textsuperscript{140} The choice of the place of
arbitration is important for at least three reasons. First, it determines the applicability of
the ML itself\textsuperscript{141} and the nature of the arbitration.\textsuperscript{142} Secondly, it determines the place of

\textsuperscript{136} The drafters have called article 19 the "Magna Carta of arbitral procedure"; see the
Seventh Secretariat Note, Analytical Commentary on Draft Test A/CN.9/264 (25 March
1984).

\textsuperscript{137} R. Lillich & C. Brower, eds., \textit{supra} note 74 at Introduction ix.

\textsuperscript{138} Article 20.

\textsuperscript{139} Article 22.

\textsuperscript{140} Article 28.

\textsuperscript{141} Article 1(2).

\textsuperscript{142} Article 1(3)(b)(i).
the arbitration award.\textsuperscript{143} Finally, the choice of the place of arbitration determines the recognition and enforcement of the award.\textsuperscript{144} To reiterate, only if the parties fail to choose the place of arbitration will the arbitrators get the power to make such a choice.

The solution provided in article 28 with respect to the choice of the law applicable to the merits of a dispute is one of the strongest indications that the ML prioritises party autonomy. First, article 28 provides that the parties are free to choose any rules of law they want to be applied by arbitrators in deciding on the substance of the dispute.\textsuperscript{145} It further determines that the term "national laws" should refer to the substantive laws, not the conflict of laws rules.\textsuperscript{146} Conversely, when the arbitrator is authorised to choose the applicable law, his/her choice will be determined by the conflict of laws rules.\textsuperscript{147} Thus, only the parties are free to choose any legal system they want; only they are free to combine rules from several systems in order to make a suitable framework for their transaction. The real issue here is whether the parties can use the power conferred on them in article 28 to set aside mandatory rules of law affecting the main contract.\textsuperscript{148} The

\textsuperscript{143} Article 31(3).
\textsuperscript{144} Article 36(a).
\textsuperscript{145} Article 28(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..."
\textsuperscript{146} Article 28(1): "...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." [emphasis added]
\textsuperscript{147} Article 28(2): "Falling any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."
\textsuperscript{148} Yves Derains cites several cases on the issue in his article "Public Policy and the Law Applicable to the Dispute in International Arbitration", in P. Sanders, ed., \textit{Comparative Arbitration Practice and Public Policy in Arbitration}; ICCA Congress Series no. 3 (Deventer: Kluwer Law and Taxation Publisher, 1987) [hereinafter \textit{ICCA Congress}
only limit imposed on the parties freedom to choose substantive law arises in articles 34 and 36 of the ML in the post-award stage of the procedure. In other words, if a mandatory rule of law has not been applied the national court may set aside an award for being against public policy (article 34(2)(b)(ii)). It may also be against public policy for a national court to recognise and to enforce such an award in some situations (article 36(1)(b)(2)).

After the analysis provided above, it is possible to conclude that the ML represents a significant attempt to broaden party autonomy in arbitral proceedings in order to meet the desire of parties to settle their disputes in private. However, recourse to national courts has not been eliminated. The extent of court involvement in arbitration within the ML framework is explored in the following section.

2. Limited Court Intervention

The basic idea of balancing party autonomy and judicial intervention is that

Series no. 3] 238 at 242-254. One case involves two companies—one from East Germany and one from West Germany. See also an award of June 1976 reported in (1979) IV Y.B. Comm. Arb. 197. Two companies concluded a licence agreement and made the contract subject to the law of East Germany. At the same time, the contract was void according to the mandatory rules of West Germany. In fact, it was contrary to the Article 85 of the Treaty Establishing the European Community, 25 March 1957. Arbitrators decided to examine the intention of the parties in order to find out whether they wanted to escape from the mandatory competition rules. They decided that the law of East Germany should be applicable.
arbitration and the courts are complementary legal processes. Arbitrators and courts are partners in a system of international commercial justice and not antagonists or competitors. The most important article that defines this balance is article 5 which reads:

"In matters governed by this Law, no court shall intervene except where so provided in this Law."

In other words, article 5 establishes the principle of express exclusion of judicial intervention in arbitral proceedings to the extent provided for in the other provisions of the ML.

There had been some concern even within the Working Group, and especially on behalf of the English delegation, that this limitation would result in an unnecessary restriction in the scope of judicial control over arbitration. The reason for such an opinion is the English tradition of courts supervising private dispute resolution. However, these objections did not change the plan of the drafters to opt for a minimum of court intervention in arbitral proceedings. The answer advanced to the objection was that the area governed by the ML was not defined precisely and that this, in fact, gave both

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arbitrators and judges a certain amount of discretion.\textsuperscript{152}

Court intervention is provided for in the ML articles at all stages of proceedings. Article 6 implicitly draws the line between two groups of articles which regulate court intervention. This article allows states, following their own hierarchies of judicial function, to decide which court or other authority will act supportively and supplementary to the parties' authority\textsuperscript{153} in the appointment of the arbitrators,\textsuperscript{154} challenge of arbitrators,\textsuperscript{155} failure or impossibility of arbitrators to act,\textsuperscript{156} determination of preliminary questions of arbitrators' jurisdiction\textsuperscript{157} and the setting aside of an award.\textsuperscript{158}

Article 9 explicitly gives a party the right of to seek from the court interim measures of protection, while article 17 empowers arbitrators to grant interim measures of protection.\textsuperscript{159} Finally, article 27 calls for court intervention in the taking and

\begin{enumerate}
\item For example, in BCICAA, this authority is conferred on the Chief Justice of the Supreme Court of British Columbia (article 11(4)(5)) or to the Supreme Court itself (13(3)). In Russia, the \textit{LICA} provides that these functions will be performed by the President of the Russian Chamber of Commerce and Industry (article 6). Until 1996, the appointing authority in Hong Kong was the High Court, but then the \textit{1996 Ordinance} (No. 75 of 1996) conferred the function to the HKIAC (section 12(1)(2)).
\item Article 11(3)(4).
\item Article 13(3).
\item Article 14.
\item Article 16(3).
\item Article 34(2).
\item Article 9: “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.”
\item Article 17: “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.
\end{enumerate}
preservation of evidence in arbitral proceedings.\textsuperscript{160} The parties will seek interim measures of protection from the courts for two reasons. First, because it may be the exclusive power of courts to order certain types of interim protection\textsuperscript{161} and second, because although the arbitrators might have the authority to grant interim measures, only courts have the power to enforce them.

It is for the latter reason that the effectiveness of arbitration and its independence from the courts is questioned. Moreover, this situation sheds more light on the issue of concurrent power of arbitrators and courts.\textsuperscript{162} Besides the fact that arbitration lacks the enforcement mechanisms the courts possess, the problem is in the private nature of the arbitration itself. Since arbitration is established on a consensual basis, its measures are directed only at the parties from the arbitration agreement. In contrast, the courts' measures can be addressed to anyone, not only to the parties involved in the case before court.

In short, by providing for court assistance only upon the request of a party or of the arbitral tribunal itself, or in other words by preventing courts from \textit{sua sponte} actions with respect to measures of interim protection, the ML moved the pendulum from judicial intervention towards arbitration.

The arbitral tribunal may require any party to provide appropriate security in connection with such measure.\textsuperscript{163}

\textsuperscript{160} Article 27: “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. To court may execute the request within its competence and according to its rules on taking evidence.”

\textsuperscript{161} For instance, Mareva injunction, or an injunction to attach bank accounts.

\textsuperscript{162} On concurrent power of arbitration and courts see M. McNerney & C.E. Esplugues,
(i) Court Intervention Outside Article 5

According to article 5, the ML explicitly determines the extent of permissible court intervention. However, in a number of their notes and reports the Working Group and the Secretariat have offered lists of issues that definitely remain outside the ML. These issues, for example, include the capacity of parties to conclude the arbitration agreement, the impact of state immunity, the contractual relations between the parties and the arbitrators, fixing of fees and costs and requests for deposits or security, consolidation of arbitral proceedings, competence of arbitrators to adapt contracts, enforcement of courts of interim measures ordered by the arbitrators, the period of time for enforcement of arbitral awards and the liability of arbitrators for misconduct or error. The Working Group and the Secretariat have suggested, without dwelling on the point, that it should be legislatures or even courts, but certainly not the parties to arbitration, who should decide whether or not court intervention is warranted in a particular case. Thus, the issue of arbitrability of a dispute may vary from state to state, and from case to case.

\textit{supra} note 133 at 57.

\footnote{163} For the full list of matters not governed by the ML see H. Holtzmann & J. E. Neuhaus, \textit{A Guide to Model Law, supra} note 40 at 218.

\footnote{164} \textit{Ibid.}, at 219.
(ii) Public Policy Issue

This analysis will not elaborate on the use of the term "public policy" in the context of international arbitration\textsuperscript{165}. Neither will it go into a detailed legal comparison between article V of the New York Convention and articles 34 and 36 of the ML, which are near duplicates of article V\textsuperscript{166}. Since arbitrability\textsuperscript{167} and public policy\textsuperscript{168} issues are two concerns which courts examine \textit{ex officio}, the emphasis in this thesis will be on the \textit{ex officio} actions of courts or other authorities with respect to the setting aside of awards (article 34(2)(b)), and actions of courts with respect to the refusal to recognise and enforce awards (article 36(1)(b)).\textsuperscript{169}

The concept of arbitrability is, in fact, also a public policy limitation upon the scope of arbitration.\textsuperscript{170} In articles 34 and 36 reference is made to the issue of arbitrability in terms of so-called objective arbitrability: that is, what can be arbitrated.\textsuperscript{171}

\begin{footnotesize}
\begin{enumerate}
\item For a detailed discussion see P. Lalive, "Transnational (or Truly International) Public Policy and International Arbitration" in P. Sanders, ed., \textit{ICCA Congress Series No.3}, supra note 148, at 258.
\item Grounds for setting aside an award in article 34(2) and for refusal of recognition and enforcement of an award in article 36 of the ML are the same as the grounds for refusal of recognition and enforcement of the foreign award provided in Article V of the \textit{New York Convention}.
\item Article 34(2)(b)(i) and article 36(1)(b)(i).
\item Article 34(2)(b)(ii) and article 36(1)(b)(ii).
\item Article 34(2)(a) and article 36(1)(a) impose the obligation to furnish certain proofs on the party which applies to the court.
\item On objective and subjective arbitrability see K.-H. Böckstiegel, "Public Policy and
\end{enumerate}
\end{footnotesize}
arbitrability is to be determined by the law of the country where the setting aside or recognition and enforcement of award is sought. Thus, that country's public policy will decide what will be arbitrable. However, non-arbitrable issues may, after a certain time, become arbitrable.\textsuperscript{172} Usually, non-arbitrable issues are within the field of the laws on competition law, bankruptcy, intellectual property rights, and matrimonial status.\textsuperscript{173}

The ML does not resolve the ambiguity of the issue of arbitrability. In general, article 1(5) of the ML leaves the issue of arbitrability outside the domain of the principle of party autonomy and the ML itself.\textsuperscript{174} This leads us to the second problem—public policy. The phrase itself, controversial at the time the ML was drafted, was much debated by the Working Group of UNCITRAL. This debate reveals a great uncertainty with respect to the actual meaning of the notion and its place within articles 34 and 36. Even the legislative history of the drafting cannot offer reliable guidelines.\textsuperscript{175}

It is significant that the "public policy problem" had appeared earlier since, under Article V(2) of the \textit{New York Convention}, public policy is grounds for refusal to enforce awards. The prevailing opinion at the time of drafting the ML was that the notion of arbitrability" in P. Sanders, ed., \textit{ICCA Congress Series No.3} at 188.


\textsuperscript{173} For example, the French \textit{Civil Code} of 1804 (\textit{Code civil des Français}) mandates that "one can arbitrate with respect to all rights of which one can dispose freely" (article 2059), but cannot submit to arbitration "questions of status and capacity of persons, questions relating to divorce and separation, or questions respecting controversies that concern public entities or public establishments and more generally any matter that concerns the public order" (article 2060).

\textsuperscript{174} Article 1(5): "This Law shall not affect any other law of this state by virtue of which certain disputes may not be submitted to arbitration...".

\textsuperscript{175} See discussion provided in H. Holtzmann & J. E. Neuhaus, \textit{A Guide to Model Law}. \textit{supra} note 40 at 918-920.
“public policy” had to be interpreted narrowly, otherwise it could be misused to enable a losing party to inappropriately avoid enforcement of an arbitration award.

When public policy has to be interpreted by national courts and according to national laws, the uncertainty may be even greater because public policy is highly dependent upon national legal culture. For instance, when public policy has to be determined according to Russian Law, courts have to look into the Fundamentals of Civil Legislation of the USSR. The explanation there is that public policy represents the fundamental principles of Russian law. Such a broad and thus vague definition allows broad scope for court interpretation.

In summary, the ML, by choosing to pattern important provisions after the New York Convention Article V, failed to bring more certainty to the determination of the limits of ex officio court intervention with respect to subject-matter arbitrability and public policy. Since public policy has traditionally been used as a ground for refusal to enforce both foreign arbitral awards and foreign court judgments, it is surprising that the ML failed to propose an original solution. UNCITRAL chose, instead, to maintain the solution adopted in the New York Convention. Because the term public policy could be understood as having different meanings in different legal systems, the Working Group was not able to reach a solution acceptable to all participants. Moreover, the Working Group and the Secretariat in discussing the term “public policy” referred to “the fundamental notions and principles of justice”, but not to “the political stance or


177 J. A. Van Den Berg, The New York Convention, supra note 170 at 360.
international policies of a State.”¹⁷⁸ In other words, the term “public policy was deemed to encompass fundamental principles of law and justice in substantive and procedural respects.”¹⁷⁹ Unfortunately, this formulation of the ML could give rise to the suspicion that international commercial arbitration lacks certainty since enforcement of awards might be refused on the basis of a vague concept. This means that the meaning of the words "public policy" will depend on domestic judicial interpretations such as in the well-known Mitsubishi Motors v Soler Chrysler-Plymouth Inc., case, where the Supreme Court of the United States held that disputes involving important regulatory issues, such as those arising under the U.S. federal antitrust laws, were arbitrable.¹⁸⁰ By expanding the scope of international arbitration to encompass antitrust issues arising under international contracts the Supreme Court of the United States sent an important message to other jurisdictions to consider changing their own attitudes regarding the arbitrability of statutory claims support of international commercial arbitration.

¹⁷⁹ Ibid., para. 297.
¹⁸⁰ In Mitsubishi, the Supreme Court of the United States enforced an arbitration clause in the contract between Mitsubishi, a Japanese car manufacturer, and Soler, a Puerto Rico based dealership. Soler insisted that the dispute was not arbitrable, because it involved the issues mandatory governed by the United States antitrust laws. The Court rejected Soler’s argument and held that the arbitration clause had to be enforced under the New York Convention. More important the Court emphasized that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, all require enforcement of the arbitration clause in question, even assuming that a contrary result would be forthcoming in a domestic context." See the judgment delivered by Justice Blackmun in Mitsubishi Motors v. Soler Chrysler-Plymouth Inc. 473 U.S. 614 (1985) at 615.
3. Independence of Arbitral Tribunal

As a principle of the ML, independence of the arbitral tribunal refers to a number of powers conferred on arbitrators in order to enable them to carry on arbitral proceedings and to render awards. Arbitral independence can also refer to the relationship between the arbitrators and any of the parties,\textsuperscript{181} though this topic will not be discussed below.

Specifically, the principle of independence of arbitral tribunals encompasses the right of arbitrators to rule on their competence, the power to provide interim measures of protection, and the right to appoint experts to assist them.\textsuperscript{182} The sources of these powers are the parties' agreements to arbitrate, on one hand, and the national law, on the other. Consequently, the authority of arbitrators cannot be broader than provided for by the parties and by the national law.\textsuperscript{183} This is consistent with the principle of party autonomy and the fact that arbitration is a procedure voluntarily undertaken by the parties.\textsuperscript{184} The types of disputes which arbitrators have jurisdiction to settle are specifically agreed to by the parties and set out in the Scope of Arbitration clause. By opting for particular procedural rules, the parties further determine limits to the procedural powers of arbitrators and the ways in which arbitrators are to arrive at their awards. However, national law sets limits to both party autonomy and to the powers of arbitrators in two

\textsuperscript{181} A. Redfren & M. Hunter, \textit{supra} note 5 at 218-226.


ways. First, it determines what can be arbitrated; then, it establishes a number of mandatory procedural rules. In this sense, the ML sets certain mandatory rules in order to protect procedural fairness.

(i) The Right of Arbitrators to Rule on Their Jurisdiction

This right is governed by article 16 of the ML. The first paragraph of this article incorporates two principles which largely determine the independence of arbitral tribunals—severability of arbitration clause and Kompetenz-Kompetenz. Kompetenz-Kompetenz deals directly with the power of arbitrators to rule on their own jurisdiction, while the severability principle deals with the validity and autonomy of an arbitration clause as distinct from the main contract. The two principles have been embodied within the same paragraph of article 16 to emphasise their close relationship:

“(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement [Kompetenz-Kompetenz]. 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 [severability]. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause [severability].”

In some international proposals and national laws adopting the ML, the two principles are incorporated in separate paragraphs in order to clarify their meaning and

185 All italicised emphases added.

186 See, for example, article 21(1)(2) of the UNCITRAL Arbitration Rules, supra note 88.
interrelation. The BCICAA, for example, separates the two principles in the following way:

Section 16

"(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement [Kompetenz-Kompetenz], and for that purpose,

(a) an arbitration clause with forms part of a contract shall be treated as an agreement independent of the other terms of the contract [severability], 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 [severability]."

Thus, although these principles were adopted by some countries in a slightly different form, their meaning has been preserved as defined in the ML itself.

Severability of Arbitration Clause

The severability principle "significantly curtails judicial interference with arbitration," confining it to "situations in which the validity of the arbitration clause itself is in question." The severability principle has been widely adopted, and in similar

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187 See, for example, relevant provisions of the statutes of Canadian provinces.


189 G. Delaume, ibid., at 205.
form, in most European countries and in the United States.\footnote{190} As previously mentioned, severability is incorporated into article 21(2) of the UNCITRAL Arbitration Rules.\footnote{191}

The provision for arbitration may be a clause of the main contract or may form a separate agreement. In the latter case, it is almost universally accepted that invalidity of the main contract does not affect the validity of the arbitration agreement and the jurisdiction of the arbitrators. Such acceptance, when an arbitration clause is contained in the main contract, has not always been so widespread. However, it has gradually been accepted in England and in countries influenced by English traditional law.\footnote{192} As a result, the English approach has come closer to the continental European approach.\footnote{193} Indeed, severability has been recognised in Belgium, France, Germany, Greece, Italy, the


\footnote{191} But, it is not directly addressed in the \textit{1961 European Convention}, supra note 95, nor in the \textit{ICSID}, supra note 92, and the \textit{Panama Convention}, supra note 96.

\footnote{192} Severability was widely discussed by the House of Lords in \textit{Heyman v. Darwins, Ltd.} [1942] A.C. 356. Their Lordships dealt with the availability of the arbitration clause included in the contract which had been repudiated. They decided to stay proceedings but the arguments given separately by their Lordships reveal the great controversy of the issue. According to Viscount Simon L.C., “an arbitration clause is a written submission, agreed to by the parties to the contract, and like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made.” See \textit{Heyman v. Darwins, Ltd.}, \textit{ibid.} at 366. Consequently, Viscount Simon L.C. moves on and concludes that “it is fallacious to say that because the contract has ‘come to an end’ before performance begins, the situation, so far as the arbitration clause is concerned, is the same as though the contract had never been made.” See, \textit{ibid.}, at 368.

\footnote{193} In \textit{Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.} [1981] 2 W.L.R. 141, the English Court of Appeal adopted an approach favourable to the severability doctrine ruling that an arbitration agreement “is, in strict analysis, a separate contract, ancillary to the main contract.” See, \textit{ibid.}, at 166.
Netherlands, Sweden and Switzerland, as well as in the former USSR and the socialist bloc countries. In general, the continental approach assumes that since an arbitration clause is severable, the authority of arbitrators is not disputable as long as it derives from a valid arbitration agreement. Therefore, an arbitral tribunal may rule on a dispute which arises from the main contract. However, this is subject to another assumption, that the arbitration clause is valid and broad enough to include any dispute regarding the validity, interpretation or performance of the contract. In other words, a problem may arise as to the question of the arbitrator’s jurisdiction when an arbitration agreement itself is not valid. The ML provides a solution by adopting the Kompetenz-Kompetenz principle.

The Kompetenz-Kompetenz Principle

This principle originated in German law which provided that parties might confer

\footnote{194 See G. Delaume, \textit{supra} note 188 at 204.}

\footnote{195 See W.E. Butler, \textit{Arbitration in the Soviet Union} (New York: Oceana Publication, Inc., 1989) at 5. The approach was confirmed in a number of cases—such as \textit{V/O Eksportles v. S.A. Lemayer Frères} (Belgium), the FTAC award of 6 October 1952, and \textit{V/O Sojuznefteeksport v. Joint Stock Company of A. Moroni \\& K. Keller} (Venice), the FTAC award of 7 January 1960, reported in W.E. Butler, \textit{ibid.}, as the awards no. 40 and 75 respectively.}

\footnote{196 See G. Delaume, \textit{supra} note 188 at 204.}

on arbitrators the power to rule on their own jurisdiction and that an arbitrators’ ruling, not the courts, would be the last word on the issue.\textsuperscript{198} The principle was accepted in modified form by other legal systems of continental Europe to confer on arbitrators the power to rule provisionally on the existence, validity and scope of an arbitration agreement, the last word being given to courts.\textsuperscript{199} This modified principle is incorporated, for example, in the \textit{1961 European Convention},\textsuperscript{200} in the \textit{ICSID Convention}\textsuperscript{201} and in the UNCITRAL Arbitration Rules.\textsuperscript{202}

The \textit{Kompetenz-Kompetenz} principle also includes the power to decide on whether the tribunal is correctly established.\textsuperscript{203} Some authors find that the principle means “no more than that arbitrators can look into questions that affect their jurisdiction without waiting for a court to do so.”\textsuperscript{204}

\begin{itemize}
\item \textsuperscript{198} As explained in P. Schlosser, “The Competence of Arbitrators and of Courts” (1992) 8 Arb. Int’l 189 at 199.
\item \textsuperscript{199} However, Schlosser argues that the principle has been modified in Germany by a decision of the Federal Court in 1988 (Wertpapiermitteilungen 1988, 1430) to mean that the arbitrators have the “first shot” regarding the scope of arbitration agreement. See P. Schlosser, \textit{ibid.}, at 203.
\item \textsuperscript{200} The \textit{European Convention}, supra note 95, article V(3): “Subject to any subsequent judicial control provided for under the \textit{lex fori}, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.”
\item \textsuperscript{201} The \textit{ICSID Convention}, supra note 92, article 41(1): “The Tribunal shall be the judge of its own competence.”
\item \textsuperscript{202} The UNCITRAL Arbitration Rules, \textit{supra} note 88, article 21(1): “The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or the separate arbitration agreement.”
\item \textsuperscript{203} P. Schlosser, \textit{supra} note 198 at 200.
\item \textsuperscript{204} W. Park, “Text and Context in International Dispute Resolution” (1997) 15 B.U. Int’l
The ML established Kompetenz-Kompetenz as a mandatory principle and the parties may not contract out the right of arbitrators to rule on jurisdiction. However, the ML does not give all the powers to arbitrators. Their decision on jurisdiction is not res judicata, but only the initial ruling on the issue. If certain procedural requirements set out in article 16(3) have been met, the ML allows concurrent court proceedings. In addition, the courts can deal with the issue in a number of other situations. For example, when ruling in the context of article 8(1) to stay proceedings and to refer a matter to arbitration, a court can decide on the issue of jurisdiction. In can also deal with the jurisdiction of arbitrators after the award has been made, i.e., when deciding to set aside the award (article 34), or when deciding on recognition and enforcement of the award (articles 35 and 36).

In short, according to the ML arbitrators may rule on their jurisdiction sua sponte (article 16(1)), on the initiative of a party (article 16(2)), in the form of interim award or in the form of a final award on the merits (article 16(3)). Finally, a party unsatisfied with the arbitrators’ ruling may bring the issue before a national court (article 16(3)).

To conclude, the ML adopted the modified Kompetenz-Kompetenz principle which gives arbitrators the “first shot” at the jurisdictional issue, while the “last shot” or a

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L.J. 191 at 201.

205 Article 16(3): “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.”

206 But see, for example, article 21(1) of the UNCITRAL Arbitration Rules, supra note 88, which provided that arbitral tribunal rules “on objections” of a party that it has no jurisdiction.
In that way the Working Group tried to balance two different approaches to the problem of division of powers between the courts and arbitrators. For a number of common law countries, accustomed to court supervision over arbitration, the *Kompetenz-Kompetenz* principle was a step too far. For example, England was reluctant to accept the extended powers of arbitrators primarily fearing errors in law and procedural misconduct and considering “last shot” type court intervention to be a waste of the parties’ time and money. On the other hand, the civil law countries which had earlier adopted the *Kompetenz-Kompetenz* principle (either pure or modified) opted for the principle as the means of avoiding dilatory tactics by a resistant party. Article 16(3) has been included as a compromise which gives the initiative to arbitrators to decide the issue *sua sponte* as a preliminary question, but also gives the right to a party to ask for a court decision on this arbitral preliminary ruling. Arbitrators do have the discretion to admit an untimely plea, but not in the post-award phase. The intention of the Working Group and the Secretariat was to preclude a party which fails to act in a timely fashion from raising the jurisdictional objection in the post-award phase—that is, at the stage of setting aside or enforcing the awards.

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207 The expressions the “first and last shot” have been borrowed from Gerold Herrmann, the Secretary of UNCITRAL. See G. Herrmann, “The Arbitration Agreement”, *supra* note 66 at 48.

208 In addition to the pure principle as originally established in German law, professor Schlosser calls pure *Kompetenz-Kompetenz* the solution provided for in article 1468(1) of the French *1981 Code of Civil Procedure* which gives the jurisdiction to arbitrators to have the first shot even if the arbitral tribunal has not been appointed and thus no proceedings have been started. See P. Schlosser, *supra* note 198 at 201.

209 See the Fifth Working Group Report, A/CN.9/246 (6 March 1984) as reproduced in Holtzmann and Neuhaus, *A Guide to Model Law*, *supra* note 40 at 510. It should be noted, however, that both the Working Group and the Secretariat emphasised that this
will not stop the ongoing arbitration, but ruling by the court on the issue is final.

(ii) The Right of Arbitrators to Provide Interim Measures

This right has already been mentioned in the section on limited court intervention. To reiterate, there are some measures that may be ordered by an arbitral tribunal, and there are some measures that can be ordered only by the courts.

Article 17

"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 to the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure."

Thus article 17 of the ML, which empowers arbitrators to order interim measures of protection at the request of a party, does not specify the types of measures which may be so ordered. It is also silent on the enforcement of such measures. There is no doubt that arbitrators may order interim measures only with respect to the parties to a dispute and only if necessary to protect the subject matter of the dispute. That power derives from the contractual nature of arbitration. However, the ML does not specify this power as a preclusion does not mean that a court ruling on setting aside or enforcement of an award is not going to examine the issue on their own initiative. Yet, such an examination will come only in the context of examination of arbitrability of a subject matter of a dispute and public policy. See H. Holtzmann and J.E. Neuhaus, A Guide to Model Law, supra note 40 at 483.
mandatory power, which means that the parties may decide otherwise. In this context, it is important to note that article 9 of the ML permits a party to seek interim measures of protection from a national court. Thus, it is clear that a decision by the parties not to empower the arbitral tribunal to order interim measures of protection does not mean that the parties have completely given up their right to seek interim measures. On the contrary, this rather confirms that the parties have a right to choose the protection they consider to be the most appropriate. As far as the enforcement of interim measures is concerned, the silence of the ML should be interpreted as a decision of the Working Group to leave the enforcement function to courts in order to avoid transformation of arbitration into another type of a court.\textsuperscript{210}

Hotlzmann and Neuhaus reveal that there was extensive discussion with respect to determination of the types of interim measures which may be awarded by arbitrators. Those mentioned initially were: measures to preserve goods by depositing them with a third person or selling perishable items; opening bank letters of credit; using or maintaining machines or completing phases of construction, where necessary, to prevent irreparable harm; preserving evidence until a later stage of the proceedings; and measures to protect trade secrets and proprietary information.\textsuperscript{211} In the end, the Working Group declined to provide a non-exhaustive list of measures. Consequently, the arbitral tribunal may order any measure except a measure that is binding upon third parties or a measure that can be enforced only with the appropriate power of the courts (such as the Mareva


\textsuperscript{211} See H. Hotzmann & J.E. Neuhaus, \textit{A Guide to Model Law, supra} note 40 at 531.
(iii) The Right of Arbitrators to Appoint an Expert to Assist Them

This is also a non-mandatory right which the parties may agree not to confer on the arbitrators. Article 26 of the ML enables arbitrators to gain more knowledge on the particular subject matter of a dispute by giving them the right to appoint an *ex officio* expert without the express authorisation of the parties. However, assistance of such an appointed expert on special issues does not mean his or her involvement in decision-making. Decision-making is given solely to arbitrators. Moreover, in accordance with the protection of the principle of the procedural fairness, not only are the parties given the opportunity to examine experts appointed by the tribunal, but they have the right to call their own experts (article 26(2)).

4. Procedural Fairness

The imperative of procedural fairness is not novel to the ML. It is a fundamental principle of modern laws. The ML incorporates the principle in a number of articles such as articles 18, 24(1), 26 and 34(2)(a)(ii). In the ML it has at least two dimensions. One is
equal treatment of the parties, which means that both parties should have the same opportunity to present their case, and that the same procedural rules will be applied for both the claimant and the respondent. The second dimension is that the parties will be protected from procedural failures of the arbitrators. In other words, it is a mandatory duty of arbitrators to protect fairness during the course of arbitration. Lack of procedural fairness may be a grounds for setting aside an award or for the rejection of recognition and enforcement of an award. It should be noted that the ML article 34(2)(a)(ii) and the New York Convention article V(1)(b) establish the same basis for action against an award: 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/her case.

There have been some objections that the detailed, strict and formal requirements of articles 18, 24(1) and 26 are contrary to the right of the parties to have a quick, uncomplicated resolution of their dispute.\textsuperscript{212} However, the Working Group found that the needs for certainly, fairness and equality, or simply for the protection of due process, should not be subrogated to in the name of the need for flexibility and better protection of party autonomy.\textsuperscript{213}

\textsuperscript{212} R. Lillich & C. Brower, eds., \textit{supra} note 74 at ix.
D. Basic Paradox: Importance of Court Assistance

Although arbitration offers parties a non-judicial means for dispute resolution, it relies upon the compulsive power of the courts. There are three stages of arbitral proceedings when powers exercised by the courts are important. First of all, the parties’ agreement to arbitrate cannot be enforced without a competent court authority. Then, courts provide necessary assistance to arbitrators during the proceedings whenever the conduct of arbitration depends on the use of measures which cannot be enforced by the arbitral tribunal itself (such as the power to order certain interim measures, to take evidence, etc.). Finally, courts give binding effect to arbitral awards.

The nature of the relationship between arbitration and courts is the reason for debate about the effectiveness of arbitration and its independence from national courts. To paraphrase Jacques Werner, the question still remains as to why would international business people want the court to help in their arbitral proceedings if they insist, at the same time, on recognition of party autonomy, independence of international arbitration and limitation of court intervention?214 The ML tries to resolve this basic paradox starting from the premise that arbitration and the courts are complementary legal processes and that they are not antagonistic or competitive.215 Moreover, the ML closely follows the lines of the Resolutions of ICCA’s 6th International Arbitration Congress held in 1978:

215 See, supra note 147.
"While arbitration is a process created by and responsive to the will of the parties, it is nevertheless governed by national laws and international treaties and cannot function effectively without the support of national courts which interpret and enforce those laws and treaties. The understanding and cooperation of judges of national courts is, therefore, a vital and indispensable element in establishing and maintaining international commercial arbitration."

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In this sense, the ML represents an attempt to support the private resolution of disputes and to allow states, at the same time, to protect their interests and public policy objectives.217 Drafters of the ML believed that this task would best be achieved by establishing the principle of limited court intervention as a deterrent to unwanted court interference in arbitration proceedings. Yet, one might argue that it is impossible to establish a uniform threshold for all adopting countries since “what is considered in one country as beneficial court assistance is regarded by users from other judicial systems as inappropriate intervention.” 218 In other words, if the ML sets too high a threshold for court intervention, many countries might reject adoption of the ML because they would see such a limitation as a limitation to their sovereignty. On the other hand, if the threshold is set too low, then the national courts would get too much supervisory power, which is contrary to the basic principles of the ML itself—party autonomy and the

216 Ibid, para. 3..

217 Dr. Ivan Szasz, Hungary’s representative in UNCITRAL and Chair of the Working Group of UNCITRAL on the ML, says that the ML is "a well balanced solution [...] in the interest of both the parties and the states concerned"; see I. Szasz, “Introduction to the Model Law of UNCITRAL on International Commercial Arbitration” in P.Sanders, ed., ICCA Congress Series No.2, supra note 122 at 37; also W. C Graham, “The Internationalisation of Commercial Arbitration in Canada: A Preliminary Reaction” (1987-1988) 13 Can. Bus. L.J. 2 at 8: "[T]he ML seeks to maintain a balance between the needs for state control over arbitration as a private dispute resolution system...”.

For a country concerned with the preservation of state sovereignty in regulating arbitral proceedings and with the continuity of its own legal culture and its own concept of judicial powers, the most controversial article of the ML is the one on the extent of court intervention. "In matters governed by this Law, no court shall intervene except where so provided in this Law" determines article 5. This article clearly provides for application of the ML as lex specialis and, thus, it provides for supremacy of the ML over national laws. Accordingly, the provision reads that court intervention in arbitral proceedings is limited only to situations expressly listed in other provisions of the ML. Conversely, article 5 does not exclude court intervention in any matter not regulated in the ML.219

There is no doubt that article 5 contributes to the uniformity of national regimes on court intervention and to certainty for the parties and arbitrators about situations in which the courts are allowed to interfere (cases of incapacity to contract, invalidity of the agreement, mistakes in rendering the award). It is an attempt to "exclude any general or residual powers given to the courts in a domestic system which are not listed in the ML."220 But, on the other hand, it might appear to be contrary to the traditional relationship between the courts and arbitration in a particular country of adoption.221

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220 See ibid. at 228.

221 M. J. Mustill, "UK Response to Model Law", supra note 151 at 8: "There are
Comments from the Canadian observer, Mark Jewett, at the UNCITRAL Working Group reveal that while the provisions of article 5 are in keeping with the legal tradition in Quebec, difficulty might be expected in limiting court intervention in provinces governed by common law. Similar comments have been made by Duncan Wallace who suggested that, in the past, civil law countries have shown much less interest in or exercised much less control by the courts over commercial arbitration law than have common law countries. English representatives in the Working Group also expressed reservations with respect to such a limitation on court intervention. In particular, they considered exclusion of the possibility of recourse to the court on questions of law to be unnecessary. One of the points made by the English representatives was that a great number of businesspeople choose the United Kingdom as the venue for their arbitration in order to retain the possibility of such judicial control. Lord Mustill warned that such court power should not be understood as English hostility towards arbitration because historical reasons ... beyond saying that in Acts of Parliament dating from 1698 the legislature has demonstrated a wish to strengthen arbitration by lending the coercive power of the courts to remedy the serious, and indeed on occasion fatal, vulnerability of arbitration to the bad faith of a party who would not abide by the agreement to submit disputes to arbitration, or co-operate in the conduct of the reference, or honour the arbitrator's award."

222 Mr. Mark Jewett, observer for Canada, noted in H. Holtzmannnn and J. E. Neuhaus, A Guide to Model Law, supra note 40 at 236 para. 35.


"the power to intervene in a pending reference on the ground of procedural impropriety was never exercised in modern times. Power to set aside or remit an award was very sparingly exercised."\textsuperscript{225}

In the context of the above discussion it is important to note that no other delegation from a common law country made comments similar to that of the English delegation. Moreover, Canada and Hong Kong, both strongly influenced by the English statutes on arbitration before their adoption of the ML, found article 5 to be satisfactory and did not object to the draft text of the Working Group.\textsuperscript{226} For the purpose of this thesis it is important to mention the comments of the Russian (at that time Soviet) and Chinese delegations. They both advocated an even lower degree of judicial control over arbitral proceedings.\textsuperscript{227} Professor Sergei Lebedev of the USSR concluded that the discussions on article 5 "revealed the different concepts of arbitration which existed in different countries" and that "it was important to consider what relationship the ML would have with existing national legislation on judicial intervention after its adoption."\textsuperscript{228} In the next chapter of this thesis, this relationship, with reference to Canada, Hong Kong and Russia, will be considered further.

\textsuperscript{225} M.J.Mustill, "UK Response to Model Law", \textit{supra} note 151 at 8.
\textsuperscript{226} See a discussion of Mr.Jewett of Canada on article 5 in H.Holtzmannn and J. E. Neuhaus, \textit{A Guide to Model Law, supra} note 40 at 236.
\textsuperscript{227} See a discussion of Professor Sergei Lebedev of the Soviet Union and Houzhi Tang of China on article 5 in H.Holtzmannn and J. E. Neuhaus, \textit{A Guide to Model Law, supra} note 40 at 236.
\textsuperscript{228} See S. Lebedev, \textit{ibid}. 
E. Conclusion: What is so Special About the ML?

The overview of the historical background and the basic principles of the ML has been presented for two reasons. The first reason is to determine those characteristics which distinguish the ML from other projects on international commercial arbitration. The second reason is to reveal what makes the ML a suitable setting for national laws and, accordingly, its reception a desirable means of legal reform. Thus, this section will be a summary of the chapter and an introduction to the case study set out in the next chapter.

It has been explained that the ML has a special flexible form which allows adopting countries to choose their own means of adoption. In this context, the UNCITRAL mission appears to be realistic—that is, to harmonise rather than to unify arbitration laws. This approach also suggests that UNCITRAL appreciates that different legal and cultural backgrounds may cause the ML to be applied and interpreted differently. Indeed, the decision by UNCITRAL to propose a model law, not a convention, was an attempt to overcome problems which some earlier conventions on arbitration had faced. For example, in 1966 the Council of Europe proposed the Strasbourg Uniform Law of Arbitration\textsuperscript{229} for the EC member states. Despite the fact that the Convention allows reservations on fifteen items, only Belgium adopted it.

In short, the ML is seen as a step-by-step process for the unification and

modernisation of national laws. It incorporates a great number of international rules and standards on commercial arbitration, but it does not define many important terms and institutions, such as arbitration, arbitrability, liabilities of arbitrators, costs and interests. However, it is still seen as the most ambitious of UNCITRAL’s projects aimed at the harmonization and unification of private law and as “one of the best examples of constructive co-operation between North, South, East and West.” Lord Justice Mustill clarifies the international role of the ML and categories four varieties of addressees:

1. states with no developed law and practice in the field of arbitration;
2. states with a reasonably up-to-date body of arbitration law which has not been greatly used in practice;
3. states with an outdated or inaccessible body of arbitration law;
4. states with an up-to-date body of arbitration law, and with a sufficient volume of arbitrations over a sufficient period to have permitted the growth of an expertise in putting their law into practice.

Despite the enthusiasm of the drafters and “intense and clever propaganda by the UNCITRAL Secretariat” the ML has been criticised by many authors. It is possible to

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231 However, it defines terms “international” and “commercial” in Article 1(2).
232 H. M. Al-Bahama, “Keynote Speech” at the conference in A. J. van den Berg, ed. ICCA Bahrain Conference, supra note 66, 26 at 34.
distinguish two types of critics: one from the perspective of developing countries, and another from the perspective of developed countries. Both sides criticise the principle of limited court intervention but with different arguments. Criticism from developed countries (primarily England) is rooted in the common law approach that courts are executive partners providing greater effectiveness to the arbitral process.\(^{236}\) It is emphasised that the courts’ rights of supervision were introduced to protect the interests of the parties—to protect them from misconduct of arbitrators and to provide them with the right of appeal on questions of law.\(^{237}\) On the other hand, critics from developing countries are concerned that the ML, by re-imposing the doctrine of arbitrability, which includes some public interest issues, indirectly infringes their sense of legal nationalism and greatly reduces the intervention by the domestic courts. As Sornarajah explains, above mentioned concerns have their basis in “the idea that all domestic control over a situation occurring within the territorial jurisdiction of a state could be removed from its jurisdiction by invoking the magic formula of international commercial arbitration.”\(^{238}\)

Notwithstanding the fact that developing countries (primarily the members of the AALCC) initiated the work of UNCITRAL on the ML,\(^{239}\) those countries criticised the adopted principles as being based solely on traditions of the West.\(^{240}\) This is consistent

\(^{237}\) M.J.Mustill, “UK Response to Model Law”, supra note 151 at 8.
\(^{238}\) M. Sornarajah, “UNCITRAL Model Law”, supra note 26 at 12.
\(^{239}\) See for further discussion M. Sornarajah, “UNCITRAL Model Law”, supra note 26 at 9-11, and I. Szasz, supra note 216 at 34.
with the attitude that globalisation of laws is the gradual trend to recognise the primacy of the Western legal traditions in the form of global or transnational law over domestic law.\textsuperscript{241} In this context, the ML provisions are considered to be a codification of principles of free trade, party autonomy and \textit{lex mercatoria}, which serve the interests of developed states.\textsuperscript{242} Paradoxically, the majority of adopting countries have been developing countries which have already experienced the consequences of legal transplantation and the application of foreign laws during colonial times.\textsuperscript{243}

On the other hand, the most developed countries (those accused of post-modern colonialism and export of legal traditions) rejected the adoption of the ML as a solution for reformation of their laws on arbitration. In summary, the most important reason they advanced for rejection of the ML was the fact that their legal systems were already modernised in keeping with economic and political globalisation and that the ML would not improve their already advanced arbitration laws. Indeed, some European countries enacted new arbitration laws before the ML was drafted. For example, England enacted an \textit{Arbitration Act} in 1979\textsuperscript{244}, France in 1981,\textsuperscript{245} Italy in 1983\textsuperscript{246} and Belgium in 1985.\textsuperscript{247}

Some other countries like the Netherlands, Switzerland and Spain decided not to

\begin{footnotes}
\textsuperscript{241} H. Fix-Fierro & S. López-Ayllón, “Globalization in Latin America”, \textit{supra} note 31 at 789-790.
\textsuperscript{242} M. Sornarajah, “UNCITRAL Model Law”, \textit{supra} note 26 at 17.
\textsuperscript{243} For example, Egypt, Kenya, Mexico, Nigeria, Peru, Sri Lanka, Tunisia, to name a few.
\textsuperscript{244} \textit{Arbitration Act}, 1979, c.42.
\textsuperscript{245} \textit{Code of Civil Procedure}, article 1442-1507 (\textit{Decret Loi} no. 81-500) J.O. May 14, 1981.
\textsuperscript{247} Belgium \textit{Judicial Code}, Sixth Part: Arbitration, art. 1717(4) 1972)(amended March
incorporate the ML despite the fact that their new statutes were passed after the ML was proposed.\textsuperscript{248}

Incompatibility of the ML with existing legal systems was emphasised by both civil law and common law developed countries.\textsuperscript{249} On the other hand, all of those critics found that the ML could be a well-suited model\textsuperscript{250} and a valuable legislative package\textsuperscript{251} for developing countries and countries without much experience or without modern legislation on the subject.\textsuperscript{252} This attitude led to considerable reluctance on the part of developing countries to adopt the ML, which was deemed as largely the creation of the developed countries.

As previously explained, Alan Watson first described the concept of legal reform through borrowing of laws or particular rules from one society into another.\textsuperscript{253}

\begin{footnotes}
\item 249 For critics from the common law perspective see M. Kerr, \textit{supra} note 236, M.J. Mustill, “UK Response to Model Law Law”, \textit{supra} note 151 at 5. Michael Kerr criticises the ML for “giving uncontrollable powers to arbitrators” which establishes them “free from all [those] checks and balances on unrestricted authority” M. Kerr, \textit{ibid.}, at 16. For critics from the civil law perspective see Pierre Lalive, who concludes that “From the point of view of a country like Switzerland, with a long tradition and experience in arbitration, the ML appears to be, rather than an ideal modern legislation, and interesting compromise between conflicting approaches, reached on several points at the level of the ‘lowest common denominator’ and more valuable politically speaking than because of its intrinsic value.” See P. Lalive, \textit{supra} note 235 at 5.
\item 251 M. Kerr, \textit{supra} note 236 at 16.
\item 252 P. Lalive, \textit{supra} note 235 at 5.
\item 253 A. Watson, \textit{Legal Transplants}, \textit{supra} note 19.
\end{footnotes}
Transplantation thus occurs as the borrowing or duplication of rules of a foreign legal system into the system of a host country. The history of law, says Watson, is packed with examples of legal transplantation. Medieval Europe transplanted Roman law. In the 19th century, during the Napoleonic conquest, the continental European countries transplanted the French Civil Code of 1804. North America, Asia and Africa transplanted both common law and civil law. English colonies transplanted English common law.

The usual reason for transplantation is the need to reform pre-existing laws or to fill wide gaps caused by the lack of adequate laws in the host country. The single law or a large body of law that is borrowed is a legal transplant. A pure legal transplant, in the Watsonian context, is where the original is being borrowed unchanged. Accordingly, a legal transplant duplicates the original. On the contrary, the ML, as demonstrated in this chapter, is a flexible document made to be modified by adopting countries. UNCITRAL gives some suggestions on what could and should be considered for modification by adopting countries, but these are not mandatory instructions. Thus, the ML is not a pure legal transplant. Even Watson, in his later works, admitted that unmodified legal transplants could hardly be efficient in cases where the economic and cultural gaps between the country of origin and the borrower are significant.254 However, Watson’s focus here is on those changes to the transplants which are necessitated by post-transplantation changes to the entire legal system. Diversity of interpretation and application makes the ML more distinct from the original version and, at the same time, enhances it by making it more easily updated and capable of development along with the

Is the ML a global law? The concept of global law is rather nebulous. It has recently been defined as “a legal order in its own right which should not be measured against the standards of national legal systems.” A number of authors believe that *lex mercatoria*, a general and autonomous body of international principles of law applicable to international merchants, is the closest to the concept of global law. Detailed examination of *lex mercatoria*, suitable as the subject of an entire doctoral thesis, is outside the scope of this one. Briefly, the origins of the concept of “*lex mercatoria*” are found in the writings of Eduard Lamber, Clive Schmitthoff, Berthold Goldman and Philippe Kahn but it is Goldman who has developed the theory. However, although the theory has been discussed extensively, it has not been universally accepted. Goldman’s

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258 See bibliography of the four authors in F. De Ly, *supra* note 256 at 209-232 and accompanying footnotes 3-136.

lex mercatoria includes substantive transnational rules, custom and usage, contract, general principles of law and international commercial arbitration as its most important elements. He defines it as “a set of principles and customary rules spontaneously referred to or elaborated in a framework of international trade, without reference to a particular national system of law.” Thus, it is a body of substantive law which includes the common customs and usage of the business community, general principles of law, rules of international organisations, standard form contracts and the reports of arbitral awards. Even this list of sources of lex mercatoria is not settled. What are the general principles of law and what are the common customs?

The threshold issue here is to determine the extent to which the ML fits into the lex mercatoria category. First of all, the ML is a set of procedural rules. The extent to which it refers to substantive rules is fairly limited. Indeed, only in the context of article 28 and the right of the parties and arbitrators to use particular substantive law to resolve a dispute, does the ML indirectly refer to lex mercatoria. In other words, the parties are free to choose any law, including lex mercatoria as the substantive law. Arbitrators have to respect the choice of the parties. If the parties fail to make a choice, the ML gives guidelines which, in the original version, does not necessarily lead to application of lex mercatoria. (This can be, however, changed by an adopting country, as will be discussed in the next chapter.) In practice, there has been a number of cases of the application of

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260 For a brief overview of Goldman’s theory of lex mercatoria see B. Goldman, Lex mercatoria; Forum internationale No. 3 (Deventer, Kluwer Law, 1983) 3.

261 B. Goldman, ibid., at 116.

national or transnational commercial law or *lex mercatoria* in arbitral awards outside of the ML. In some cases, such as *B.P. v. Libya*, *Texaco v. Libya* and *LIAMCO v. Libya* the parties to international business transactions decided that their transactions should be subject to an international body of rules. In some other cases, in the absence of the parties’ choice, arbitral tribunals made international conflict of law rules or general principles of private international law or *lex mercatoria* or transnational law as the applicable law. Those awards are still subject to debates between the proponents and opponents.

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266 In the three Libyan cases cited in *supra* 254-256 the choice of law clause determined that the matter of concession “shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunal.” [emphasis added]
267 See, for example, arbitrators’ direct reference to *lex mercatoria* in *Pabalk Ticaret Ltd. Sirketi (Turkey) v. Norsolor S.A. (France)*, award of 26 October 1979, no. 3131 (1984) IX Y.B. Comm. Arb. 109 at 110: “Faced with the difficulty of choosing a national law the application of which is sufficiently compelling, the Tribunal considered that it was appropriate, given the international nature of the agreement, to leave aside any compelling reference to a specific legislation, be it Turkish or French, and to apply the international *lex mercatoria*.”

See also arbitrators’ reference to “international principles of law” in *Deutche Schachtbau und Tiefbohrgesellschaft mbH (DST) (FR Germ.) et al. v. The Government of the State of R’as Al Khaimah (UAE) and the R’as Al Khaimah Oil Company (Rakoil) (UAE)*, award in case no. 3572 of 1982, (1989) XIV Y.B. Comm. Arb. 111 at 117: “[17] Reference either to law of any one of the companies, or of such State of the State on whose territory one or several of these contracts were entered into, may seem inappropriate, for several reasons. [18] The Arbitration Tribunal will refer to what has become common practice in international arbitrations particularly in the field of oil drilling concessions and especially to arbitrations located in Switzerland...[19] The Arbitration Tribunal therefore holds *internationally accepted principles of law governing contractual relations* to be the proper law applicable to the merits of this case.” [emphasis added].
the opponents of the *lex mercatoria* concept. In conclusion, those debates emphasise that *lex mercatoria* is not a complete system of law and arbitration awards based on such an incomplete system are subject to the rules of public policy of the countries of enforcement.

To conclude, the ML is not stateless, global law, because its principles derive from national practice and national legal systems. It codifies but it does not invent principles. It indirectly refers to *lex mercatoria* but is not *lex mercatoria* since it is not a substantive law.

In short, the ML appears to furnish a flexible pattern for changing the arbitration regimes in different countries by establishing its unique balance of four basic principles (party autonomy, limited court intervention, independence of arbitral tribunals and fairness of procedure), and offering elements for a new arbitration culture to adopting states. To evaluate the impact of the ML and its new arbitration culture on three adopting countries, this thesis starts with an investigation of these countries' pre-existing laws and legal cultures.
CHAPTER THREE: A Case Study Begins

The history of arbitration in Canada, Hong Kong and Russia are explored below as a way of introduction to the reception of the ML in each country. This chapter examines the nature of the relationship between courts and arbitral tribunals in pre-adoption periods and reveals the constraints the old legislation placed on arbitration. It also analyses how the fact that all three countries have developed so-called mixed legal systems\textsuperscript{268} has influenced the emergence of a distinct arbitration culture.

A. Canada Before the Adoption of the ML

As previously mentioned, the old legal framework for arbitration in Canada was the English \textit{Arbitration Act} of 1889 (in the common law provinces) and the \textit{Code of Civil Procedure} (in Quebec), which was modelled on the French civil law.\textsuperscript{269} There were no


\textsuperscript{269} \textit{Arbitration Act 1889 (An Act for Amending and Consolidating the Enactments Relating to Arbitration, 1889, 52 & 53 Vict. c. 49 [hereinafter Arbitration Act 1889]) in common
federal statutes on arbitration. Rather, in each province, there was one law on arbitration that was applicable to both international and non-international and commercial and non-commercial arbitration. Canadian legislation on arbitration remained unchanged for a long time due to various political reasons and economic factors, despite the fact that the English legislation changed significantly twice in the period from the Arbitration Act 1889, until the Arbitration Act 1979.

The complexity of the federal system and constitutional framework, with legislative powers divided between the Federal Parliament and the provinces, was the most important obstacle to changes and accession to international arbitration treaties. The Constitutional Act of 1867 (previously known as the British North America Act, 1867, 30 & 31 Vict. c.3) in section 92 enumerated the exclusive powers of provincial legislatures which includes property and civil rights as well as the administration of justice in the Provinces (s. 92(13)(14)). These powers were interpreted to encompass legislation on arbitration and the enforcement of arbitration awards. See more in O. Davidson, "International Commercial Arbitration Law in Canada" (1991) 12 Nw. J. Int'l L. & Bus. 97 at 99-100. See also L. Kos-Rabczewicz-Zubkowski, "Adaptation of Model Law in Canada," supra note 269 at 43.

A restrictive economic policy kept more than 75 percent of Canadian international transactions limited to the United States. Canada and USA had a good record of litigation of commercial disputes and had no major problems with reciprocal enforcement of judgments.

After the Arbitration Act 1889, supra note 269, the following new arbitration statutes were enacted in England: Arbitration Act, 1934, 24 & 25 Geo. 5, c.14 [hereinafter Arbitration Act 1934] Arbitration Act, 1950, 14 Geo. 6, c.27 (Eng.) [hereinafter Arbitration Act 1950], Arbitration Act, 1979, Eliz. c: 42 [hereinafter Arbitration Act
1. Arbitration in Common Law Provinces

Since the end of the nineteenth and the beginning of the twentieth century all common law provinces, as well as all colonies of Great Britain, had legislation based on or the same as English law. The reception of English law in each Canadian province depended on a province's history. For example, English law was brought to the Canadian west in 1670 by the Hudson's Bay Company but reception in provinces acquired by settlement officially only started when the colonial legislature enacted its first statute.\textsuperscript{274}

In general, all provinces except Quebec received English common law officially in the period from 1758 to 1870.\textsuperscript{275} With the Statute of Westminster of 1931\textsuperscript{276} the British Parliament yielded the capacity to legislate for Canada, unless Canada so requested. However, the English common law continued to have a significant impact on Canada and on Canadian courts.\textsuperscript{277} Professor Gerald Gall enumerates the most important principles and values of the British legal tradition which have become the cornerstone of the

\textsuperscript{274} G. Gall, \textit{The Canadian Legal System}, 3rd ed. (Toronto: Carswell, 1990) at 51-52. Gall explains that it was under the Hudson's Bay Company's Charter of 3 May 1670 that the British settlers brought English common law and statutory law.

\textsuperscript{275} Officially the reception of English law in New Brunswick and Nova Scotia occurred in 1758, Prince Edward Island in 1773, Ontario on 15 October 1792, and Newfoundland in 1832. British Columbia received English law on 19 November 1858. In the Northwest Territories, Manitoba, Alberta and Saskatchewan the reception came on 15 July 1870 or after the \textit{British North America Act} of 1867, \textit{supra} note 271, established the Dominion of Canada. See G. Gall, \textit{ibid.} at 51.

\textsuperscript{276} Statute of Westminster, 1931, 22 & 23 Geo. 5, c.4.

\textsuperscript{277} G. Gall, \textit{supra} note 274 at 53.
Canadian legal system: the doctrine of responsible government, the doctrine of the rule of law, the doctrine of parliamentary sovereignty, the independence of the judiciary and the jury trial, stare decisis,\textsuperscript{278} and British influence on legal education and the legal profession.\textsuperscript{279}

Legal education in Canada began in the English tradition. Education of lawyers in England itself started as a five-year apprenticeship to a barrister. Before Oxford and Cambridge universities' law schools introduced law as an academic discipline at the end of the eighteenth century,\textsuperscript{280} the Inns of Court had been the most important centres of legal education. After the mid-nineteenth century systematic legal education based on academic studies started to prevail over practice oriented training. Traditional legal education in Canada started as training in law offices. In 1872, the Law Society of Upper Canada, founded in 1797, was granted responsibility for training of prospective lawyers. Admission to the bar followed a similar pattern to that of the English Inns of Court. Apprenticeship was the major mode of legal education during the nineteenth century in Canada. In 1883, the first faculty of law, the Dalhousie Law School, was founded in Halifax, Nova Scotia.\textsuperscript{281} It was not until the foundation of the Canadian Bar Association

\textsuperscript{278} Before 1949 Canadian courts were bound to follow English high courts' decisions. As of 1949, the Supreme Court of Canada became the final court in Canada and decisions of the House of Lords and the Privy Council are no longer binding on Canadian courts.

\textsuperscript{279} G. Gall, \textit{supra} note 274 at 57 and 59.


\textsuperscript{281} See more in J. Willis, \textit{A History of Dalhousie Law School} (Toronto: University of Toronto Press, 1979).
in 1914 that a university-based system of legal education emerged in Canada.

Not surprisingly, even before 1889 the English arbitration law had become a model for the legislatures of the Canadian common law provinces. The English law provided that the parties could submit for arbitration all present or future disputes in a written submission which did not have to name arbitrators initially. The court had great control over arbitration, from its establishment until the award was rendered. Thus, it is possible to say that the Arbitration Act 1889 established the system of judicial control over arbitration.

The courts were given a broad discretion to stay proceedings and to set aside an award for misconduct of arbitrators or for error of law. A special case procedure was established by the Common Law Procedure Act of 1854 to give arbitrators the power to

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283 The Arbitration Act 1889, supra note 269, section 27.


285 Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125 [hereinafter 1854 Act] section 5. “Arbitrator may state special case: It shall be lawful for the arbitrator upon any
state the award or part of it in the form of a special case for court. The "Arbitration Act 1889" kept the special case procedure at the discretion of the arbitrators. At the same time, that the "Arbitration Act" established so-called "consultative cases" as a possibility for arbitrators to state any question of law for the opinion of the courts in a form of a special case in a pending arbitration. In addition to all these limitations on the powers of arbitrators, it is important to mention that arbitrators were not permitted to act as amiable compositeurs. They were required to make their decisions according to the law and not ex aequo et bono.

Regardless of the existence of eight common law jurisdictions, the 1931 Conference of Commissioners on Uniformity of Legislation found that the common law provinces of Canada had achieved a sufficient level of uniformity (resemblance to the English "Arbitration Act 1889") and that any further unification at the federal level was unnecessary. Given the framework of the English "Arbitration Act 1889" and the English compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the superior courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the Court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court."

"Arbitration Act 1889", supra note 269, section 7. “Powers of arbitrators: The arbitrators or umpire acting under a submission shall, unless the submission expressed a contrary intention, have power: ... (b) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court...”

"Arbitration Act 1889", supra note 269, section 19. Statement of case pending arbitration: “Any referee, arbitrator, or umpire, may at any stage of the proceedings under a reference, and shall, if so directed by the court, state in the form of a special case for the opinion of the court any question of law arising in the course of reference.”

The eight common law jurisdictions are Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan.
common law, the arbitration process in all provinces except Quebec was understood as “a somewhat suspicious departure from the court’s normal jurisdiction and something that courts could only tolerate as long as the courts controlled the process.” Accordingly, courts not only exercised broad supervisory powers over arbitration, but also hesitated to give a reference to arbitration in a number of situations.

The following historical overview will be organised in two parts. The first part examines the development of common law related to arbitration before 1979 while the second part deals with some of the influences the English *Arbitration Act 1979* and English case law had on Canadian practice before the adoption of the ML.

Newfoundland was not included in the Report of the Conference on Uniformity of Legislation because it joined Canada in 1949. Quebec is a civil law jurisdiction. On the report of the Committee see L. Kos-Rabcewicz-Zubkowski, *Commercial and Civil Law Arbitration in Canada* (Ottawa: University of Ottawa Press, 1978) [hereinafter *Arbitration in Canada*] at 13. It is important to notice that Prince Edward Island had the arbitration provisions found in the English statutes prior to 1889. All other common law provinces had arbitration acts based on the English *Arbitration Act 1889* [Alberta, R.S. 1922 c. 98; British Columbia, R.S. 1924, c. 13; Manitoba, R. S. 1913, c.9; New Brunswick, R.S. 1927, c.126; Nova Scotia, R.S. 1923, c.227; Ontario, R.S. 1927, c. 97; Saskatchewan R.S. 1920, c.55). See also "The Report on the Draft Provincial Arbitration Act Submitted by the Canadian Chamber of Commerce," (1931) 19 Proceedings of the Canadian Bar Association 274.


But, this author found an interesting ruling of the court in Ontario which suggested a rather liberal interpretation of the submission and exceptional support for arbitration. In *Carveth v. Fortune* (1862) 12 U.C.C.P. 504 the court held that the Court should always incline to support awards unless they appear to be manifestly unjust and that a liberal interpretation should be given to submission, with a view to carrying out the intention of the parties.
1.1. Judicial Control of Arbitration Before 1979

Professor Castel concluded that in all common law provinces, as well as in English law itself, three points were essential to a system of arbitration:

"(1) the validity of the submission (that is, the written agreement to submit present or future differences to arbitration),

(2) the power of the court to assist in the implementation of the arbitration (for example, by staying court proceedings when there is a submission), and

(3) the enforcement of the award (by leave of the court of judge) in the same manner as a judgment or order to the same effect." 291

In sum, in order for arbitration to commence, the existence of a dispute and the existence of a submission were necessary. 292 Most provincial acts provided for a written form of a submission. 293 However, the signatures of both parties were not understood as a strict requirement for agreement. 294 In the early days, a submission or an arbitration agreement was seen as a part of the main contract. In other words, the principle of severability was not recognised and an arbitration clause was held inoperative if the


292 In an early Ontario case of Cruickshank v. Corby (1880), 30 U.C.C.P. 466 (Ont.H.C.), affirmed (1880), 5 O.A.R. 415 (C.A.) the court summarised the general requirements for arbitration as follows: “To every award are five things incident: matter of controversy, submission, parties to the submission, arbitrators, and delivering up the award.” [emphasis added]

293 See for example British Colombia Arbitration Act, R.S.B.C. 1960, c. 14, or Ontario Arbitration Act, R.S.O. 1970 c. 25.

294 In McSweeney v. Wallace (1870), 8 N.S.R. 83 (C.A.) and in Lyon v. Morgan [1917] 2 W.W.R. 224 (B.C.C.A.) the courts held that even if there was no written agreement signed by parties, where both parties participate in the arbitration proceedings, objection could not then be taken after the award was rendered. See also Nolan v. Ocean Accident Corp. (1903) 5 O.L.R. 544 (C.A.).
whole contract was cancelled\textsuperscript{295} or its existence otherwise denied.\textsuperscript{296} Accordingly, the issue as to whether the main contract was in existence or void \textit{ab initio} was to be decided by the courts, not by arbitrators.\textsuperscript{297} That was consistent with the traditional English law, which did not recognise the \textit{Kompetenz-Kompetenz} principle and severability (except for a limited number of reasons).\textsuperscript{298}

(i) Arbitrability

In 1918, in \textit{Stokes-Stephens Oil Co. v. McNaught},\textsuperscript{299} the Supreme Court of Canada held that the intention of the parties to refer a dispute to arbitration should be taken into consideration and that the issue of the scope of arbitration clause was not within the exclusive competence of the Court. In \textit{Twentieth Century Fox Corp. v. Broadway}

\begin{thebibliography}{9}
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Theatres Ltd., the Court of Appeal in Saskatchewan held that “if on the hearing of an arbitration it appears that the dispute is as to whether there ever has been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract and that question has to be decided by the court.” In Canadian Industries Ltd. v. St. Anne-Nackawic Pulp & Paper Co., the New Brunswick Supreme Court (Queen’s Bench Division) also held that disputes respecting validity of contracts with arbitration clause could not be decided in arbitral proceedings.

A submission had to refer to resolution of a dispute that was deemed arbitrable. However, what was arbitrable in Canada before the adoption of the ML? Clearly, a criminal prosecution could not be referred to arbitration. The court usually addressed the issue of arbitrability when ruling on a stay of proceedings, then in a so-called special case procedure and, finally, in the post-award stage, when the court had to decide on setting aside an award. Initially, arbitral tribunals had jurisdiction to hear and decide any case where a dispute arose from facts but not from questions of law. In Stokes-Stephens Oil Co. v. McNaught, the Supreme Court of Canada held that if the sole matter to be dealt with by the arbitrators was a question of law, a stay of the action might be properly refused. In Macdonald v. North Western Biscuit Co., the Court of Appeal in Alberta

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302 Fraser v. Escott (1865), 1 C.L.J. 324, 1 U.C.L.J. (N.S.) 324 (U.C. Practice Ct.).
303 Stokes-Stephens Oil Co. v. McNaught, supra note 299 at 689.
found that a dispute before arbitration was a question of law which could be properly referred by the arbitrators to the Court. In British Columbia, the Court of Appeal in *Famous Cloak & Suit Co. v. Phoenix Assurance Co.* 305 decided to stay proceedings after finding that no important question of law was to be disputed before arbitrators.

As pointed out by some authors, almost everything related to contractual obligations between parties could be related to the issues of law and thus be found non-arbitrable by the court. 306 When one party wanted to go to court despite the fact that an arbitration agreement existed, the court would not stay proceedings if a matter of law or mixed facts and law had to be determined. Neither would the court stay the proceedings if interpretation of the contract was involved. 307 This position was confirmed by the court in *Chappelle v. Watt* 308 which held that even where the arbitration agreement covered a question of law as a small part of the dispute the court might have sufficient reason for

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305 *Famous Cloak & Suit Co. v. Phoenix Assurance Co.* (1931), 44 B.C.R. 120 (C.A.). But see *Calvin v. McPherson* (1854) 4 U.C.C.P. 150. Here the court held that questions of law might be referred to arbitration.


307 *M.J.O'Brien Ltd. v. Seaman Kent Co. Ltd.*, (1928) 62 O.L.R. 160 at 161, 3 D.L.R. 43 at 44 and the commentary on the case by L. Kos-Rabczewicz-Zubkowski, *Arbitration in Canada*, supra note 288 at 72. But see R. McLaren & E.E. Palmer, Q.C., *supra* note 297 who explain at 36 that generally, the application would be granted if the arbitration clause was broad enough to cover the issues involved, even if those issues were solely matters of law, liability or questions of damages. Clearly, the authors refer to *Stokes-Stephens Co. v. McNaught*, *supra* note 299, and the decision of the Supreme Court of Canada which upheld the application for stay explaining that the stay should be granted if the arbitration clause is broad enough to cover issues involved. *Ibid.*, at 684. In particular, the reference is given to the opinion of Anglin J. who emphasised that where the important questions of facts were to be determined, the circumstances that important questions of law were also involved would not justified the refusal of a stay. See *ibid.* at 689.
refusing a stay. In *Jussem v. Nissan Automobile Co. (Canada) Ltd.*\(^{309}\) the High Court in Ontario dismissed the application to stay proceedings and held that the court would not stay the proceedings if it found that there were substantial questions of law involved. What would, then remain for arbitration to decide? Nothing more than minor problems—accounting or technical points of fact.\(^{310}\) However, with the development of trade and especially with the increased Canadian involvement in international trade, this approach has been curtailed, as has the English approach since the *Arbitration Act 1979* was enacted. This will be explained in detail in the next section of this chapter.

Initially, a submission to arbitration was revocable at any time before an award was made. The making of a submission did not remove the jurisdiction of the court. Moreover, any arbitration agreement which provided for the exclusion of the court’s jurisdiction was deemed illegal and void as being contrary to public policy.\(^{311}\) However, the principle of revocability of submission was later modified to mean that a submission was irrevocable, except by the leave of the court.\(^{312}\) The issue of the removal of the court’s jurisdiction was, in a certain way, related to cases involving the so-called *Scott v. Avery*\(^{313}\) clause. Indeed, in the cases involving *Scott v. Avery* clauses the parties made


\(^{313}\) *Scott v. Avery* (1855) 5 H.L.C. 811, 10 E.R. 1121.
arbitration a condition precedent to litigation and thus prevented themselves from proceeding in court until an arbitral award was rendered. In other words, the Scott v. Avery clause was understood not to remove the court’s jurisdiction but to defer it. In 1898, the Supreme Court of Canada held in Guerin v. Manchester Fire Assurance Co., that the law of England “provides that an agreement renouncing the jurisdiction of legally established Courts of Justice is null and void, but an agreement that no action shall be maintained until after an arbitration award has been obtained is perfectly valid since it merely makes arbitration a condition precedent to action.”

(ii) Stay of Courts’ Proceedings: Discretion of Judges

The above discussion reveals that there was a strong tendency to use the existence of a dispute, the scope of an arbitration clause and arbitrability as grounds for challenging the jurisdiction of arbitrators. Such jurisdiction was thus scrutinised carefully during the arbitral proceedings, but also later, in the recourse against the award.

A number of cases related to stay of proceedings reveal that provincial statutes

gave courts a great deal of discretion to decide on the jurisdiction of arbitrators. British Columbia and Ontario statutes illustrate the extent of court discretion to rule on stays of proceedings in cases where despite the existence of a valid submission one of the parties decided to refer a matter to the court.

Section 6 of the British Columbia Arbitration Act 1960

“If a party to submission, or a person claiming through or under him, commences legal proceedings against another party to the submission, or a person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.” [emphasis added]

Section 7 of the Ontario Arbitration Act

“If a party to a submission, or a person claiming through or under him, commences any legal proceeding in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and a judge of that court if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.” [emphasis added]

317 Arbitration Act, R.S.B.C. 1960, c.14. However in the later version of the Act, R.S.B.C., c. 18, this section was divided into two sentences (the first sentence stops at “apply to the court to stay the proceedings” and the second starts with “The court, if satisfied.”), but the actual wording has remained unchanged.

318 Arbitration Act, R.S.O. 1980, c.25.
Both provisions gave discretion to courts to order stay of proceedings\(^{319}\) and conferred responsibility upon the party opposing the arbitration to show that there were no grounds to proceed with arbitration.\(^{320}\) In other words, courts now had the power to grant a stay, but they could decline to do so—except in cases where the existence of *Scott v. Avery* clause called for a mandatory stay of court proceedings. It is interesting to note the difference between the British Columbia and Ontario provisions. The latter duplicated section 4 of the English *Arbitration Act 1889*\(^{321}\) providing for the discretion of any court referred to by the parties, whereas the former, the British Columbia *Arbitration Act*, provided for the discretion of the Supreme Court of British Columbia.\(^{322}\)

It is also important to notice that the above provisions did not provide a full list of requirements which had to be fulfilled in order to obtain a stay of proceedings. The provisions stated some requirements related to timely application (such as the requirement to apply at the time of appearance, and before delivering any pleadings or before taking any other steps or face being precluded from the right to apply for a stay)\(^{323}\)

\(^{319}\) To reiterate, the ML article 8(1) and new provincial acts provide for a *mandatory* stay if certain requirements are met.


\(^{321}\) Except for a part where the Ontario act said “a judge of that court” and the English act said “that court or a judge thereof”.


and requirements related to the applicant himself (it had to be a party to a submission or a person claiming through or under a party\textsuperscript{324}). In addition, case law confirmed a number of other requirements. For example, a stay could be granted only with respect to a matter that was within the scope of a valid and written submission.\textsuperscript{325} In the English case \textit{Heyman v. Darwins},\textsuperscript{326} Lord MacMillan found that the issues to be ascertained were: (a) the precise nature of the dispute; and then (b) whether the dispute fell within the terms of the arbitration clause; and then (c) whether the arbitration clause was still operative.\textsuperscript{327} Only then was the court to decide if there was sufficient reason why the matter should not be referred to arbitration.\textsuperscript{328} However, the question remained as to what a sufficient reason for the court to stay the proceedings would be. A sufficient reason might be that important questions of fact were to be determined by arbitration. On the other hand, a sufficient reason to refuse a stay could be when questions of law or mixed questions of facts and law were to be determined,\textsuperscript{329} or in the case of fraud affecting the contract.\textsuperscript{330}

\textsuperscript{381} \textit{(Q.B.)} the Court held that a defendant who knew of a dispute, but delayed to commence arbitration, would lose the right to arbitrate.

\textsuperscript{324} \textit{Niagara South Board of Education v. H.G. Acres Ltd. et al.}, (1972) 3 O.R. 815.

\textsuperscript{325} For example in \textit{M.J. O'Brien Ltd v. Seaman Kent Co} (1928) 62 O.L.R. 160 [1928] 3 D.L.R. 43 (S.C) the court held that where the parties had agreed to arbitrate disputes, and then the question to be decided was one of law, or one of mixed law and facts, and where one of the parties brought and action at law, the Court would not stay the action.

\textsuperscript{326} \textit{Heyman v. Darwins Ltd.}, supra note 298.

\textsuperscript{327} \textit{Heyman v. Darwins}, \textit{ibid.}, at 375.

\textsuperscript{328} \textit{Ibid.}


(iii) Special Case Procedure

The inferiority of arbitration to courts becomes even more evident with respect to the “special case procedure.” These types of cases are also related to the above discussion on the lack of jurisdiction of arbitrators to decide questions of law. In sum, whenever arbitrators had to decide a question of law, they could or sometimes simply had to state such an award as a special case for the court’s opinion. That means that a special case procedure was not always subject to the discretion of arbitrators, but rather that the court could direct arbitrators to state the issue. Richard McLaren and Earl Edward Palmer, Q.C., explain that this solution was provided for in all common law provincial statutes in Canada in order to help arbitrators with some issues they were not sufficiently knowledgeable to deal with.\(^331\) For example, section 10(b) of the British Columbia Arbitration Act and section 7(b) of the Ontario Arbitration Act in the same way and using the same expression\(^332\) gave discretion to arbitrators to state their award in the form of a special case for the opinion of the court.\(^333\) In that way the court whose opinion was

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\(^331\) See R. McLaren & E.E. Palmer, Q.C., *supra* note 297 at 63 and a related reference to the provincial legislation in *footnote* 60.

\(^332\) According to both provincial statutes the arbitrators or umpire “*may, unless the submission expresses a contrary intention*, state an award for the opinion of the Court...”

\(^333\) That was consistent with the early case law on the issue. For example, in *Kesteven v. Gooderham* (1861) 20 U.C.Q.B. 500 (U.C.C.A.) the court held that there was no compulsory provision for stating legal questions, but merely a power of the arbitrator to do so, and therefore, the court had no jurisdiction to give directions, no questions having been stated by the arbitrator in pursuance of this power.
sought could give a final decision.\(^\text{334}\) Obviously, then, the “special case” procedure seriously jeopardised the finality of arbitration awards because it appeared to be a method of ensuring judicial review of the award.\(^\text{335}\) In this respect, it is interesting that in 1870, in *Ross v. Bruce*,\(^\text{336}\) the Ontario High Court held that it was possible for the parties to state in the submission that arbitrators had to state a special case, and if they failed to so, the award’s validity would be endangered.

There was also a situation in which a party could ask arbitrators or the court to state in the form of a special case for the opinion of the court any question of law arising during an arbitral proceeding. This situation, rooted in the English *Arbitration Act 1889*, was called a “consultative” case\(^\text{337}\) in order to emphasise that there was an ongoing arbitration while a court was giving its opinion. When requested by a party, this procedure was usually initiated as a request to arbitrators to state a special case for the opinion of the court and only after the arbitrator refused to do so, was a party allowed to apply to the court. Such consultative cases were officially entitled by provincial statutes as a “Special case for opinion of court.”\(^\text{338}\) Arbitrators were also given discretion to state a


\[^\text{335}\] English arbitration practice shows that arbitrators tried to avoid such judicial review simply by giving no reasons for the award or giving written reasons in a separate document.


“consultative case” before rendering an award, as confirmed, for example, in *Jamieson Construction Co. v. Edmonton* in Alberta.339

If directed by the court, arbitrators had to state a special case. However, if the arbitrators refused to state a special case on request of a party, if they continued an arbitration while a party applied to the court, and if they rendered the award, they could be guilty of misconduct. That happened in *Power v. Lake Superior Power Co.*340 when the arbitrator refused to state a special case upon request of the Counsel for the Power Company. Lake Superior Power Co. made a motion to set aside an award on the grounds that the arbitrators refused to state a special case and that they had exceeded their jurisdiction. The motion was granted.

(iv) Misconduct and Error in Law: Supervisory Powers of Courts

English courts’ broad supervisory powers related to the doctrine of misconduct and “error in law on the fact of the award” were used in the statutes of Canadian common law provinces to extend court supervisory power to the post-award stage.341 In general,

provide explicitly for the right of the party to require a special case.


341 See, for example, section 11(2) of the Alberta *Arbitration Act*, R.S.A. 1980, c. A-43 and section 14 (2) of British Columbia *Arbitration Act*, R.S.B.C. 1960, c. 14. It was found that the provisions giving power to the courts to set aside the award for the reason of misconduct of arbitrators are stated so broadly as to encompass error of law on its face. See *British Columbia Law Reform Commission Working Paper No. 25, supra* note 282 at
according to the doctrine of misconduct the courts had the power to remove an arbitrator or to set aside an award on the grounds of bias, bribery, corruption, excess of jurisdiction, failure to dispose of all matters referred to arbitration and breach of the rule of natural justice.\textsuperscript{342} Error of law on the face of an award, on the other hand, meant that an error could be seen not only in the award but also in related written documents. However, the question of what constituted an error of law was difficult to ascertain. McLaren and Palmer concluded that only material errors were sufficient to be used in this area.\textsuperscript{343}

(v) Enforcement of Arbitral Awards

Finally, as far as recognition and enforcement of arbitral awards was concerned, it was necessary to distinguish at least three situations. The first was the situation of enforcement of a domestic award—that is, enforcement of an award in the province where it was rendered. The second situation was enforcement of an award across Canada. The third situation was recognition and enforcement of foreign awards.

Enforcement of a domestic award in the province where it was rendered was considered either as a contractual or a statutory right. Since submission was a contract between parties to arbitrate, non-performance of an award was seen as a breach of that

\textsuperscript{105.}


\textsuperscript{343} R. McLaren & E.E. Palmer, Q.C., \textit{supra} note 297 at 118.
contract. Accordingly, a party demanding enforcement had a right to bring an action. Such enforcement was the only common law method of enforcing awards where the submission was oral.\textsuperscript{344} In \textit{Mc. Naught v. Stokes-Stephens Oil Co. (No.4)}\textsuperscript{345} the Supreme Court of Alberta held that where an award entitling one party to be paid “at the contract price” had been given the status of a judgment of the Court, it could be enforced by action. However, more often and whenever the submission was in writing, a party would apply for enforcement of an award in the same manner as a judgment. This method was provided for in provincial legislation. For example, section 15 of the British Columbia \textit{Arbitration Act} explicitly said that “[a]n award on a submission may, by leave of the court, be enforced \textit{in the same manner as a judgment} or order of the same effect [emphasis added].”\textsuperscript{346} The same solution was provided for in section 24 of the Manitoba \textit{Arbitration Act},\textsuperscript{347} section 12 of the Alberta \textit{Arbitration Act},\textsuperscript{348} and in all other provincial acts.\textsuperscript{349} Thus, a party applying for enforcement of an award was supposed to file the award in the court, in the required form. An application for leave to enforce an award was subject to strict formal requirements and thus to the discretion of the court to refuse or to accept it. In other words, courts would carefully examine an application itself and an

\textsuperscript{344} \textit{British Columbia Law Reform Commission Working Paper No. 25, supra} note 282 at 133.


\textsuperscript{346} R.S.B.C. 1960 c. 14.

\textsuperscript{347} R.S.M. 1970, c. A120.

\textsuperscript{348} R.S.A. 1980, c. A-43.

\textsuperscript{349} Note, however, that the related provision in Ontario was slightly different. Indeed, \textit{Arbitration Act}, R.S.O. 1980, c. 25 section 13 provided that “[a]n award may, by leave of
award.

In *Baker v. Kelly*\textsuperscript{350} the court in Ontario held that the court or judge deciding on the issue of execution of an award had discretion to permit a stay of execution in order to enable the opposite party to apply for an extension of time within which to move against the award. In *Re Riverside Hills Estates Ltd.*,\textsuperscript{351} the Vancouver Land Registration District refused to register an application to file a certificate of the Court. The applicant had obtained a Court order to enforce an award under section 15 of the British Columbia *Arbitration Act*, but the Registrar found that the party had failed to use proper words in the application and thus did not make a sufficient distinction between a judgment and award.

Apart from the procedural requirements, enforcement of awards was affected by the requirements related to the award itself. From the mid-19th century case of *Taylor v. Bostwick*,\textsuperscript{352} it seems that a court would enforce an award that was satisfactory on its face. In that case it was held that a court should enforce an award where the grounds of complaint are not apparent on the face of the award. Along the same lines, a court in Manitoba ruled in *Bannatyne v. Assiniboia*,\textsuperscript{353} holding that error not appearing on the face of an award could not be raised by way of defence. On the other hand, if the court found

\begin{itemize}
\item \textsuperscript{350} (1907) 14 O.L.R. 623 (Master).
\item \textsuperscript{351} *Riverside Hills Ltd., Re* (sub nom. *C.E. Barker Ltd., Re*) (1963), 46 W.W.R. 509 (B.C.S.C.).
\item \textsuperscript{352} *Taylor v. Bostwick* (1859), 1 Chy. Chrs. 23.
\item \textsuperscript{353} *Bannatyne v. Assiniboia (Rural Municipality)(No.3)* [1934] 1 W.W.R. 497, 41 Man. R. 640 (K.B.).
\end{itemize}
that an award did deal with matters outside the arbitration agreement it would refuse enforcement.\textsuperscript{354} As explained above, the court in a number of situations decided to set aside awards for falling outside the scope of the submission or for arbitrators exceeding their jurisdiction or for misconduct.\textsuperscript{355}

The second group of enforcement cases are those involving enforcement of Canadian awards in other provinces. In general, enforcement of an award in other jurisdictions within Canada would start with obtaining leave to enter an award as a judgment of the court. As previously explained, that was in accordance with provincial arbitration statutes which stated that an award would become enforceable in the same manner as a judgment. After leave was obtained in the jurisdiction where the arbitration had taken place, enforcement in other common law provinces was subject to the Reciprocal Enforcement of Judgments Act(s).\textsuperscript{356} A party failing to obtain leave would

\textsuperscript{354} Tulley v. Chamberlain (1871) U.C.Q.B. 299 (C.A.).

\textsuperscript{355} For example in Dureault v. Purdy [1971] 2 W.W.R. 153 (Sask. Q.B.) the Court held that the arbitrator had misconducted himself when dealing with matters outside the scope of arbitration agreement and set aside the award. In Cozoff v. Welsh (1914) 7 W.W.R. 531 the Court of Appeal in British Columbia held that when it appears on the face of the award that the arbitrator had exceeded his jurisdiction, it would be possible to set aside the award.

have to sue on the award.\textsuperscript{357}

Enforcement of all foreign awards in Canada was subject to reciprocity only through bilateral treaties, because until 1985 Canada was not a party to any international treaties on arbitration and enforcement of foreign awards and judgments.\textsuperscript{358} If there was no bilateral treaty between Canada and the country where an award was rendered the general requirements of common law would apply. That meant the plaintiff had to show that the parties had agreed to arbitration, that such submission was valid, that the arbitration was conducted in accordance with such submission, and, finally, that the award was valid under the law of the place where it was made.\textsuperscript{359} Influenced by English case law, Canadian courts first held that if a foreign award had been made enforceable by a foreign court as a judgment, then it would be enforced as a judgment in Canada, not as an award. In \textit{Stolp & Co. v. Browne & Co.},\textsuperscript{360} the court held that an award of an arbitrator abroad did not come within the definition of a foreign judgment until it had been made an order of the Court. Upon such order the award and judgment merged, which in effect

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\textsuperscript{357} R. McLaren & E.E.Palmer, Q.C., \textit{supra} note 297 at 106-107. See also Kos Rabcewicz-Zubkowski, \textit{Arbitration in Canada}, \textit{supra} note 288 at 85-86.

\textsuperscript{358} Before joining Canada, Newfoundland gave effect to the \textit{1923 Geneva Protocol on Arbitration Clauses} in its \textit{Arbitration (Foreign Awards) Act} (22 Geo. V, S. Nlfd., 1930, c.2). However, after joining Canada, Newfoundland became bound by treaty obligations as applicable to Canada (not \textit{vice versa}), so the Protocol’s provisions ceased to have an effect. For example, before Canada’s accession to \textit{the New York Convention} the following jurisdictions were reciprocating jurisdictions with British Columbia: Alberta, Austria, the Federal Republic of Germany, Manitoba, New Brunswick, Nova Scotia, the Northwest Territories, Newfoundland, Ontario, Prince Edward Island, Queensland, Saskatchewan, Victoria, and the Yukon.


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meant that judgments were to be enforced, not awards. \[^{361}\] However, this position was changed later and even if foreign law required an award to be made enforceable by a foreign court judgment, Canadian courts did not assume that a foreign award merged into a foreign judgment. Accordingly, they would enforce a foreign award, but not a foreign judgment. \[^{362}\]

1. 2. Judicial control from 1979 to 1985

It is interesting to compare developments in international commercial arbitration in England and Canada since the former, in 1979, enacted a new law on arbitration which significantly changed the traditional English concept of judicial control over arbitration. Essentially, the *Arbitration Act 1979* came after a period of growing unpopularity of England as an arbitration venue. That arose as a consequence of the broad powers of courts to intervene in arbitral proceedings. The new English statute, like its predecessors, was applicable to both domestic and international arbitrations. More importantly, the *Arbitration Act 1979* improved the position of arbitrators in several ways discussed below.

First, the *Arbitration Act 1979* abolished the special case procedure and second, it abolished the jurisdiction to set aside an award for error of law or facts on the face of


\[^{362}\] See J.-G. Castel, "Recognition and Enforcement of Foreign Judgments in Personam..."
Instead, it established a limited right to appeal (section 1(2)(3)). Further limitations were provided for in section 2, limiting the powers of courts to determine preliminary points of law only with the consent of an arbitrator (section 2(1)(a)) or all parties (section 2(1)(b)) and only if this would result in substantial cost savings to the parties (section 2(2)(a)) or if determination of the question of law was one of general public importance or if there was some other special reason (section 2(3)(a)(b)).

An important change introduced by the *Arbitration Act 1979* was the modification of the public policy doctrine in section 3 and the introduction of so-called “exclusion agreements” (section 3(2)) for present and future international disputes. In short, an “exclusion agreement” was a written agreement excluding the right to appeal or, in other words, contracting out judicial review.

(i) English Case Law (*Nema* and *Bremer Vulkan*)

Given its new position in the statute, arbitration started to gain more recognition...
from the courts in England. In the first case which dealt with leave to appeal under the new Act, the *B.P.T. Tioxide Ltd. v. Pioneer Shipping Ltd, and Armada Marine S.A.* (Nema) case, the standards for granting review of an arbitral award on the grounds of error of law were set up by Lord Denning (speaking for the Court of Appeal) as a two-tiered standard. Lord Denning found that there should be no review unless the party opposing the enforcement showed that the arbitrator misdirected himself/herself on the point of law and that the decision was one no reasonable author could reach. Then Lord Diplock speaking for the House of Lords explained that according to the *Arbitration Act 1979* leave to appeal should be rejected in all but the most compelling cases. These were such cases in which there was some special reason for appeal. Lord Diplock described those most compelling cases as cases in which it was apparent to the judge that the meaning ascribed to the arbitration clause by the arbitrator was obviously wrong.

Another important English case came with respect to recognition of the principle of severability of arbitration clause, which was not dealt with in the *Arbitration Act 1979*. Lord Diplock in *Bremer Vulkan Schiffbau and Maschinenfabrik v. South India Shipping*

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366 Lord Denning: “In short, under the *Arbitration Act 1979* the judge should apply the same test in regard to an arbitrator’s decision as the courts habitually apply in regard to decisions of magistrates or tribunals—which can be questioned only on points of law.” See *Nema* (1980) Q.B. 547 (C.A.) at 566-567.


368 See *Nema* [1982] A.C. 724 at 742.

369 See *Nema* [1982] A.C. 724 at 742-743.
Corporation Ltd. (Bremer Vulkan) held that an arbitration clause was a separate contract, ancillary to the main contract.\(^\text{370}\)

(ii) Canada Reluctant to Accept English Modernisation

This modernisation of the English law was considered by Canadian provincial legislatures planning reforms of arbitration law, but these considerations did not result in any changes of the relevant provincial statutes. Accordingly, rulings of provincial courts reflected the Arbitration Act 1889. For example, in M. Loeb Ltd. v. Harzena Holdings Ltd.,\(^\text{372}\) the High Court in Ontario refused to stay an action holding an arbitration agreement to interpret the lease contract as a question of law.\(^\text{373}\) In Northwestern Utilities Ltd. v. Peyto Oils Ltd.,\(^\text{374}\) the Trial Court in Alberta dealt with an agreement for exploration and exploitation of oil and gas resources on private land concluded in 1938.

\(^{370}\) Bremer Vulkan Schiffbau and Maschinenfabrik v. South India Shipping Corporation Ltd. [hereinafter Bremer Vulkan] [1981] 2 W.L.R. 141.

\(^{371}\) Bremer Vulkan, ibid, at 166.


\(^{373}\) At the same time the court in Ontario gave a precise guidelines to interpret section 7 of the Ontario Arbitration Act, R.S.O. 1980, c. 25. In considering whether a stay should be granted, the following principles were relevant: the burden lay on the party resisting the stay; a stay tended to be refused if matters of law had to be determined; an action should not be stayed if the dispute involved the interpretation of an agreement; an action should be stayed where the dispute was one of fact and involved technical evidence, or where it involved the interpretation or application of foreign law. See M. Loeb Ltd. v. Harzena Holdings Ltd. (1980) 18 C.P.C. 245 at 249-250.

and amended in 1942. Contained in this agreement was an arbitration clause, which the
court determined was an “ordinary arbitration clause” because it did not have any express
or implied terms that arbitration would be condition precedent to litigation. In that way,
the court ruled along the lines of the 1974 Supreme Court of Canada decision in
_Deuterium of Canada Ltd. v. Burns and Roe_ which recognised _Scott v. Avery_ as part of
Canadian law. However, the _Ship M.V. Sea Pearl v. Seven Seas Dry Cargo Shipping
Corp (Sea Pearl)_ case, which was also decided in 1983 but by the Federal Court of
Appeal, showed that the higher courts were willing to follow new directions from
England (and the US). _Sea Pearl_ dealt with the _forum non conveniens_ problem in
maritime matters. The Canadian court relied on the rule established by the English case
law that the discretion of the court to grant a stay should be exercised unless a strong
cause for not doing so is shown by the plaintiff. Accordingly, Pratte J. invoked section
50(1)(b) of the _Federal Court Act_ to explain that the court had discretionary power to
stay proceedings where “it is in the interest of justice that the proceedings be stayed.” In
addition, Pratte J. held that the _prima facie_ rule was that contractual undertakings had to

377 The Federal Court of Appeal dealt with an appeal of a judgment of the Trial Division refusing to stay an action brought by a Chilean respondent against the Cyprus-based appellant. Thus, the important fact was that neither the appellant nor the respondent had any connection with Canada. An arbitration clause of the charter party referred to arbitration in London a dispute which arose when the ship arrived at Quebec.
be honoured and “that in order to depart from that prima facie rule, ‘strong reasons’ are needed, that is to say, reasons that are sufficient to support the conclusion that it would not be reasonable or just, in the circumstances, to keep the plaintiff to his promise and enforce the contract he made with the defendant.”380 Emphasising that the principle had been applied in England and in the US, Pratte J. concluded that the same principle should be applied in Canada. He allowed appeal, set aside the decision of the Trial Division and stayed the proceedings pending arbitration.

2. Arbitration in Quebec

Quebec law today is seen as a mixité of the French and English law. The reception of French law formally started in the 17th century when French settlers in North America started to organise their relationships (as well as relationships with the aboriginal people) following the pattern of legislation in France. Even though some authors point out that the French sources, even at that time, were more mixed than uniform, the Quebec legal system definitely became a mixture after the arrival of the English settlers in the 18th century.381 Specifically, in 1760 sovereignty was transferred to the English382 but the

380 See “Sea Pearl”, supra note 376 at 681.
381 H.P. Glenn, supra note 268 at 4.
382 The population of Quebec, or Novelle-France at the time, became subjects of the King of England after the capitulation of Montreal on 8 September 1760. By the Treaty of
Quebec Act of 1774 confirmed the preservation of the French law for property and civil rights. At the same time the 1774 Act introduced English law in constitutional, administrative and criminal law matters, as well as in certain commercial matters. In the 19th century, codification of the Quebec law was strongly influenced by codification in France. Quebec's Civil Code of 1867, for instance, was patterned upon the 1804 Civil Code of France (later called Code Napoleon). Quebec's Code of Civil Procedure, codified first in 1866 and subsequently changed in 1897 and again in 1965, was also influenced by the French procedural law—even though some elements of the English adversarial model appeared. It seems that over time, the English law has more and more influenced Quebec's legislation on commercial matters. It is noteworthy that, unlike France, Quebec has never had a commercial code.

Even though Quebec has some of the oldest law schools in Canada, it was not

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Paris, signed on 10 February 1763, France ceded to Great Britain its colonies in North America, including its Novelle-France.

383 The Quebec Act (1774) 14 Geo. III, c. 83.

384 P.H. Glenn, supra note 268 at 5.

385 The Civil Code of Lower Canada of 1867 was re-codified in 1991 as the new Civil Code of Québec, S.Q. 1991, c.64. For more on the history of civil law in Quebec see J. Brierley & R. Macdonald, eds., Quebec Civil Law: An Introduction to Quebec Private Law (Toronto: Edmond Montgomery Publications Ltd., 1993)[hereinafter Quebec Civil Law].


389 P.H. Glenn, supra note 268 at 6. For more on the development of the civil law and commercial law in Quebec, see J. Brierley, “The Renewal of Quebec’s Distinct Legal Culture: The New Code of Quebec” (1992) 42 U.T.L.J. 484. See also J. Brierley & R. Macdonald, eds., Quebec Civil Law, supra note 385.
until 1948 that a university law degree was recognised as a requirement for admission to practice.\textsuperscript{390} Before 1948, the professional corporations of notaries and lawyers were in control of legal education through professional training. In other words, Quebec, like the common law provinces, had a long history of rivalry between academic and professional legal education. Until the 1960s, the development of an academic curriculum was a slow process with no financial support from professional corporations. At the same time, professional education made another significant impact on academia. Judges and lawyers were often university teachers and many full-time judges served as deans of law faculties.\textsuperscript{391} However, both the practice and teaching of law was based on French civil law principles and the university law degree offered at the six law faculties presently in Quebec is known as the \textit{bachelor of civil law} (B.C.L.) in contrast to the LL.B. degree at universities in the common law provinces.\textsuperscript{392}

(i) Impact of French Law and Practice

Prior to the trans-Canada-reform in 1986, arbitration had only marginal status in


\textsuperscript{391} See J. Brierley, \textit{ibid.}, at 151.

\textsuperscript{392} Laval, McGill, Montréal, Sherbrooke and the Université du Québec à Montréal offer civil law programmes. The University of Ottawa has both civil law and common law sections.
Quebec, as evidenced by the *Code of Civil Procedure 1966.* The provisions of the Book Seven of the Code governed domestic and international arbitration, commercial and non-commercial. The reluctance of Quebec legislators to change the old regime on arbitration (based on the 1843 court decision in *L'Alliance v. Prunier*) was premised on fear that through arbitration the “traditional law of Quebec might be at risk, business being dominated by the English-speaking sector of the population, who might be inclined to favour the application of the common law.” Thus, given the framework of the French law since the *Quebec Act 1774,* and, in particular, the influence of old French civil law of procedure, Quebec's civil procedure law from 1866 to 1966 did not recognise the right of parties to promise to arbitrate (*clause compromissoire*). Indeed, the *Code of Civil Procedure 1866* defined a submission, first, as “an act by which persons, in order to prevent or put an end to a lawsuit, agree to abide by the decision of one or more arbitrators whom they agree upon” and, secondly, an act which provided the names of arbitrators and the matter of the dispute to be specified. In that way, Quebec put more limits on the principle of party autonomy than did the common law provinces, all of which, as previously described, provided for a submission as an agreement to arbitrate all present and future disputes.

Professor Kos-Rabcwicz-Zubkowski argues that the issue of validity of *clause*

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396 Article 1431 of the *Code of Civil Procedure 1866,* *supra* note 386.
compromissoire was also a long-disputed issue in France. Considering French legal doctrine, he suggests that French courts originally recognised the validity of clause compromissoire related to international commercial matters, but then denied it in the period from 1843 to 1925. Indeed, in 1843, the French Supreme Court refused to enforce clause compromissoire as an agreement to arbitrate future disputes on the grounds of a strict interpretation of article 1006 of the French Code of Civil Procedure. This article required a submission to define the subject matter of a dispute and to appoint arbitrators. The clause compromissoire before the court failed to meet these requirements. Article 631 of the Code du Commerce 1925 re-validated the clause. In comparison, Quebec waited until 1966 to change its position.

(ii) Changes After Zodiak

In practice, Quebec courts relied on the 1843 L’Alliance v. Prunier ruling. In 1961, for example, in Vinette Construction Ltée v. Dame Drobrinsky it was held that a

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397 Article 1434 of the Code of Civil Procedure 1866, supra note 386.
400 T. Carbonneau, ibid., at 53, footnote 88.
clause compromissoire was void as contrary to public policy. Later, in 1964 in *National Gypsum Co. Inc. v. Northern Sales Ltd.*[^402] the Supreme Court of Canada held that under Quebec law only an agreement to arbitrate a present dispute was valid.[^405] In 1966, the amended article 951 of the *Code of Civil Procedure* stated simply that an undertaking to arbitrate must be set out in writing and that when a dispute has arisen the parties must execute a submission. Otherwise, if one of the parties refuses to do so, the court will appoint an arbitrator. Notwithstanding the legislative changes, it seems that the courts continued to hold clause compromissoire invalid in international commercial disputes on the same grounds as in the nineteenth century[^404]— until *Zodiak International Productions Inc. v. Polish People's Republic.*[^405]

The decision of the Supreme Court of Canada in *Zodiak* was seen as the most important decision since the 1966 legislative reform. A dispute arose from a contract


[^405]: It is important to notice that in *National Gypsum Co. Inc. v. Northern Sales Ltd.* the Supreme Court of Canada applied the law of Quebec as the applicable law to determine whether to stay an action commenced in Quebec or to give a respect to arbitration in New York. Accordingly, the court held that a clause compromissoire in a charter party providing for arbitration in New York was invalid.


concluded in 1970 on exclusive distribution of Polish films in Canada and in certain other territories by Zodiak, a Quebec company. The arbitration clause was a clear example of clause compromissoire providing for future disputes to be settled by the Court of Arbitration, in Warsaw, Poland. In 1972 Zodiak initiated an arbitration proceeding but, unsatisfied with the award, started an action in Quebec before the Superior Court in 1973. The defendant, the Polish People's Republic, then invoked the arbitration clause to claim that the Quebec court lacked jurisdiction. The trial court dismissed the argument of the Polish party but the decision was overturned in 1981 by the Quebec Court of Appeal. The Court of Appeal held that clause 16(a) of the distribution agreement was "a complete undertaking to arbitrate and that this type of clause is now valid in Quebec law and that its effect is to remove from the ordinary courts of law any issue arising out of obligations resulting from the contract."\textsuperscript{400} The Supreme Court of Canada held that "the prevailing opinion since the coming into effect of the new Code of Civil Procedure is that the adoption of article 951 in its present form sufficed to render the complete undertaking to arbitrate valid."\textsuperscript{407}

(iii) Arbitrability and Public Order

Related to the validity of an arbitration clause is also the issue of arbitrability of

\textsuperscript{400} Zodiak, supra note 405 at 532-533.
\textsuperscript{407} Zodiak, supra note 405 at 538.
the subject matter of a dispute. As in France, the law in Quebec expressly determined arbitrability first in the Code of Civil Procedure 1966.

**Article 940**

"Any person may enter into a submission to arbitration respecting any rights of which he has the free exercise.

However, no one may enter into submission respecting *alimentary gifts* or *legacies*, separations between consorts or questions which concern either *public order of the status or capacity of persons.*" [emphasis added]

The 1986 revision of the *Civil Code* and the *Code of Civil Procedure* related to arbitration resulted in a new stipulation of arbitrability in the *Code of Civil Procedure 1986*:

**Article 1926.2**

"Disputes over the status of capacity of persons, *family matters* or *questions of public order* cannot be submitted to arbitration.” [emphasis added]

As problems of other "questions which concern public policy" appeared in practice, courts in Quebec looked for answers in provisions of the *Civil Code*. For example, in

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408 Article 2006 of the French *Civil Code* of 1804 expressly prohibits arbitration of public policy matters: “It shall not be possible to agree to submit to arbitration questions of the civil status and capacity of persons, of those relating to divorce or judicial separation or disputes concerning public collectivities and foundations and more generally in all the fields which concern public policy.”

409 An Act to Amend the Civil Code and the Code of Civil Procedure in Respect to Arbitration, R.S.Q. 1986, c.73.
Procon (Great Britain) Ltd. v. Golden Eagle Co.\textsuperscript{410} the Court of Appeal found that a breach of warranty by architect or contractors was not arbitrable as a matter of public policy.\textsuperscript{411}

A strict and narrow interpretation of arbitration law was common not only with respect to the issue of arbitrability and public order in the context of the scope of arbitration clauses, but also with respect to the powers of arbitrators to award damages and stays of proceedings. The most criticised decision of the Quebec courts was the one in Couplan Inc. v. C.E.V.M.I.-Chimie.\textsuperscript{412} The court held that the arbitration clause in the contract did not give power to the arbitrators to decide on the question of the amount of damages but only on the question of the breach of contract and the existence of the right to damages.\textsuperscript{413}

(iv) Stay of Courts’ Proceedings

As far as the issue of stay of proceeding when a valid arbitration clause exists is concerned, it is important to note that the law of Quebec has not used the Scott v. Avery

\textsuperscript{410} Procon (Great Britain) Ltd. v. Golden Eagle Co.\textsuperscript{410}[1976] Que. C.A. 565.


\textsuperscript{413} For further discussion on the case see W. Graham, supra note 411 at 23-24 and M.
terminology, but before the 1966 reform, article 13 of the *Civil Code* was read to mean that the parties could not remove through arbitration agreement with respect to future disputes the jurisdiction of the courts.\[^{414}\]

In 1894 the Supreme Court of Canada in *Royal Electric Co. v. Three Rivers*\[^{415}\] held that where there is an arbitration clause in a contract, the court *may* force parties to submit to arbitration a matter in dispute coming within such a clause and not permit them to bring action. In other words, it was held that a stay of proceedings is at the discretion of the court.\[^{416}\] In *Duhamel v. Country Fire Insurance Co.*\[^{417}\] the Superior Court of Quebec held that “if the question of liability is to be determined by arbitration he [the party] cannot seek to establish the liability of the insurers in an action.” However, since the adoption of article 951, in 1966, the courts will stay proceedings and enforce valid arbitration agreements referring to present or future disputes.

When deciding to stay proceedings the courts examine the scope of the arbitration

\[^{414}\] L. Kos-Rabcewicz-Zubkowski, *Arbitration in Canada*, * supra* note 288 at 42. In *Anchor Marine Insurance Co. v. Allen* (1886), 13 Q.L.R. 4, 14 R.L.O.S. 449 (C.A.) Ramsay J referred to *The Merchants Marine Insurance Company and Ross* (1884) 10 Q.L.R. 237 and stated that “[u]nder the common law of this country one cannot stipulate that you will not have recourse to the ordinary courts for the decision of your rights.” But see also *Guerin v. Manchester Fire Assurance Co.* (1898) 29 S.C.R. 139 where the Supreme Court of Canada ruling on a judgment of the Quebec Court of Appeal held that the principle of *Scott v. Avery* was applicable under Quebec as under English law. Accordingly, the Court held that in cases where the arbitration was made a condition precedent to litigation no action would be maintainable until after an award was rendered.


\[^{416}\] In contrast, French courts today must decline jurisdiction. See article 1458(1) of the *French Code of Civil Procedure*.

clause in order to find out whether the courts lack jurisdiction over the action. In *Heyman v. Lafferty, Harwood & Co.*, the Quebec Court of Appeal interpreted article 950 of the *Code of Civil Procedure* to mean that even if a valid arbitration clause is not specific that the arbitrator's decision will be final and binding. In the *Zodiak* case it was established that an arbitration clause deprives the courts of subject-matter jurisdiction or jurisdiction *ratione materiae*—in other words, that the parties are free to waive the jurisdictional issue. In another 1983 case, *Monette v. Couture*, the problem appeared with respect to the time limit for pleading the existence of an arbitration clause. The proceedings had been started even though there was an arbitration clause providing for arbitration of a dispute. In addition, the defending party failed to plead a lack of jurisdiction of the court and, moreover, attended discovery proceedings. The Quebec Court of Appeal held that such attendance was an acceptance of the court's jurisdiction.

(v) *Kompetenz-Kompetenz* and Severability of Arbitration Clause

It is interesting to compare Quebec's approach to the principles of *Kompetenz-

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419 Marc Lalonde finds that the distinction between two types of jurisdiction is an analytical difficulty for both courts and theory. Jurisdiction *ratione materiae* concerns the allocation of cases between different orders of jurisdiction according to subject matter. Jurisdiction *ratione personae* concerns the allocation of cases with the same subject matter according to factors pertaining to the parties. See M. Lalonde, *supra* note 411 at 717.

Kompetenz and the severability of arbitration clauses with the French continental approach on one hand and the Canadian common law approach on the other. In France, compétence-compétence is used to describe the powers of arbitrators to rule on their own jurisdiction. Unlike the traditional German law, which gave the last word to arbitrators, the French law gives the arbitrators only the "first shot" but preserves court control as a "final shot". However, the arbitrators are granted the right to express the "first word" on their jurisdiction even if "the arbitral proceedings have not yet commenced."421

Severability of arbitration clauses, for international disputes, was finally adopted in France in 1963. The Court de cassation held in Gosset v. Carapelli422 that "in international arbitration, the agreement to arbitrate, whether concluded separately or included in the contract to which it relates, is always, but in exceptional circumstances [...] completely autonomous in law, which excludes the possibility of it being affected by the possible invalidity of the main contract."423 Many authors argue that the severability doctrine, however, has not yet been extended to domestic arbitration in France.424 Both principles were addressed by the Quebec Superior Court in Prévost Silk Screen Inc. v. Les Produits Franco Inc.425 The Court held that the issue of the jurisdiction of an arbitrator can be determined by the arbitrator himself/herself. Moreover, an arbitrator's competence

421 Article 1458 section 2 of the French Code of Civil Procedure. See more on the French approach in P. Schlosser, supra note 192 at 201.
423 Gosset v. Carapelli, ibid., at 545.
424 A. Samuel, supra note 184 at 164. See also R. David, supra note 37 at 194.
425 Prévost Silk Screen Inc. v. Les Produits Franco Inc. J.E. 80-298 (C.S.) [unpublished]. For the facts of the case, see a summary provided by M. Lalonde, supra note 411 at 714-715.
to do so would not deprive the parties of the right to ask the court in a motion for homologation (or confirmation) of the award to determine the issue finally. In addition, the court held that arbitrators could also judge the validity of the main contract to which an arbitration clause is a part.

(vi) Enforcement of Arbitral Awards

Recognition and enforcement of foreign awards (including international ones and awards from Canadian common law provinces) was a troubling issue in Quebec because article 950 of the Code of Civil Procedure 1966 provided for a procedure of homologation of “awards” in general.

Article 950:

“The award of arbitrators can only be executed under the authority of a court having jurisdiction, and upon suit instituted in the ordinary way to have the party condemned to execute it. [emphasis added] The court before which such suit is brought may examine into any grounds of nullity which affect the award or into any other questions of form which may prevent its being homologated; it cannot, however, enquire into the merits of the contestation.”

In Re John Helmsing Schiffartsgesellschaft M.b.H. and Marechart Ltd.426 the Trial Division of the Federal Court read article 950 of the Code of Civil Procedure to mean that the homologation of a foreign award could be a proceeding equivalent to a simple

motion. Marc Lalonde finds the decision of the Federal Court extremely important for extending the application of article 950 to foreign awards because Book Seven of the *Code of Civil Procedure* only refers to domestic awards.\(^{427}\) Indeed, the second paragraph of article 950, requiring that the award be executed under the authority of a court having jurisdiction, limits the ability of the Quebec courts to homologate foreign awards.

International awards, on the other hand, could also become enforceable by the application of article 178 of the *Code of Civil Procedure*, which means as foreign or extraprovincial judgments, if foreign courts homologate awards.\(^{428}\) In that way, a foreign judgment homologating an arbitral award could be re-examined on the merits as any foreign or extraprovincial judgment and enforced in Quebec only by an action on exemplification.\(^{429}\) Because of the court ruling in *Orsi v. Irving Samuel Inc.*\(^{430}\) on the application of article 178 decided that an action on exemplification of a foreign judgment would allow the court to reopen the case on issues which have been already raised in the original action before arbitrators, some authors have found the procedure under article 950 better for a successful party in arbitration.\(^{431}\) However, problems with the treatment of foreign and international arbitration awards have been overcome with the 1986 reform

\(^{427}\) M. Lalonde, *supra* note 411 at 736.

\(^{428}\) Article 178 of the *Code of Civil Procedure*: “Any defence which was or might have been set up to the original action may be pleaded to an action brought upon a judgment rendered out of Canada.” See also M. Lalonde, “Arbitration in Quebec”, *supra* note 411 at 736.

\(^{429}\) An exemplification, on the other hand, means that the party who seeks the enforcement of the foreign award must prove it in a special form, as regulated in article 1220 of the *Civil Code*, or the award would be a private writing only.


of the *Code of Civil Procedure*. Indeed, “Title II,” added to the Book Seven and incorporating principles of the *New York Convention*, brought Quebec in line with most modern arbitration statutes in the world.

B. Arbitration in Hong Kong Before the Adoption of the ML

The purpose of this section is to outline the development of arbitration in Hong Kong with an emphasis on the influence of English law and practice on the one hand and Chinese customs on the other. The section is divided into two subsections. The first section describes the establishment of the colonial system in the context of the 1843 reception of common law. The second subsection investigates the departure of Hong Kong from the path established by English law and practice and suggests possible consequences of the “one country, two legal systems” concept on international commercial arbitration in Hong Kong.

1. Common Law Dominance in the Chinese Environment

Unlike most of the former British colonies, Hong Kong was acquired (in 1843\(^{432}\))

\(^{432}\) In fact, the process took three stages in 1843, 1860 and in 1898. The end of the first stage corresponds with the end of the First Opium War (1839-1843). The result of the
not for settlement or territorial expansion by England, but for the establishment of a commercial, diplomatic and military base in the Far East.\textsuperscript{433} However, common law had been introduced in Hong Kong even prior to the British colonisation— that is, in 1833 when Hong Kong was still part of China. \textit{An Act to regulate the Trade to China and India}\textsuperscript{434} was passed to create a court with criminal and admiralty jurisdiction for the protection of Her Majesty’s subject within the dominions of the Emperor of China and on the high seas within one hundred miles of the court of China.\textsuperscript{435} The reception of English law was then fostered as “a ready-made corpus of law, which could be modified by judges as necessity arose, and by legislators as policy demanded, and as a structure that was at once suited to the mercantile requirements of the British Empire yet adapted to local circumstances.”\textsuperscript{436}

Dezalay and Garth sketch an interesting perspective on the early days of the First Opium War was the \textit{Treaty of Nanking (Treaty Between China and Great Britain, 29 August 1842)}\textsuperscript{93} C.T.S. 465 and the official colonisation of Hong Kong. Since the Treaty came in effect in 1843 that year was taken as the beginning of the British colonial legal system. The Second Opium War (1856-1860) ended in 1860. The \textit{Convention of Peking (Convention and Treaty of Peace and Friendship with China, 24 October 1860)}\textsuperscript{123} C.T.S. 71 added Kowloon Peninsula to the territory of Hong Kong. Finally, in 1898 the British Empire acquired what is known as the New Territories by the 99-year lease provided for in the \textit{Convention of Peking}.

\textsuperscript{433} A. Chen, “From Colony to Special Administrative Region: Hong Kong’s Constitutional Journey” in R. Wacks, \textit{The Future of the Law of Hong Kong} (Hong Kong: Oxford University Press, 1989) 76 at 77.

\textsuperscript{434} \textit{An Act to regulate the Trade to China and India} (28 August 1833), 1833, 3&4 Wm IV. c.93.


English influence in Hong Kong in their remarkable book *Dealing in Virtue*. Speaking of Hong Kong law as law on the frontier, these authors argue that the English promoted not the rule of law, but a paternal system in which law played a very marginal role "as a kind of ornament for the gentlemanly life-style." Accordingly, when there was a need for formal law, the English colonists could look toward London. Dezalay and Garth also insist that Hong Kong always lacked a strong Chinese legal tradition because the Chinese population of Hong Kong consisted mainly of immigrants from the Mainland not very much interested in China, especially after the 1949 Revolution. Hsu also finds that the Westernization of the Chinese population through the use of English and through the British influence in education was fostered by the fact that the Hong Kong Chinese merchant population was not as provincial as the agrarian mainland population. Andrew Phang finds English influence so strong that the colony has become a mere "carbon copy of the English common law, with only the slightest of variations in the sphere of customary law."

In 1844 Ordinance No. 15 expressly declared for the first time that "the law of England shall be in full force in the said Colony of Hong Kong except where the same shall be inapplicable to the local circumstances of the said Colony or of its inhabitants"

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440 Y. Dezalay & B. Garth, *ibid.*, at 258.
441 See B. Fong-Chung Hsu, *Hong Kong in Transition*, supra note 435 at 20-30.
The "local circumstances" concept, however, remained a troubling issue for the courts for a number of years. It seems that the prevailing opinion of the courts determined local circumstances as those that existed on 5 April 1843.\textsuperscript{444}

Even though the \textit{1844 Ordinance} could be read to mean that not all relationships in Hong Kong would be governed by common law, it created a legal system far from one of legal pluralism. Courts in Hong Kong were not only bound by English statute law, but also by English common law and equitable precedents—that is, decisions of the House of Lords and the Privy Council.\textsuperscript{445} English was the official language of the colony, of Hong Kong's legislation and its legal profession. Education of local lawyers was patterned after the English system.\textsuperscript{446} British business and law firms dominated the Hong Kong market. At the same time, Chinese law and custom were incorporated into family and succession matters but application was poor because English judges appointed to Hong Kong lacked

\textsuperscript{444} \textit{Ordinance No. 15} of 21 August 1844 was also known as the \textit{1844 Supreme Court Ordinance}. It is significant that with respect to application of English law the wording of the first Ordinance was only slightly changed in the \textit{1873 Supreme Court Ordinance}. It then remained unchanged until the \textit{Application of English Law Ordinance} of 1 January 1966, cap 88. For application of Chinese law where English law was held inapplicable to local circumstances see \textit{In Wong Kam Ying and Ho Po Chun v. Man Chi Tai} [1967] H.K.L.R. 201.


\textsuperscript{446} Peter Wesley-Smith emphasises that it is important to understand that the common law was successfully exported from England by the export of English lawyers, of English legal literature and of English trained law teachers as much as by the export of the English Bench. See P. Wesley-Smith, "Understanding the Common Law" in R. Wacks, ed., \textit{The Future of Law in Hong Kong} (Hong Kong: Oxford University Press, 1989) 15 at 36.
knowledge and understanding of Chinese culture and language.\footnote{See B. Fong-Ching Hsu, \textit{Hong Kong in Transition}, supra note 435 at 12, and 14-16. See also T. Ujejski, “The Future of the English Language in Hong Kong Law” in R. Wacks, ed., \textit{ibid.}, at 172-179.}

For the above-mentioned reasons the legal system created in Hong Kong was considered to be a “fused common law system” where the Chinese law and custom became part of the common law of Hong Kong.\footnote{B. Fong-Chung Hsu, \textit{Hong Kong in Transition}, supra note 435 at 13 and 18. Note also that in \textit{Lui Yuk-Ping v. Chow To} [1962] H.K.L.R. 524 the court held that Chinese law and custom was part of the common law of Hong Kong.} It is important to note that the \textit{Application of English Law Ordinance 1966}, which modified the 1844 \textit{Ordinance}, did not make explicit reference to the reception of the English common law. Indeed, it stated that the \textit{common law}, (not English law) and rules of equity may be applicable in Hong Kong and at the same time deleted the date of reception (5 April 1843) from the text. Regardless of these changes, Hsu concludes that because the judges did apply English legal reasoning and English cultural values in interpreting Chinese law and traditions, local traditional Chinese elements almost vanished over the time.\footnote{B. Fong-Chung Hsu, \textit{ibid.} See also B. Fong-Ching Jsu & P.W. Baker, “Law and Opinion in Hong Kong in the Late 1980s” (1990) 20 H.K.L.J. 342 at 348, and A. Phang, \textit{supra} note 442.}

(i) Direct Application of English Law on Arbitration

Not surprisingly, then, Hong Kong’s law on arbitration was patterned after English law. Moreover, until 1979 Hong Kong’s law duplicated the English law on
That was in particular the case with Hong Kong’s first *Arbitration Ordinance* enacted in 1963, which used identical terms as the English *Arbitration Act 1950*.

Even before the *1963 Arbitration Ordinance*, English law governed arbitration in Hong Kong. For example, from 1873 to 1901 arbitration was regulated by Hong Kong’s rules of court, then from 1901 to 1950 by the *Code of Civil Procedure Ordinance No. 3*, which itself was based on the English *Arbitration Act 1889*.

Neil Kaplan goes even further back to the earliest colonial days of Hong Kong under its first Governor, Sir Henry Pottinger. Pottinger tried in 1844 to regulate and promote arbitration in *An Ordinance to authorise His Excellency the Governor of Hong Kong to refer all civil actions or suits to arbitration (Ordinance No. 6 of 1844)*. Pottinger’s attempt to promote arbitration before there was a Supreme Court in Hong Kong failed because it was seen as giving too much power to the Governor. Yet, it nevertheless indicates that arbitration was considered as a way of dispute resolution by the English Government and

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452 R. Morgan, “A Brave New World”, *supra* note 450 at 190, footnote 66.

indeed practised since 1844.\textsuperscript{454}

Given the paths of the English 1889 and 1950 \textit{Arbitration Acts},\textsuperscript{455} and considering the influence of English precedents, it can be concluded that Hong Kong in that period did not go beyond the English reforms. As in England, the same statute governed domestic and non-domestic arbitration in Hong Kong. Courts were given broad supervisory powers over arbitral proceedings.

Hong Kong also followed changes of English law with respect to application of the \textit{New York Convention}.\textsuperscript{456} The \textit{New York Convention} was added as Part IV to the 1963 \textit{Arbitration Ordinance} in 1975.\textsuperscript{457} Because of its colonial status, the Government of the United Kingdom had the right to exercise prerogative powers and thus to negotiate treaties and conventions applicable in Hong Kong. Thus, Hong Kong became a party to the \textit{New York Convention} by virtue of the United Kingdom’s accession to it on behalf of Hong Kong and other dependent territories. In the same manner Hong Kong had acceded to the \textit{1923 Geneva Protocol} and the \textit{1927 Geneva Convention}.\textsuperscript{458}

It is important to remember that the English \textit{Arbitration Act 1950}\textsuperscript{459} consolidated the three principles of its 1889 and 1934 predecessors.\textsuperscript{460} These are: the power of courts to set aside an award for an error of law on the face of the award; special case procedure and

\begin{itemize}
  \item[454] N. Kaplan, “The Need For Writing”, \textit{ibid.}, at 28.
  \item[455] \textit{Arbitration Act 1889}, supra note 269, \textit{Arbitration Act 1950}, supra note 273.
  \item[456] \textit{New York Convention}, supra note 10.
  \item[457] \textit{Arbitration (Amendment) Ordinance} (No. 85 of 1975).
  \item[459] \textit{Arbitration Act 1950}, supra note 273.
\end{itemize}
the impossibility of removing access to courts or judicial review even with the existence of valid arbitration agreement.\textsuperscript{461} Since the 1963 Arbitration Ordinance was an "amalgam and a transplant"\textsuperscript{462} of the provisions of the English Arbitration Act 1950\textsuperscript{463} the three principles became a part of Hong Kong's law on arbitration.

Despite the fact that it transplanted English laws, Hong Kong was not considered a popular arbitration venue. On the contrary, the most complex and important cases always went to London. Those decided in Hong Kong did not depart significantly from English arbitration practice.

(ii) Important Decisions of Hong Kong High Court

The way in which the Hong Kong courts dealt with stays of proceedings until the adoption of the ML also followed English law and practice. Section 6(1) of the 1963 Arbitration Ordinance\textsuperscript{464} duplicated section 4(1) the English Arbitration Act 1950.\textsuperscript{465} To reiterate, it provided discretion for the court to stay proceedings if satisfied that there was no sufficient reason why the matter should not be referred to arbitration. This section was,

\begin{itemize}
\item \textsuperscript{460}Arbitration Act 1889, supra note 269 and Arbitration Act 1934, supra note 273.
\item \textsuperscript{461}For more on this principle see "Arbitration in Canada before 1985" in this chapter.
\item \textsuperscript{462}F. Leung, "The Hong Kong Arbitration (Amendment) Ordinance 1982" (September 1985) J. Bus.L. 423.
\item \textsuperscript{463}Supra note 273.
\item \textsuperscript{464}Supra note 450.
\item \textsuperscript{465}Supra note 273.
\end{itemize}
however, repealed later by the 1975 Arbitration Ordinance\textsuperscript{466} and its new, section 6A, duplicating section 1 of the English Arbitration Act 1979\textsuperscript{467}, dealt with non-domestic disputes.\textsuperscript{468} Consequently, the position of courts in Hong Kong with respect to section 6 and stays of proceedings was pre-determined by English precedents. Thus, when called upon to decide on stays of proceedings, Hong Kong judges first looked into the existence of a dispute and if they found no dispute they would not grant a stay.\textsuperscript{469}

In \textit{Continental Corporation (no.2) v. Vicenzo Fedele}\textsuperscript{470} the troubling issue for the court dealing with an application for stay of proceedings (section 6) was a short arbitration clause in the documents of the sale of commodities which read: “Arbitration: Friendly arbitration in Hong Kong.” The court granted a stay and held that the intention of the parties to arbitrate was clear regardless of the short form of the clause. The court further held that the partner’s involvement in proceedings did not constitute taking a step in proceedings. Finally, and echoing the English court reasoning in \textit{Heyman v. Darwings Ltd.}\textsuperscript{471}, the court found that substantial questions of fact rather than questions of law were in dispute.

\textsuperscript{466} \textit{Supra} note 457.

\textsuperscript{467} \textit{Arbitration Act 1979, supra} note 273.

\textsuperscript{468} This section was repealed again when the ML was adopted in 1989. Since then article 8 of the ML applies to all international disputes.

\textsuperscript{469} N. Kaplan, J. Spruce and T. YW Cheng, \textit{Hong Kong Arbitration, supra} note 43 at 3.


\textsuperscript{471} \textit{Heyman v. Darwings Ltd., supra} note 298.
3. 1982: The New Era Begins

A significant departure from the English practice started in 1980 when the Hong Kong Law Reform Commission was given responsibility to modernise the existing law and practice of arbitration. One of the changes suggested was to use the English Arbitration Act 1979 as a model for a new ordinance. However, another set of changes were introduced to take into consideration the specific circumstances of Hong Kong and especially the possibility of Hong Kong becoming an important arbitration centre. As a result, the 1982 Arbitration Ordinance went beyond the English path.

Comparison of the 1982 Arbitration Ordinance and the 1963 Arbitration Ordinance inevitably begins with screening for three important principles that determined the relationship between courts and arbitrators. As in the English Arbitration Act 1979, the courts’ power to set aside an award for error of law on the face of the award was abolished by section 23(1) of the 1982 Arbitration Ordinance. A special case procedure was abolished by section 9 of the Ordinance even though some kind of a “consultative case” procedure remained in section 23A(1). Hong Kong followed section 2(2) of the English Arbitration Act 1979 and thus provided for the possibility of stating before the High Court (at the request of the parties, either with the consent of the arbitrator or of all other parties) a question of law arising during arbitration.

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473 Arbitration (Amendment) Ordinance (No. 10 of 1982).
474 Ibid.
475 Arbitration Act 1979, supra note 273.
Finally, the 1982 Arbitration Ordinance went beyond the English act to provide for both the possibility of removing court jurisdiction and the possibility of restoring it by the consent of the parties, whatever the subject matter of the dispute and for all non-domestic arbitrations.\textsuperscript{476} To reiterate, the English Arbitration Act 1979 provided for three special categories of non-domestic agreements which could not remove the jurisdiction of the court.\textsuperscript{477}

Other improvements of the English Arbitration Act 1979 were related to expanding the powers of the Hong Kong High Court. Indeed, the High Court was given power to order the consolidation of pending arbitrations against the wishes of one of the parties\textsuperscript{478}. The High Court was also given the power to dismiss an arbitration for want of

\textsuperscript{476} 1982 Arbitration Ordinance section 23B.

(1) subject to the following provisions of this section and section 23C-

(a) the Court shall not, under section 23(3)(b), grant leave to appeal with respect to a question of law arising out of an award; and

(b) the Court shall not, under section 23(5)(b), grant leave to make an application with respect to an award; and

(c) no application may be made under section 23(1)(a) with respect to a question of law,

if the parties to the reference in question have entered into an agreement in writing (in this section referred to as an "exclusion agreement") which excludes the right of appeal under section 23 in relation to that award or, in a case falling with paragraph ©, in relation to an award to which the determination of the question of law is material.

(2) If the parties to an exclusion agreement subsequently enter into an agreement in writing to revoke the exclusion agreement to provisions of subsection (1) shall cease to apply to the reference or references in question until such time as a further exclusion agreement is entered into by the parties.

\textsuperscript{477} Section 4(1) of the English Arbitration Act 1979, supra note 273, refers to maritime disputes, and disputes arising out of a contract of insurance and a commodity contract.

\textsuperscript{478} 1982 Arbitration Ordinance section 6B.(1) Where in the relation to two or more arbitration proceedings it appears to the Court -

(a) that some common questions of law or fact arises in both or all of them, or

(b) that the rights to relief claimed therein are in respect of or arise out of
prosecution on the same basis as the High Court could dismiss an action on the same
ground.479

Another important improvement was the establishment of conciliation as a part of
an arbitration procedure. Giving consideration to Chinese and Asian traditional methods
of dispute resolution,480 the new 1982 Arbitration Ordinance provided for the
appointment of a conciliator by the High Court481. Accordingly, the enforcement of
conciliated agreements was provided for as if they were arbitral awards.482

In addition to the above modifications, Kaplan, Spruce and Cheng report the
following improvements:

- With the permission of the Chief Justice, High Court judges, District
  Court judges and magistrates were permitted to accept appointment as
  arbitrators (section 13A).
- With the permission of the Attorney General, public officers were also
  permitted to accept appointment as arbitrators.
- Provision was made for hearing cases concerning arbitrations in camera
  on the application of a party (section 23A(4)).

the same transaction or series of transactions, or
(c) that for some other reason it is desirable to make an order under this
section,
the Court may order those arbitration proceedings to be consolidated on such terms as it
thinks just or may order them to be heard at the same time, or one immediately after
another, or may order any of them to be stayed until after the determination of any other
of them.

479 1982 Arbitration Ordinance section 29(A).
480 Professor Yasuhei Taniguchi insists that the conciliation culture is the culture of West
Asia. See, for example his articles “The Changing Attitude to International Commercial
Dispute Settlement in Asia and the Far East” (1997) 2 A.D.R.L.J. 67 and “Is There a
Growing International Arbitration Culture? An Observation from Asia” in A.J. Van Den
Berg, ed., International Dispute Resolution: Towards and International Arbitration
481 1982 Arbitration Ordinance section 2A(1).
482 1982 Arbitration Ordinance section 6B.
Where a reference is to three arbitrators the award of any two of them shall be binding but if no two agree then the award of the chair is binding (section 11). \textsuperscript{483}

Given the fact that on 1 July 1997 Hong Kong would become a part of China, the territory planned a second set of changes of its arbitration rules. Indeed, the \textit{Sino-Britain Treaty}, \textsuperscript{484} signed in 1984 on the July 1997 transfer of sovereignty of Hong Kong, indicated that in the future interaction of the two legal systems the Chinese element might have more effect. Moreover, as some authors argued, the localisation of the Bench, the greater use of the Chinese language, and the political circumstances following the transfer of sovereignty would from now on be more significant for the law of Hong Kong than developments in the common law in England. \textsuperscript{485}

\textsuperscript{483} N. Kaplan, J. Spruce & T. YW Cheng, \textit{Hong Kong Arbitration}, supra note 43 at xxviii-xxix.


\textsuperscript{485} P. Wesley-Smith, \textit{supra} note 446 at 36. See also B. Fong-Chung Hsu, \textit{Hong Kong in Transition}, \textit{supra} note 435 at 137. Hsu especially points at the importance of the new Mainland political ideology and its influence on judicial process and private practice of lawyers in Hong Kong (ibid.). Raymond Wacks doubts a wide range of issues that were subject to statutory reforms in England would ever be adopted in Hong Kong. These underdeveloped areas are more likely to come under the Mainland Chinese influence. See R. Wacks, ed., \textit{The Law in Hong Kong (1969-1989)} (Hong Kong: Oxford University Press, 1989) at 15 and related footnotes 31 and 32. Andrew Phang pessimistically predicted that “in so far as 1997 looms over the Hong Kong horizon, there is more apparent divergence that convergence [of two legal systems].” See A. Phang, \textit{supra} note 442 at 3.
As far as court practice is concerned, there was a growing interest in arbitration among both Hong Kong and foreign merchants. Many cases have been commented on in Western law journals and reports. One of the frequently quoted cases is *Wharf Properties Ltd.* and *Anor and Eric Cumine Associates, Architects Engineers and Surveyors and 17 others.* In this case the Hong Kong High Court was dealing with an application for a stay of proceedings in accordance with section 6 of the *1982 Arbitration Ordinance.* Even though an arbitration clause for this very complex multiparty dispute did not cover all the defendants, the court, facing the danger of a multiplicity of proceedings, granted a stay. It is interesting to read the commentary on the case given by Kaplan and Spruce who appeared for one of the defendants. They revealed that the court did not refer to the leading English cases on the subject, but relied primarily on Lord Moulton's judgment in *Bristol Corporation v. John Aird.* The High Court held that it should consider all the circumstances of the case but that it should consider them with a strong bias in favour of maintaining the bargain between the parties, who had in mind overriding the jurisdiction of the court. Kaplan and Spruce move on to show that the decision could be of importance for English practice as well. Indeed, the judgment in *Wharf* was delivered a couple of days before the English Court of Appeal decision in *Northern Regional Health*

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Authority v. Derek Crouch Construction Company Limited\(^{488}\) which held that if the arbitrators have the power to open up, revise and review certificates and other powers, that must be a virtually conclusive point in favour of ordering a stay.\(^{489}\)

(ii) Nema Guidance Applied in Hong Kong

One of the consequences of the modernisation of English law on arbitration was a quest for more respect for arbitration in the judicial review of awards. Indeed, section 1 of the *Arbitration Act 1979* repealed section 21 of the *Arbitration Act 1950* with respect to statement of case for a decision of the High Court. Further, it set up requirements for an application to appeal an award as follows:

“(3) An appeal under this section may be brought by any of the parties to the reference—

(a) with the consent of all the other parties to the reference, or
(b) subject to section 3 below, with the leave of the court.

(4) The High Court shall not grant leave under subsection (3)(b) above unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and the court may make any leave which it gives conditional upon the applicant complying with such conditions as it considers appropriate.”

Section 23 (3)(4) of the *1982 Arbitration Ordinance* duplicates the above provisions of the English *1979 Arbitration Act*. In practice, though, the guidelines for interpretation of

\(^{488}\) *Northern Regional Health Authority v. Derek Crouch Construction Company Limited* [1984] Q.B. 644.

\(^{489}\) *Ibid.*, at 645.
these provisions were given by Lord Diplock of the House of Lords first in Nema and later in Antaiós Compania Naviera SA v. Salen Rederierna. Antaiós practically restated the Nema’s guidelines simplifying the procedure for application. That decision appeared to be of a great significance for Hong Kong judges because it provided guidelines as to how the court discretion to grant leave to appeal should be exercised. In order to show that the procedural guidelines of Antaiós were used to assist Hong Kong judges in deciding appeals, Kaplan, Spruce and Cheng reproduce the Practice Direction of 29 May 1985 on application for leave to appeal against arbitration awards set out by Sir Denys Roberts CJ.

The Nema and Antaiós guidelines were considered in particular in Attorney General and Technic Construction Co. Ltd. and in PT Dover Chemical Co. and Lee Chang Yung Chemical Industry Corporation. In Technic the High Court, dismissing

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491 Antaiós Compania Naviera SA v. Salen Rederierna (hereinafter Antaiós) [1985] A.C. 191. It is important to note that the Nema’s guidelines were too complicated and not sufficiently precise in terms of language used to define qualifications for appeal. However, Lord Diplock simplified and clarified the guidelines in Antaiós four years later.

492 See “Practice Direction” in N. Kaplan, J. Spruce and T. YW Cheng, Hong Kong Arbitration, supra note 43 at 139.


the appeal, held that the Hong Kong courts were bound to follow the instructions of the House of Lords as to how judicial discretion should be exercised. Accordingly, and emphasising the intention of the English Parliament to limit court intervention and to support the finality of arbitral awards, the High Court concluded that the intention of the Hong Kong legislature had to be the same. In Dover, on the other hand, the Court of Appeal of Hong Kong indicated that it used the Nema guidelines but also those of Antaios on the exercise of discretion over whether to grant or refuse leave to appeal. Further, the Court held the guidelines of Technic inappropriate for this case and concluded that “where leave to appeal to the court was sought only by the party aggrieved by the award of the arbitrator there is a presumption in favour of finality and against granting leave.” Dover is an important case because the Court determined that despite the existence of differences between the English Arbitration Act 1979 and the 1982 Arbitration Ordinance, the intentions of the legislators were clearly identical—that is, to support the finality of an award.

The courts in Hong Kong also followed English case law standards on removal of arbitrators for misconduct. For example, in Kong Kee Brother Construction Co. Ltd. and Attorney General the court dealt with an application under sections 24 and 25 of the 1982 Arbitration Ordinance to remit an award on the ground of technical misconduct. The Court reviewed a number of English cases, including the Nema guidelines, in order to stress the need to preserve the finality of arbitral awards and to only allow setting aside in special cases. The court went on to explain that although the concept of fairness may

be absolute, the rules, the means by which fairness are to be achieved, vary enormously in accordance with the context.

(iii) Enforcement of Arbitral Awards

As in England, methods of enforcement of awards in Hong Kong were chosen in accordance with the nature of the arbitral award. In order for a party to get enforcement, an arbitration award had to be converted into a judgment either through an action on the award, or, more likely, as regulated by section 28 of the 1982 Arbitration Ordinance in the same manner as in England after the Arbitration Act 1979.

Section 28 of the 1982 Arbitration Ordinance

"An award on an arbitration agreement may, by leave of the court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in terms of the award."

Enforcement of foreign awards, however, had changed since Hong Kong's 1975 accession to the New York Convention. As of 1975, it was possible to enforce a non-domestic award either as a foreign arbitration award or as a Convention award. According to Part III of the 1975 Arbitration Ordinance, enforcement of foreign awards was subject to reciprocity. On the other hand, if at least one of the parties came from a state that was a member to the New York Convention, then Part IV of the 1975 Arbitration Ordinance,

which incorporated the *New York Convention*, was applicable. Foreign awards were enforceable in the same manner as domestic awards under the regime of section 23 of the 1975 *Arbitration Ordinance*. Convention awards were enforceable either by action or in the same manner as awards of arbitrators enforceable by virtue of section 28.\footnote{497 See section 42(1) of the 1963 *Arbitration Ordinance* (as amended by the 1975 Ordinance).}

*Werner A Bock KG and The N's Co. Ltd.*\footnote{498 *Werner A Bock KG and The N's Co. Ltd.* [1978] H.K.L.R. 281.} was one of the first tests of the applicability of the *New York Convention* in Hong Kong. Specifically, it was a test of the grounds on which enforcement could be refused as specified by Part IV of the 1975 *Arbitration Ordinance*. When the plaintiff sought leave to enforce an award rendered in Germany under the rules of the Hamburg Chamber of Commerce, the Commissioner refused enforcement under section 44—holding that the composition of the arbitral tribunal was not in accordance with the agreement of the parties.\footnote{499 The problem with the composition of the tribunal arose because the defendant failed to appoint his arbitrators even though he was given proper due notice. According to the applicable procedural rules of the Hamburg Chamber of Commerce, the Chamber appointed an arbitrator and after that the two arbitrators agreed on the umpire and rendered a unanimous award in favour of the plaintiff. *Werner A Bock KG and The N’s Co. Ltd.*, *ibid.*, at 281-282.} The Commissioner further held that the burden of proof should be on the plaintiff, not the defendant. The plaintiff appealed. The Court of Appeal granted leave to enforce the award in an extraordinary ruling which basically recognised that although there were some procedural irregularities in the appointment of the arbitrator, the burden of proof that the goods were defective was on the defendant, not on the plaintiff. More importantly, however, the Court of Appeal held that even if the applicable law was wrong, the arbitrators’ ruling to
enforce the award on such law would not be contrary to public policy. The Court of Appeal moved on to conclude that Part IV of the 1975 Arbitration Ordinance was aimed at discouraging unmeritorious technical points and to uphold New York Convention awards except where complaints of substance could be made good.300

In Guang Dong ye Hai Import and Export Corporation and Chan Chi Keung and Chan Chi Kwong Johnny formerly trading as Delta Industrial Corp.,501 leave to enforce an arbitration award of the Foreign Economic Trade Commission of the Chinese Council for Promotion of International Trade was sought in Hong Kong. An interesting point was that even though the award was rendered after China acceded to the New York Convention, the whole dispute arose out of joint venture contracts concluded before the accession and was to be resolved according to an arbitration agreement signed on 1 November 1986—also before China’s membership in the New York Convention. Kaplan, Spruce and Cheng’s commentary on this unreported case reveals that in arriving at its judgment the court offered its own reading of the New York Convention and did not refer to the English case of Minister of Public Works of the Government of the State of Kuwait and Sir Frederick Snow and Partner.502 In the English case it was established that a foreign arbitral award qualified as a “Convention Award” if the State in which it was

501 See also a comment on Werner A Bock KG and The N’s Co. Ltd., by N. Kaplan, J. Spruce and T.YW. Cheng, Hong Kong Arbitration, supra note 43 at 203.
made had become a party to the New York Convention by the date when proceedings to enforce the award were begun, even if it was not such a party at the date when the award was made. Looking beyond the literal meaning of the principles of construction, the Hong Kong court found that the requirements of a “Convention Award,” in the provisions of Part IV, were procedural. The court thus concluded that it was not necessary for the agreement to be concluded after China’s accession to the New York Convention.

(iv) Hong Kong International Arbitration Centre

Finally, it is important to mention that even before Hong Kong adopted the ML, it had started to develop its own international arbitration centre. The opening of the Hong Kong International Arbitration Centre [hereinafter HKIAC] in September 1985 came after the Sino-British Joint Declaration was signed. However, the establishment of the HKIAC came as a result of a serious of actions which started at the beginning of the 1980s and which were aimed to modify the framework for arbitration in Hong Kong. As previously described, it was the Hong Kong Law Reform Commission that had the idea of not only to bring the Hong Kong 1963 Arbitration Ordinance into accordance with the English Arbitration Act 1979, but to go beyond simple transplantation—to modernise its law and to establish a new South East Asian arbitral centre able to deal with complex

504 To reiterate, the Joint Declaration, supra note 484, changed the status of the British colony into a Special Administrative Region of the PRC as of 1 July 1997.
commercial disputes. However, it was only after the adoption of the ML that the centre became able to compete with European and other arbitration centres in dealing with international disputes.

C. Arbitration in Russia and Soviet Union

The ML did not introduce Russia to the institution of private commercial dispute resolution. Despite the fact that the most important places for economic disputes in the early post-Revolutionary years had been special state courts (arbitrazh), the Western concept of private dispute resolution was adopted by the Bolshevik state. The 1923 Code of Civil Procedure provided for an independent and neutral tribunal based on the principles of Kompetenz-Kompetenz and severability of arbitration clauses. Accordingly, two permanent arbitration centres were established to deal with international disputes in maritime and in commercial areas.

In the late 1980s, perestroika changed most of the political and economic objectives of the Soviet State. Many legal institutions were likewise transformed. The major changes came in the field of foreign investments. A number of new transactions that increased the establishment of joint enterprises with foreign investments were

505 Code of Civil Procedure of the RSFSR; Sobranie Uzakonenii i Rasporiazhenii RSFSR (1923) no.46-47, item 478.
permitted. At the same time the number of disputes involving foreign partners and joint ventures increased.

New rules on international commercial arbitration in Russia developed as a part of the numerous and tremendous reforms of the Russian state and its legal system. However, emerging from revolutions, wars and dramatic social and political changes, Russian law is still in a state of flux. Indeed, non-Russians often characterise the Russian legal framework as lacking stability. Therefore, to understand the complexity and achievements of the recent Russian legal reforms, it is necessary to understand the Russian legal tradition—which is "neither Western European nor wholly Eastern."  

1. Pre-Soviet Period: Early Days

The legal system in Tsarist Russia (1649 to 1917) emerged primarily from Russian legal traditions, despite the fact that the empire was comprised of a great number of territories with very different cultural and legal traditions.  

G. Smith, Reforming the Russian Legal System (Cambridge: University Press, 1996) at 2. Smith insists that the Russian legal culture is rooted in a great number of different traditions, some indigenous, some dating back to the Byzantine Empire, some to the 250-year Mongol-Tartar occupation, and still others introduced from Western Europe. See G. Smith, ibid.

traditions, on the other hand, were based on the Romanist civil law traditions and influenced primarily by German and French laws. Not surprisingly, Russian attempts to modernise the legal system and to codify laws followed the French and German patterns of modernisation by means of civil and criminal codes. However, the results of these reforms were far from expected and the country never reached the level of legal development seen in Western Europe. According to Professor Feldbrugge, Russian pre-19th century legal reforms brought no major systemic changes but only some low-key modifications of existing institutions. Moreover, he considers the social changes unsuccessful, the absolute and autocratic power of the Tsar eroded too slowly.

The judiciary was established in 1775 with a very complex structure (matching a complex class structure). Contrary to the Western legal traditions of independent judiciary and separation of powers, Russian courts were not independent enough to limit the power of the Tsar or his administrative officials. Until the 1905 Revolution, the Tsar had all power to legislate. The courts’ lack of power was historically consistent with their position in the earliest days of Russian law. The earliest surviving compilation of customary laws, the Pravda Russkaia, suggests that there was no reliable system of


509 F.J.M. Feldbrugge, ibid., at 82.

510 F.J.M. Feldbrugge, ibid.


512 The 1905 Revolution transformed Russia into a form of constitutional monarchy. From 1905 the State Duma was empowered to pass laws, but the Tsar retained legislative powers when the Duma was not in session. See further discussion on the 1905 Revolution in W.E. Butler, Russian Law (Oxford: Oxford University Press, 1999) at 29.
dispute resolution in medieval Russia—"there was no system of courts, no possibility of
appeal, no legal profession, no legal commentary on the princely legislation or judicial
judgments." Moreover, until the 1864 court reform Tsar’s bureaucracy was even able to
change court decisions. Even the Russian elite saw the court reform as a foreign import
that did not comport with Russian’s traditions.

In the 19th century, Russia came under the strong influence of legal nationalism
which had already resulted in codification of civil and criminal laws in other countries of
the Romano-Germanic tradition—Prussia, France, and Austria, to name a few. Like
other Central and Eastern European countries at that time, Russia was struggling to
balance "a body of codes and statutes patterned on the French model, and the language of
the scholars deeply affected by the German tradition."

The 1864 Court Statutes initiated judicial reforms of the civil and criminal
courts. This was the first Russian code to introduce modern Western legal institutions
into the monarchy. The reform established a court system based on the principles of

513 W. E. Butler, Soviet Law, supra note 508 at 11.
514 W. E. Butler, ibid., at 31.
515 J. Quigley, supra note 511 at 31.
516 As a part of overwhelming codification work in Russia, two important projects were
undertaken. First, a 48-tome collection of Russian legislation from the period 1649-1825
was published in 1830 (the Complete Collected Laws of the Russian Empire). Second,
fifteen volumes of the Digest of Russian Laws appeared in 1832.
517 G. Ajani, “By Chance and Prestige: Legal Transplants in Russia and Eastern Europe”
518 The new laws sometimes called the Judicial Statutes, the Code of Civil Procedure, or
simply the 1864 judicial reform, were announced on 20 November 1864. See the 16th
volume of the Svod Zakonov.
independent public courts, an oral adversary procedure, and the jury system. The Courts of Cassation of criminal and civil cases were established and a professional Bar was founded.

The reform also introduced the Western principles of third-party dispute resolution. First, an arbitrator was free to choose as applicable not only Russian law, but any set of rules he/she found relevant for a particular dispute, relying even “on life experience and his own conscience.” Second, court intervention in arbitral proceedings was limited primarily to enforcement of arbitration awards in particular situations. Unfortunately, however, the judicial reform and the modernisation of the court system initiated in 1864 failed to change the legal culture of the Russian elite. The Tsar’s despotism, reliance on autocratic privileges, corruption at all levels of administration and a low level of compliance with legal norms were all obstacles to modernisation and reform.

The Russian codificatory work ended in the early days of the Twentieth Century with two important documents. The draft of the Criminal Code came in 1903, while the draft of the Civil Code came in 1913. Those drafts were prepared following the basic

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519 R. Wortman, The Development of a Russian Legal Consciousness (Chicago: The University of Chicago Press, 1976) at 2: “It [the new law-added] made possible a defence of the accused, establishing limits to the tyranny of the police. It brought into being a trained legal profession that could make the new system work. The Judicial Reform appears as a brilliant flash of light, illuminating the gloomy background of tsarist institutions.”

520 For more on the 1864 reforms see E. L. Johnson, An Introduction to the Soviet Legal System (London: Butler & Tanner, 1969) at 17-19 and G. Smith, supra note 507 vat 17-20.

principles of codification in the continental civil law tradition—a great number of rules were systematised and codified. Unfortunately, the October 1917 Revolution prevented the legislature from passing the long-awaited civil and criminal codes. However, the 1913 Draft of the Civil Code, based on the German pandectist framework, was the reference for the 1922 Civil Code of the socialist state.\footnote{For more on the drafts of the Criminal Code 1903 and the Civil Code 1913 see W. Butler, Russian Law, supra note 512 at 29 and 333.}

As a part of judicial reform came the establishment of four special economic courts to deal with commercial disputes. Those four courts existed in Moscow, St. Petersburg, Odessa and Warsaw (today Poland). In that way, Russia moved toward a unique tripartite court system consisting of the Constitutional Courts, courts of general jurisdiction, and economic courts. This system, with some modifications, has survived until the present.

Despite numerous attempts to introduce legal reforms and thus to modernise the state and society, the initiated legal changes failed to bring desired social changes to Imperial Russia. The rule of law principle was never really accepted by the nationalist Russian intelligentsia. On the other hand, the aristocratic elite remained firmly attached to the authoritarian traditions of the Russian monarchy. Protecting a backward, almost-feudal system, aristocrats protected their own privileges. Lack of legal consciousness, poor legal education, ineffective implementation of laws, and bureaucratism, along with

\footnote{Civil Code of the Russian Soviet Federated Socialist Republic, Sobranie Uzakonenii i Raspoporazhenii RSFSR (1922) no. 36, item 423. Civil Code was enacted on 31 October 1922 and came into force on 1 January 1923. For a commentary see K. Halverson, \textit{ibid}.}
some natural limitations of the Empire,\textsuperscript{523} were all barriers to social changes, modernisation of the Russian legal traditions and acceptance of western models in the pre-Revolutionary period.

2. The Soviet Period: \textit{Arbitrazh} Courts v. Arbitration

In the earliest days of the Bolshevik State\textsuperscript{524} the new government passed a number of decrees to abolish the legal traditions and laws of the Tsarist time. By Decree No. 1 \textit{“On the Courts”} the Bolshevik government abolished the judicial system, the Procuracy and the bar.\textsuperscript{525} At the same time the commercial courts of St. Petersburg, Moscow and Odessa were abolished. The Decree No. 2 \textit{“on the Courts”} issued by the All-Russia Central Executive Committee and the Council of People’s Commissars established a system of peoples’ courts.\textsuperscript{526} These changes were based on the Marxist-Leninist theory of

\textsuperscript{523} Professor Butler emphasises that the natural limitations of the Empire itself are for instance its size, its languages, ethnic diversity, historical, religious and political experience, illiteracy and poverty of population. See W. Butler, \textit{Soviet Law, supra} note 508 at 25.

\textsuperscript{524} E.L. Johnson distinguishes four periods in development of the Soviet legal system: from 1917-1920 war communism; from 1921 to 1927 the New Economic Plan; from 1928 to 1953 Stalinism; and from 1953 until perestroika - the period of the cult of personality. See E.L. Johnson, \textit{An Introduction to the Soviet Legal System} (London: Butler & Tanner, 1969) at 24.

\textsuperscript{525} Decree No. 1 \textit{“on Courts”}, Sobranie Uzakonenii i Raspriazhenii RSFSR (1917-1918), no. 4, item 50 (24 November 1917). For English text see Y. Akhapkin, \textit{First Decrees of Soviet Power} (London: Lawrence & Wishart, 1970) at 44.

\textsuperscript{526} Decree No. 2 \textit{“on Courts”}, Sobranie Uzakonenii i Raspriazhenii RSFSR (1918), no. 26, item 240 (15 February 1918). For English text see Y. Akhapkin, \textit{ibid.}, at 99.
state and law. Under Marxism-Leninism state and law are considered to be class weapons
serving the interest of the dominant class in every society. New concepts of socialist law
and a socialist legal system were imposed, instead of the traditional civil law institutions
of ownership, separation of powers, individual rights. The principle of separation of
powers was abandoned promptly and the new Soviet government established popular
sovereignty as the basic principle of the state. New Soviet legal theory declared that all
power must belong to the people and that the delegation of legislative and other powers to
non-representative organs would not be necessary in the new state. Even the need for law
was questioned.\footnote{527} It was thought that the law was just an instrument of the capitalist class
to control the exchange of goods and protect private property.\footnote{528}

Many Western scholars agree that the \textit{Civil Code} of 1922 was drafted by pre-
Revolutionary lawyers along the line of the 1913 draft and that the Soviet civil law of
eyear post-revolutionary days had its roots in the Romano-Germanic legal traditions.\footnote{529}

\footnote{527} See V.I. Lenin, \textit{Marx, Engels, Marxism}, 4th ed. in English (Moscow: Foreign
Languages Publishing House, 1951) at 10.

\footnote{528} For example, see A.G. Goikhbarg, \textit{Osnovy chastnogo imushchestvennogo prava
(ocherki)} (Moskva: Izdatel'stvo "Krasnaia nov" Glavpolitprosvet, 1924) (title in English:
\textit{Foundations of Private Property Law (outlines)}) at 9: "The bourgeoisie called its state a
legal state. Religion and law are the ideologies of oppressing classes..."

\footnote{529} See for instance W.E. Butler, \textit{Soviet Law}, supra note 508 at 176. See also J. Quigley,
\textit{supra} note 511 at 37. Quigley even explains that the first Soviet drafters could not escape
from the Western influences since they all had practised law for many years before the
1917 Revolution. Quingley emphasises that the following characteristic of the Romanist
law tradition existed in the early Soviet law: highly codified legal rules, stare decisis was
not followed, importance of legal theory and academics in interpretation of the codes. See
J. Quigley \textit{ibid.}, at 37. Albert Schmidt finds that the Soviet codificatory work in 1922
resembled the civil law traditions in a centralised court system with a weak judiciary and
exalting legislation as a source of law. See A. Schmidt, "Soviet Civil Law as Legal
History: A Chapter or a Footnote" in G. Ginsburgs, ed., \textit{The Revival of Private law in
However, the similarities are related more to the form than to the contents of these codes. The most important change came with the change of the concept of ownership. The 1913 Civil Code draft was based on the principle of the private ownership. On the contrary, the 1922 Civil Code was based on the legal, ideological and practical superiority of state ownership and on ideas of the New Economic Policy (NEP). Similarities with the Western legal culture vanished in the 1930s, as Russian law started to transform into Soviet law.

In the Stalinist period of the 1930s, the whole legal system and the state institutions were reconstructed to support the concept of a planned economy. A new concept of “economic law,” which should regulate relationships between state enterprises related to all economic activities, including property matters, overruled the traditional civil law in the period from the 1950s to the late 1980s. New Soviet ideology determined that civil law should be limited to a body of rules related to relationships between individuals or individuals and socialist enterprises. Legislation related to economic activities reflected the fundamentals of Soviet ideology. Accordingly, new economic law was not based on market economy principles of freedom of contract and private property but on rigid rules of planned contracts which state enterprises had to conclude to achieve tasks set up by state plans. Changes in commercial dispute resolution were based on the principle that disputes between state enterprises should be settled as administrative disputes over the fulfilment of central plans.

530 F.J.M. Feldbrugge, Russian Law, supra note 508 at 230.
The 1924 Decree on Arbitration established two types of arbitration: arbitrazh courts as special courts for economic disputes involving state enterprises, and courts of conciliation or treteiskii sud as ad hoc arbitration for economic disputes between private parties. In other words, an arbitrazh court or state arbitration was not seen as a court of last resort but a central component of the economic life of a Soviet enterprise. That was in line with the importance of state ownership and central planning and with the non-recognition of private ownership. In the next decade, the arbitrazh courts became the main fora for domestic economic disputes. Two institutional arbitrations, the Maritime Arbitration Commission [hereinafter MAC] and the Foreign Trade Arbitration Commission at the All-Union Chamber of Commerce and Industry [hereinafter FTAC] were established as the third type of arbitration to deal with international commercial disputes. Private dispute resolution before courts of conciliation lived only on the books while in practice the NEP prioritised arbitrazh courts.

Soviet civil courts of general jurisdiction almost never dealt with commercial activities dealing only dealt with cases related to a relatively small economic value. Their jurisdiction was limited primarily to family matters, housing and labour law. Civil courts lacked independence and real judicial power. Instead, they just distributed orders and


instruction of the party committees (so-called “telephone justice”).

The following paragraphs will explain the three mechanisms for resolution of economic disputes.

(i) State Arbitration or Arbitrazh Courts

A special Decree of 20 March 1931 re-established the system of state arbitration courts (Gosarbitrazh, hereinafter arbitrazh) with mandatory jurisdiction over domestic economic disputes between state enterprises and institutions in relation to the fulfilment of economic plans. Up to 1938 those courts heard 330,000 cases. Katharine Pistor

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535 The 1931 Decree was replaced by the Statute on State Arbitrazh of the USSR Council of Ministers enacted by the Decree of 17 August 1960, no. 892, SP SSSR (1960), no.15, item 127 (for text in English see (1965) 2:1 Soviet Statutes and Decisions 5):

article 3: State Arbitrazh of the USSR Council of Ministers shall resolve disputes in which enterprises, organisations, and institutions of different union republics, or enterprises, organisations, and institutions of union subordination, participate, namely:

(a) disputes arising in the conclusion of contracts for an amount exceeding 10 million rubles;

(b) disputes arising in the conclusion of contracts for use of non-public railroad sidings in freight shipments of over 100 cars per day;

(c) disputes arising in the performance of contracts and on other grounds, when the amount of the suit exceeds 100,000 rubles;

(e) disputes accepted by Arbitrazh at the request of council of ministers of union republics.”

In addition see the Statute on State Arbitrazh Attached to the USSR Council of Ministers confirmed by Decree of the USSR Council of Ministers, 17 January 1974, no. 60, SP
found over 800,000 cases a year for the federal Gosarbitrazh in the 1980s.\textsuperscript{537}

It is important to note that despite the fact that the Russian word \textit{arbitrazh} can be literally translated into the English word "arbitration," the concept is very different. The \textit{arbitrazh} is a court system, not an independent non-state tribunal as in traditional sense of arbitration. Accordingly, judges in \textit{arbitrazh} courts were considered as a part of government administration.\textsuperscript{538} Not only did these courts have power to resolve dispute and to enforce their judgments, but they also had administrative powers to order other state agencies to help enforce judgments, and even "quasi-legislative" powers to issue normative orders to state enterprises.\textsuperscript{539} Contrary to the traditional civil court judges, who are concerned with the interest of the parties in a dispute, judges in \textit{arbitrazh} courts were


Article 1: “Gosarbitrazh USSR shall.... settle the biggest and most important economic disputes among state, cooperative, and other social enterprises, organisations, and institutions of union subordination or of various union republics in accordance with the competence established”.

Article 2: The principal tasks of Gosarbitrazh USSR shall be: § 3 giving active assistance in the settlement of economic disputes at enterprises, organisations, and institutions in the cause of their observing socialist legality and state discipline in the fulfilment of plan assignments and contractual obligations...”

More on jurisdiction in articles 8, 9 and 10.


\textsuperscript{537} See K. Pistor, \textit{supra} note 533 at 69.

\textsuperscript{538} \textit{Decree on State Arbitrazh}, 17 August 1960, no. 892, \textit{supra} note 535, article 1: “State Arbitrazh of the USSR Council of Ministers shall be an agency [emphasis added] for the resolution of the biggest and most important economic disputes among state, cooperative, and other social enterprises, organisations, and institutions.” Also in \textit{Decree on State Arbitrazh Attached to the USSR Council of Ministers}, 17 January 1974, no. 60, \textit{supra} note 535, article 1: “State Arbitrazh attached to the USSR Council of Ministers (Gosarbitrazh USSR) shall be a union republic agency [emphasis added].”

\textsuperscript{539} W. Butler, \textit{Soviet Law}, \textit{supra} note 508 at 125.
concerned with the economic activity of enterprises in the overall context of the economic planning system. However, some studies on arbitrazh courts showed that these judges (called arbitrers in Russian) were more independent than judges of courts of general jurisdiction, free of corruption and less likely to be members of the Communist Party.\footnote{540}

In 1991 arbitrazh courts were transformed into special economic courts to deal with domestic economic disputes other than the implementation of economic plans and involving all legal entities (not only state enterprises).\footnote{541} These changes will be elaborated under the next headings.

(ii) \textit{Treteiskii sud} or Courts of Conciliation:

Domestic arbitration (\textit{treteiskii sud} or court of conciliation), established in 1924 as an independent third-party arbitration, was practically abolished from the Soviet practice. Regardless the fact that they were later regulated in a special decrees such as the

\footnote{540} L. Shelley, \textit{supra} note 532 at 71.


Article 1: “The arbitrazh court shall exercise judicial power in the resolution of disputes arising from civil legal relations (economic disputes) or from legal relations in the sphere of administration (disputes in the sphere of administration).” See English version in (1994) 30 Soviet Statutes and Decisions 7.
1960 Decree or the Decree attached to the 1964 RSFSR Code of Civil Procedure, courts of conciliation were hardly ever used. Ironically, in the Letter of Instruction of the State Arbitrazh of the USSR Council of Ministers of August 31, 1960, no. I-1-55 the State Arbitrazh of the USSR Council of Ministers instructed arbitrazh courts to assist and support treteiskii sud (courts of conciliation) in considering major and complicated economic disputes. The Council passed the Temporary Rules of Consideration of Economic Disputes by a Court of Conciliation, limiting the jurisdiction of courts of conciliation to individual [emphasis added] economic disputes among enterprises, organisations and institutions. Thus, treteiskii sud was a traditional arbitral tribunal on the books. They had one or several judges (three or more) who were not necessarily lawyers. Submission of disputes to these courts was purely voluntarily. Their decisions were binding and not subject to appeal. In the case of nonexecution of a decision, the case was brought before an arbitrazh court for compulsory execution. It is interesting

542 Decree on State Arbitrazh, 17 August 1960, no. 892, supra note 535, article 4: "Individual economic disputes may, by mutual consent of parties, be transferred for resolution by a court of conciliation (treteiskii sud) chosen by the parties to consider the given case."


546 Temporary Rules, supra note 545, articles 2 and 3.

547 Temporary Rules, supra note 545, article 13.

548 Temporary Rules, supra note 545, article 15.
that the provisions of the *1964 Decree on Chosen Arbitration Courts*\(^{549}\) almost duplicated the *Decrees* from 1924 and 1960. Article 1 limits jurisdiction of these tribunals to any disputes arising between citizens except those related to labour or family relations and provides for the writing form of the agreement to submit a dispute to the court.

(iii) International Commercial Arbitration

As previously mentioned, the Soviet Union established two arbitration centres in the early 1930s. The first, the Maritime Arbitration Commission (the MAC) was established in 1930.\(^{550}\) The second, the Foreign Trade Arbitration Commission (the FTAC) was founded two years later\(^{551}\) and it rendered its first award on 15 November 1933. The FTAC dealt with 87 cases until 22 June 1934.\(^{552}\)

In Stalin’s era and during the Cold War, Soviet involvement in international trade

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\(^{550}\) *Decree of the Central Executive Committee and the Council of People’s Commissars of the USSR on the Foreign Trade Arbitration Commission at the All-Union Chamber of Commerce* of 13 December 1930, SZ SSSR (1930), no. 60, item 637. See English text in W. Butler, *supra* note 506 at 150.

\(^{551}\) *Decree of the Central Executive Committee and the Council of People’s Commissars of the USSR on the Foreign Trade Arbitration Commission at the All-Union Chamber of Commerce* of 17 June 1932, SZ SSSR (1932), no. 48, item 281. See English text in W. Butler, *supra* note 506 at 115.

was limited primarily to the countries of the Socialist Bloc. On rare occasions, however, disputes involving non-socialist countries arose. The FTAC and MAC resolved the majority of these international economic disputes. For disputes between the Soviet enterprises and entities from other CMEA\textsuperscript{333} and socialist countries these tribunals had mandatory jurisdiction. On the other hand, the FTAC and MAC resolved disputes between the USSR and Western companies on the basis of special bilateral treaties signed by countries. In the contracts signed on the basis of those treaties, two forms of arbitration agreements prevailed. One was a statement of recognition of the right to arbitrate, and another was a statement of commitment to execute any arbitration award.\textsuperscript{554} Russians hardly ever agreed to submit those disputes outside the Soviet Union and if they had to do so, the alternative forum would be Stockholm.\textsuperscript{555} By January 1, 1997 the FTAC (renamed the Arbitration Court of the USSR Chamber of Commerce and Industry in 1987) had handled 6,304 cases in total. The number of yearly administered cases increased significantly from 1972 when the \textit{Moscow Convention} was signed among the CMEA countries.\textsuperscript{556} For example, FTAC accepted consideration of 1036 cases in the

\textsuperscript{333} CMEA is the abbreviation for the former Council for Mutual Economic Assistance, set up in 1949 by all former socialist countries of Central and East Europe, except Albania and Yugoslavia. In other words, Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Poland, Romania and the USSR founded the CMEA, then Cuba joined CMEA in 1975, and Vietnam in 1978. The CMEA ceased to exist in September 1991.


period 1978-81. The majority of cases (90%) involved parties from the CMEA countries, whereas only 10% of cases involved disputes with parties from other countries. In 1987 the FTAC started to operate under the Chamber of Commerce and Industry of the Russian Federation.

Impartiality of the FTAC and MAC arbitrators was often questioned. First, even though the FTAC was not a part of the court system, it was a type of government agency, because it was attached to the Chamber of Commerce, which was directed by the Ministry of Foreign Trade. Russians denied that the FTAC and MAC arbitrations were part of the governmental structure and they tried to prove that the Chamber of Commerce itself was a social organisation separate from the state. A second basis for criticism was the fact that all the arbitrators on the FTAC and MAC lists were Russians. Here, Russia pointed out that their statutes and rules on arbitration provided for all qualified individuals to be appointed as arbitrators. However, the appointment of those individuals was always confirmed by the Presidium of the Chamber of Commerce. In addition, the mandatory use of Russian language also raised doubts that the Russian arbitrations were not impartial. Section 8 of the FTAC Rules of Procedures provided for Russian as the only language of international arbitration, even though it also provided for official translation for parties with no language skills! On the basis of these criticisms and

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Handbook on Com. Arb. Suppl. 5. Annex 1-1. The contracting states of the Moscow Convention were: Bulgaria, Cuba, Czechoslovakia, German Democratic Republic, Hungary, Mongolia, Poland, Romania and USSR.

557 But see K. Hober, supra note 555 at 156.

following the 1958 FTAC ruling in the *Jordan Investment* case,\(^{559}\) it was believed that arbitration in Moscow followed the pattern of pro-Soviet awards.\(^{560}\) Finally, the critics emphasised the fact that the Russian courts had, for more than 30 years, refused to enforce foreign arbitral awards from non-socialist countries against Russian enterprises. Indeed, the first enforcement case appeared in January 1992, with respect to enforcement of an arbitral award rendered in London.\(^{561}\)

In the *Jordan Investment* case the dispute arose when Sojuznefteexport, the Soviet oil combine, informed two Israeli private companies acting as buyers—Jordan Investment Ltd. and Delek' Israel Fuel Corporation Ltd., that it could not perform its obligations because the Ministry of Foreign Trade had cancelled export licences for delivery of fuel oil. Relying on the *force majeure* provision of the contract, the Soviet party informed the Israelis that the contract was cancelled. Jordan Investment Ltd. started arbitration before the FTAC claiming that the Soviet party could not rely on the *force majeure* excuse for a number of reasons. First, Jordan Investment Ltd. tried to prove that regardless of the fact that the exclusive duty to obtain export licences was on the seller, the Russians did nothing to try to overcome the Ministry's refusal. Furthermore, Jordan Investment Ltd.


claimed that the refusal of the licence was not covered by the *force majeure* provision since it was not even mentioned among circumstances which could be considered as giving rise to an absolute impossibility of performance. Considering *force majeure* as unpredictable and an *ultra vires* action of the Government, Jordan pointed out that the Ministry’s refusal was of a different nature, that it was directed only to the individual case. Finally, Jordan Investment Ltd. objected to the identity of the Soviet combine, emphasising that it was nothing but part of the state organisation as the Ministry of Trade. When the FTAC rendered an award in favour of the Soviet combine Western scholars added their criticism of the result. The criticism focused on the status of the FTAC, its impartiality and the fairness of its procedure.\textsuperscript{562} It was pointed out that the FTAC established an all-Russian tribunal consisting of three law professors to hear the international dispute. As already discussed, the FTAC Rules at that time provided for a list including only 15 Russian experts. In addition, the FTAC was considered as “a state-organised institution which has to be considered not so much as an arbitral tribunal but in the nature of a state court.”\textsuperscript{565} Finally, the fairness of the FTAC procedure was objected to because the all-Russian tribunal refused to admit Jordan’s evidence relating to obtaining export licences, even though the FTAC Rules obliged the tribunal to hear both parties.

For all these reasons, the *Jordan Investment* case became the most-discussed award rendered in Moscow. After the case, Soviet arbitration practice came under greater scrutiny in the West and Western parties were not inclined to settle their dispute in

\textsuperscript{562} See for further discussion M. Domke, *supra* note 559 at 787, and S. Pisar, *supra* note 531.

\textsuperscript{563} M. Domke, *supra* note 559 at 797.
3. The Post-Soviet Period: The End of the Socialist Era

The Russian Federation officially started to create its own policy and regulatory body of laws after the *Agreement on the Creation of the Commonwealth of Independent States (Minsk Agreement)* was signed on 8 December 1991. The separation of the Baltic Republics and the establishment of the Russian Federation resulted in fundamental changes in the legislation of the former USSR. Indeed, the speed of the process of separation and attempts to create a new legal framework left many Western investors confused. To offer a temporary but acceptable solution, the Russian Parliament (the *Duma*) decided to apply Soviet laws during the transitional period, if they were not contrary to the new Russian Constitution and basic values of the new state. Since economic transformation was carried out prior to political transformation: many new laws on trade and foreign investment were enacted before the Constitution. For example, the new Russian Constitution was adopted by national referendum on 12 December 1993, whereas the *Law on Enterprises and Entrepreneurial Activity* came on 25 December

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564 *The Minsk Agreement* signed by Belarus, RSFSR and Ukraine established the Commonwealth of Independent States in 1991.

1990, and the *Law on Foreign Investments* and the *Law on the Fundamental Principles of the Tax System* were passed in 1991. The *Patent Law*, Trademark Law, and software legislation were adopted the following year. In 1993 the *Copyright Law* came in force. The first modification of the *Civil Code* came in 1994; a second began in 1995 and came into effect from March 1, 1996.

The early economic transformation and dramatic political changes has led Western parties to believe that the Russian legal framework is unstable, contradictory in general, unclear in some areas, totally absent in others, and often simple unenforceable due to the inefficiency of the judiciary and police. Moreover, transformation of the Soviet legal system in the 1990s did not change the complex structure of the court system and failed to bring clarity into the relationship between the courts and arbitration.

Transformation of the courts started on 4 July 1991, when the Russian *Law on the*

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Arbitration Court was passed. It was then that the system of arbitrazh courts started to change into a system of economic courts. Their jurisdiction resembles the jurisdiction of pre-Revolutionary arbitration courts in the four cities—they deal with economic disputes where each party to the dispute is either an organisation or a person officially registered with the government as an entrepreneur. Moreover, the 1991 Law of the Arbitrazh Court provides for jurisdiction of the arbitrazh courts in disputes involving “organisations with foreign investments and organisations and citizen-entrepreneurs that are located on the territory of another state in those instances envisioned by the present Law and the Arbitrazh Procedure Code of the Russian Federation.” It also gives broad supervisory powers to arbitrazh courts over domestic arbitration (treteiskii sud)—to review and to enforce domestic arbitral awards. Finally, the 1991 Law of the Arbitrazh Court established the Supreme Arbitrazh Court and thus defined the whole appellate procedure.

The 1993 Russian Constitution provides for three types of courts: constitutional courts, courts of general jurisdiction, and arbitrazh or economic courts. Civil courts of

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573 For further discussion on arbitration courts see F.J.M. Feldburgge, Russian Law, supra note 508 at 210-211; and K. Halverson, supra note 521 at 65-77.
574 See the 1991 Law of the Arbitrazh Court, supra note 541, article 1.
575 See the 1991 Law of the Arbitrazh Court, supra note 541, article 1, paragraph 3.
576 Note the discrepancy in terminology: the Supreme Court is sometimes translated as the Higher Arbitrazh Court. This will not be considered as a problem in this thesis because article 11 of the 1991 Law of the Arbitrazh Court undoubtedly determines that it is “the highest economic judicial organ of the Russian Federation and [it] shall exercise supervision over the judicial activity of the arbitrazh courts in the Russian Federation.”
general jurisdiction primarily have their jurisdiction related to international commercial transactions limited to labour disputes and tort suits. As previously explained arbitrazh courts as a special type of state courts dealt only with domestic economic disputes until 1 July 1995.

The 1993 Constitution also improved the position of judges of the economic courts along the lines of the position of judiciary in the Western democracies— independence, immunity, and life tenure. Finally, according to the 1995 Code of Arbitrazh Procedure arbitrazh courts can have jurisdiction over disputes between Russian and foreign commercial entities if the parties do not explicitly provide for a third-party arbitration or some institutional international arbitration.

In sum, the 1993 constitutional transformation brought two kinds of changes into the structure of the judiciary in the Russian Federation. Firstly, it introduced certain principles from the Western legal tradition related to the status of judiciary and the principle of separation of powers. Secondly, it preserved some principles of Russian legal culture, in particular the organisation of the court system established in the pre-

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581 The 1995 Code of Arbitrazh Procedure, ibid., Chapter 3. Article 22.6: "An arbitrazh court shall consider cases subject to its jurisdiction with the participation of organisations and citizens of the Russian Federation, as well as foreign organisations, organisations with foreign investments, international organisations, foreign citizens, and persons without citizenship engaging in entrepreneurial activity, unless otherwise envisioned by an international treaty of the Russian Federation." See also Section V. Proceedings in
Revolutionary and Soviet periods. Loyalty to the old Soviet values and legal culture comes as a result of the fact that most of judges appointed to serve in the arbitration courts in 1991 served as arbitrators in the former Soviet system. It appears that the 1991 and 1995 judicial reforms were aimed primarily at promoting arbitrazh courts to Western investors as a part of a conventional court system. In addition, the reforms were aimed at re-gaining the confidence of Russian business people, who considered state arbitrazh incompetent and irrelevant institutions for the resolution of economic disputes. Long-experience with the corruption of judges and so-called “telephone justice” made managers of Russian enterprises reluctant to seek protection of the arbitrazh courts at the beginning of the 1990s. Indeed, foreigners tried avoiding going to Russian courts of law whenever possible.

The improvement in court procedures and the new status of judges of arbitrazh courts should change the general presumption of foreign partners that “regular courts are untested with economic problems, that they lack clarity regarding jurisdiction, money to

cases with the participation of foreign persons articles 210-212.

582 Two recent surveys on contract enforcement before and after perestroika illustrate that distrust of Russian managers in the effectiveness of contract enforcement by arbitrazh courts has become part of Russian legal culture. Peter Rutland explains in detail that directors of the Soviet state enterprises would first try to achieve resolution of a dispute appealing to the ministry that has jurisdiction over their industry sector, then to the relevant Party officials and only then to arbitrazh. See P. Rutland, “Interventions in Industry: Case Studies,” Ch. 3 in The Politics of Economic Stagnation in the Soviet Union: The Role of Local Party Organs in Economic Management (Cambridge: University Press, 1993), 73-90. Kathryn Hendley presents a number of cases in which managers decided to rely on personal connections instead of arbitrazh courts and concludes that the “inability to get a fair shake in the arbitrazh courts remained a consistent theme.” See K. Hendley, “The Spillover Effects of Privatization on the Russian Legal Culture” (1995) Trans. L & Contemp. Prob. 40 at 61. See in particular the case study under the heading D: “Enforcing Contracts: The Arbitrazh Courts” at 58-62.
pay court reporters and record keeping, and that judges have little experience concerning complex commercial disputes.\(^{583}\) Along with the increase in the number of business transactions comes an increase in the number of cases before arbitrazh courts. For example, there were 208,081 cases decided by arbitrazh courts in 1994 and 290,094 cases in 1996.\(^{584}\) Unfortunately, there is no record of cases involving foreign parties, but some lawyers practising in Russia report success in litigating before arbitrazh courts.\(^{585}\)

Not has only Russia decided to preserve the three-part court system, it has also recognised a dual commercial arbitration system. Ad hoc domestic arbitration (treteiskii sud) existed in statutes since 1924 but was not considered important in practice during the Soviet era. The 1991 Law on the Arbitrazh Court again refers to the right of the parties of recourse to treteiskii sud.\(^{586}\) Treteiskii sud, as regulated later by the 1992 Temporary Arbitration Regulation\(^{587}\), must deal with domestic commercial disputes in particular sectors of industry. They can be established as ad hoc or permanent tribunals. In practice, a number of those tribunals have been already established within particular industrial sectors\(^{588}\) but Russian business people rarely used them. Because of the lack of enforcement powers of treteiskii sud and the possibility of interference of economic courts in the proceedings of treteiskii sud, a number of Russian business people sought


\(^{585}\) See N. Davis, supra note 578 and K. Hober, supra note 555.

\(^{586}\) Article 7 of the 1991 Law of Arbitrazh Court, supra note 541.

\(^{587}\) Vedomosti RSFSR, 1992, no 30, item 1790.

\(^{588}\) K. Pistor, supra note 533 at 70.
protection of their contractual rights before the economic courts. One of the recent surveys on contract enforcement in Russia revealed that parties usually do not voluntarily comply with judgments of treteiskii sud and that almost 90% of cases they decide have to be enforced by arbitrazh courts.\textsuperscript{589} This is again historically consistent with the position of domestic arbitration in the Soviet period.

It is difficult of draw conclusions about the work of judges sitting in arbitrazh courts and courts of conciliation because the reports on cases are not published by the courts, but by a governmental agency (Board of State Arbitrazh). Available statistics only show the number of cases settled by courts, but not the nature of the procedure, nor the reasoning of the judges. On the other hand, the FTAC awards are selectively published in the form of reports and summaries\textsuperscript{590} and they can be understood as samples of certain tendencies in decision-making. The picture of the Soviet legal culture portrayed by Russian law and Russian law books duplicates the official picture created by the Party and governmental bodies which instructed judges and arbiters on how to implement economic policy.

Occasionally stories of individuals who were involved in Russian dispute resolution would appear outside Soviet Union. For example, Louise Shelley interviewed fifty experienced Soviet lawyers and arbitrators who emigrated to the United States, Canada and Israel. Their stories reveal that legal behaviour of judges in civil courts was different than that of judges in arbitrazh courts. Most of the practitioners interviewed bu

\textsuperscript{589} K. Pistor, \textit{supra} note 533 at 73.

\textsuperscript{590} Only 17% of awards were released in Russian and some of them are available in English.
Shelley insisted that the proceedings before arbitrazh courts were directed by highly qualified and experienced professionals. Judges of arbitrazh courts had a better understanding of economic disputes and a better knowledge of the related law than the judges of civil courts of general jurisdiction. Even though the Soviet legal system was a civil law system, precedents were considered as important guidelines for judges of arbitrazh courts who reviewed previous decisions as reported by the Board of State Arbitrazh of the USSR Council of Ministers.\footnote{K. Pistor, supra note 533 at 69.}

Although sometimes criticised by politicians, arbitrazh decisions were not influenced by the Party as much as decisions of judges of civil courts.\footnote{See L. Shelley, supra note 532 at 71.} Since those decisions could be appealed, arbitrazh judges were very concerned with the number of appealed decisions in their files.\footnote{L. Shelley, supra note 532, at 70.} They were afraid that a greater number of appealed decisions would affect their re-appointment for another four-year period. Disappointingly, their decision-making was usually pre-determined by projected goals of the economic system rather than by the needs of individual cases.\footnote{See examples in L. Shelley, supra note 532 at 74-76.}

Until July 1993 international commercial dispute resolution was governed by modified rules from the Soviet period, by bilateral agreements on trade and investment signed between USSR and non-CMEA countries, and by several international treaties: the New York Convention,\footnote{New York Convention, supra note 10; ratified by USSR in 1960.} the European Convention on International Commercial
Arbitration (the European Convention); the Convention on Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technical Co-operation (the Moscow Convention), and The Unified Rules of Procedure of the Arbitration Courts Operating Beside the Chambers of Commerce of the CMEA Member States (Uniform Rules) of 1974. Application of the Moscow Convention and Uniform Rules was mandatory for all arbitral tribunals in CMEA member states. This reflected the socialist concept of international trade—that the socialist state had a monopoly on regulating all the activities of its nationals and that state-owned companies were the only legal entities allowed to trade with foreign companies.

Despite the fact that the former USSR had formally incorporated international standards by signing the New York and the European Conventions, Western investors were reluctant to submit disputes to arbitration in Russia. Neither an effective court system, nor a well-developed system of private dispute resolution mechanisms existed. Western parties were primarily uncomfortable with the mandatory character of arbitration proceedings and their resemblance to formal judicial procedures. Secondly, past inconsistency and unpredictability of the FTAC and the reputation gained as a result of the Jordan Investment, Ltd. v. Sojuznefteksport award seriously damaged the reputation

596 European Convention, supra note 93; ratified by the USSR in 1964.
597 Moscow Convention, supra note 516.
599 K. Pistor, supra note 533 at 62-63.
600 Jordan Investment, Ltd. v. Sojuznefteksport, supra note 559.
of Moscow as a neutral venue. A significant explanation for the adoption of the ML was that it might help overcome, or even eliminate, these problems.

D. Conclusion

This chapter examined the legal frameworks for international commercial arbitration that existed prior to the completion and implementation of the ML in Canada, Hong Kong and Russia. The analysis revealed that the three countries had different (and mixed) legal cultures from different legal families. In addition, the reception of foreign laws took different forms and produced different results in each country.

Canada and Hong Kong both received English common law. It is important to note, however, that the relationship of English law to these two new jurisdictions developed differently. More importantly, the character of the non-Western laws that existed in these territories before the reception of English law was significantly different. Europeans fostered the reception and application of English law in most of Canada and French law in Quebec. They used the laws of their countries of origin to establish laws in the new territories. As previously explained, official reception of new laws followed settlement. On the other hand, the reception of English law in Hong Kong was imposed unilaterally. Hong Kong then transformed the structure of its Chinese indigenous law to accommodate the common law.

The reception of English law in both Canada and Hong Kong was far-reaching in the field of commercial arbitration. Following the pattern of the English *Arbitration Act*
1889, the two jurisdictions both enacted laws that established judicial supervision over arbitration. A re-birth of traditional models of dispute resolution developed in Hong Kong with the growth of Asian markets in the 1980s and the emergence of Hong Kong itself as a leading laissez-faire financial and trading centre. Following these events, Hong Kong introduced legal reforms that went beyond the English *Arbitration Acts* of 1889, 1950 and 1979 in extending the powers of arbitrators and limiting the powers of the courts. Hong Kong then moved to consider adoption of the ML, even before the United Nations officially recommended its application to member states and to establish a centre for international commercial arbitration in 1985.

Canada, closely linked to the US market and hampered by the complexities of its constitution, reluctantly waited until 1986 to modernise its arbitration laws based on the 19th century English statute. Canada was also the only major trading country that had not become a member to the *New York Convention*, even though England, and indirectly Hong Kong, had became signatories in the 1970s.

The Russian legal system developed as a mixture of 19th century civil law institutions and imperial laws. After the October 1917 Revolution, Marxist-Leninist ideology dictated a break with these civilian legal traditions. In the sixty years of the Soviet regime, arbitration, in the sense understood in the West, did not achieve a position as an important private dispute resolution mechanism. Courts of conciliation or *treteiskii sud* existed in the statutes but were not fully developed in fact. International commercial arbitration, on the other hand, was accepted as a method of dispute resolution among socialist bloc countries. Most of the Western countries avoided being involved in disputes before tribunals in the Soviet Union. The most commonly used type of arbitration in the
Soviet Union was not using an independent private authority but a specific state organised system of courts of arbitration—that is, *arbitrazh*.

Courts and arbitrations in the USSR had contact on only rare occasions. The civil courts of general jurisdiction did not deal with domestic economic disputes. Regardless of the fact that they were inexperienced in deciding economic issues, civil courts of general jurisdiction had to deal with the enforcement of awards in international disputes as provided for in the *New York Convention* (which the Soviet Union joined in 1960). Awards in disputes between the Soviet Union and parties from other socialist countries were always voluntarily complied with in accordance with the *Moscow Convention* and with the policy of cooperation between members of the Socialist Bloc. In contrast, compulsory enforcement was usually sought (and, as previously explained, never granted) for awards in disputes between the Soviet and Western parties.

Considering the significant differences between the pre-existing legal frameworks of Canada, Hong Kong and Russia, this thesis hypothesises that the ML will be converted into the national laws of these three countries in significantly different ways. Just as English law has been incorporated in different ways in Canada and Hong Kong, it is suggested that the ML will also be interpreted in different ways in all three countries. Differences will appear at both the law-making level and at the level of interpretation and application. The modes of reception of the ML at the law-making level are discussed in Chapter Four, while the different results in practice of such reception is examined in Chapter Five.
CHAPTER FOUR: Reading Between the Lines  
At the Law-Making Level

The purpose of this chapter is to show to what extent the pre-existing legal frameworks in Canada, Hong Kong and Russia determined the countries' approach to the ML and to suggest the nature of the changes caused by the adoption. Analyzing the modifications and additions to the original ML text, the thesis here tests the ML's ability to meet the needs of differing states. In the same context the chapter focuses on the routes of development of the ML’s basic principles within the national legal systems.

It was said before that the three countries were looking not only for modernization of their laws but also for promotion of their arbitration centres as important world venues for dispute resolution. For that reason, this chapter refers also to the practice of the British Columbia International Commercial Arbitration Centre [hereinafter BCICAC], the Hong Kong International Arbitration Centre [hereinafter HKIAC] and the Moscow International Commercial Court of Arbitration [hereinafter MICAC].

A. The Canadian Experiment

In 1986, Canada became the first country to adopt the ML and the impact on

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Canada has been discussed extensively. Adoption of the ML was the second part of a major renovation of the old Canadian international commercial arbitration legal framework that had been based on the English Arbitration Act 1889 in the common law provinces, and on the French civil law in Quebec. The first legal change was the 1986

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603 To repeat, the Arbitration Act 1889 (An Act for Amending and Consolidating the Enactments relating to Arbitration, 1889, 52 & 53 Vict. 49) in common law provinces, and the Code of Civil Procedure 1965 (1965, R.S.Q. c.-25) in Quebec. For more on Quebec's modifications of rules on international commercial arbitration see S. Weinstein,
ratification of the *New York Convention*. The implementation of the *New York Convention* resulted in the enactment of both federal\(^{604}\) and provincial laws. Some provinces implemented both the *Convention* and the ML by the way of a single statute\(^{605}\) while others opted for implementation by the way of separate statutes.\(^{606}\) Thus, by simultaneously implementing both the *New York Convention* and the ML, the Canadian provinces were in a unique position to evaluate not only the coexistence within the same state of two interrelated legal regimes on arbitration, but also their cohesion within the same act. In this way, the new Canadian laws on international commercial arbitration really provided the first test of the UNCITRAL Working Group’s desire to draft the ML so as to take into account the *New York Convention* and the UNCITRAL Arbitration Rules.\(^{607}\)

As a country with two legal systems—civil law in Quebec and common law in the other provinces—Canada was the first test of the ML’s capacity to accommodate a

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\(^{605}\) Alberta, Manitoba, New Brunswick, Newfoundland, the Northwest Territories, Nova Scotia, Prince Edward Island (see *infra*, note 613) and Ontario (after the 1986 *Foreign Arbitral Awards Act*, S.O. c. 25, was superseded in 1988 by the new *International Commercial Arbitration Act*, S.O. c. 30, sec. 14).


diversity of legal systems within one country. The Canadian experience shows that diversity in legal framework is not incompatible with a uniform, relevant and efficient set of rules. Professor Robert Paterson explains that "in the absence of greater arbitration law uniformity among states than exists presently, it may be more realistic to use the ML [...] as a basis for uniform international arbitration laws among states." Interest in the "Canadian way" among legal scholars and countries considering adoption of the ML increased at the end of the 1980s, primarily in Pacific Rim markets, and later in the 1990s, after NAFTA came into force. The Canadian experience, then, has been a guide for a number of Pacific Rim countries considering modification of their arbitration laws and a first step toward harmonisation of rules on international commercial arbitration in the whole Pacific Rim area. The enactment of new legislation

608 This possibility of having different laws within the territory of the same state was widely discussed in the United Kingdom at the time of modernisation of the UK arbitration rules. As a consequence, the ML was adopted in Scotland in 1990, but not in England, Wales, or Northern Ireland. Diversity of international commercial arbitration norms is not regarded as a disadvantage in the United States, where the ML has been adopted by some states. See the list of adopting states prepared by the International Trade Law Branch of the United Nations Office of Legal Affairs, supra note 7.


610 NAFTA, supra note 98.

has been widely scrutinised by numerous Canadian and world experts and practitioners but was respected by a number of countries which subsequently adopted the ML.

Only a year after its acceptance by the UNCITRAL, the ML was implemented at both the federal and provincial levels in Canada. The enactment of legislation based on the ML was seen as a way of modernising the old-fashioned provincial acts. Two

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612 See authors and articles quoted at supra note 602.


Provincial Jurisdiction:

Manitoba: International Commercial Arbitration Act, S.M. 1986, c.32;
Newfoundland: International Commercial Arbitration Act, S.N. 1986, c.45;
Saskatchewan: International Commercial Arbitration Act, S.S. 1988-89, c.1-10.2;

It should be noted that Quebec chose to amend the previous rules by adding Title 13A (Of Arbitration Agreements) and by changing Book VII "Arbitrations" of the Code of Civil Procedure. However, the ML also inspired these modifications.

614 A recommendation to provincial legislators and the federal Parliament to adopt uniform legislation based on the ML was one of the conclusions from the Quebec Conference on International Commercial Arbitration, held in October 1985.
legislative goals, establishment of an arbitration centre in Vancouver and creation of a new pro-arbitration act, are set up in the preamble of the 1986 British Columbia statute:

"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 other resolved by means of arbitration, and whereas British Columbia has not previously enjoyed a hospitable legal environment for international commercial arbitrations;..."615

The federal and provincial acts, however, differ greatly in their scope of application. The federal Commercial Arbitration Act616 (the “federal act”) applies to both domestic and international arbitration,617 but only with respect to limited number of issues. The federal act governs disputes “where at least one of the parties to the arbitration is Her Majesty in right of Canada, a departmental corporation or a Crown corporation or in relation to maritime or admiralty matters."618 Conversely, arbitration between private parties is left to provincial acts, all of which (except Quebec) have separate statutes for domestic and international arbitrations.

As noted earlier, the old arbitration regime in the common law provinces governed international and domestic, commercial and non-commercial arbitration. At the provincial level (except for Quebec) the ML created a dual system—that is, one for international commercial and one for domestic arbitration. In addition, the ML had an

617 The federal Commercial Arbitration Act, ibid., modified Article 1 of the ML (by deleting paragraphs 3 and 4), thus making the law applicable not only to international but also to domestic arbitrations.
618 Commercial Arbitration Act, ibid, section 5(2).
impact on the rules of domestic arbitration in a number of provinces. For example, British Columbia’s rules on stay of proceedings, set up in section 15 of its domestic arbitration act (BCCAA), repeat section 8 of the international act (BCICAA). Alberta, New Brunswick, Ontario, and Saskatchewan have also tried to establish harmonious rules on domestic and international arbitration by introducing some of the ideas of the ML into domestic arbitration. The Proposals For a New Alberta Arbitration Act says:

"The reasons for patterning the draft Act on the ML are:

(a) that this will keep Alberta law about domestic arbitrations in as much harmony as circumstances permit with the Alberta law about international commercial arbitrations;

(b) the ML is, in general, a good model; and

(c) there is some value in keeping Alberta law in as much harmony as circumstances permit with the developing international mainstream of arbitration law."

Along the same lines is the new domestic Arbitration Act of Manitoba, which came into force on 28 June 1997. In contrast, the statutes governing domestic arbitrations in Nova Scotia, Newfoundland, Prince Edward Island and Northwest Territories are still based on

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619 See BCCAA, S.B.C. 1986, c.3.
620 BCICAA, supra note 613.
622 University of Alberta; Institute of Law Research and Reform, The Proposals For a New Alberta Arbitration Act (Edmonton: The Institute, 1988) at 9.
1. Modifications and Additions to the ML

Canada took a unique way of adoption and made numerous modifications to the original ML text. In this respect, Canada was the first to test the UNCITRAL Working Group’s premise that the ML was a flexible tool which could be modified easily to match
the legal culture and legislative needs of any particular adopting country.

First, to be compatible with Canada’s own constitutional law, the Canadian adoption involved both federal and provincial reform. The federal act created a uniform system adopting the ML for both international and domestic arbitrations. In contrast, all provinces, except Quebec, created two parallel systems—one, based on the ML, was applicable for international arbitration; and, the other, based on previous arbitration statutes, was applicable for domestic arbitration. However, statutes on domestic arbitration have also been influenced by the ML and accordingly modified.

The most important modifications and additions can be summarised as follows.

The Canadian provinces added provisions on the rights of arbitrators to order consolidation of proceedings,\(^{626}\) to order interest and costs.\(^{627}\) All Canadian provincial statutes added provisions which promote conciliation and mediation. More significantly,

\(^{626}\) For example, section 27(2) of the BCICAA reads that: “If 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) if all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with section 11(8);
(b) if all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.”

See also the Alberta International Commercial Arbitration Act, supra note 613, section 8 or the Ontario International Commercial Arbitration Act, supra note 613, section 7.

\(^{627}\) For example, section 31 (7)(8) of the BCICAA, supra note 613, reads that:

“(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 are in the discretion of the arbitral tribunal...”
it is now within the discretion of arbitrators to apply these provisions throughout the arbitration proceedings.¹²⁸ These modifications should be understood as an attempt to promote Canada as a suitable place for resolving disputes, including disputes involving Pacific Rim parties, who traditionally prefer mediation to arbitration.¹²⁹ As a result of these attempts, the BCICAC received over 3,300 applications for mediation between 1987 and 1993.¹³⁰

All of the above ML changes were placed where the UNCITRAL Working Group left open the possibility of such change.¹³¹ However, some Canadian provinces moved

¹²⁸Note the different formulations in provincial acts:

1. Article 5 in Alberta and Article 6 in New Brunswick: "For the purpose of encouraging settlement of a dispute, an arbitral tribunal may, with the agreement of the parties, employ mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure";

2. Section 30(1) in British Columbia: "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".

¹²⁹For more on the use of mediation see C. Branson, Q.C., "A View From the Centre," supra note 602, at 537.

¹³⁰C. Branson, Q.C., "A View From the Centre," supra note 602, at 703.

¹³¹Matters not governed by the ML include: the capacity of parties to conclude the arbitration agreement; the impact of State immunity; the contractual or other relations between the parties and the arbitrators or arbitral institution; the fixing of fees and costs and requests for deposits or security; the consolidation of arbitral proceedings; competence of arbitral tribunals to adapt contracts; the enforcement by courts of interim measures of protection ordered by the arbitral tribunal; the period of time for enforcement of arbitral awards; the role of courts prior to selection of the place of arbitration; the liability of arbitrators for misconduct or error; the competence of a court to execute a request to assist in the taking of evidence and the rules according to which it does so; and the question of what disputes are and are not arbitrable. See Holtzmann & Neuhaus, A Guide to Model Law, supra note 40 at 218.
beyond the suggestions of the Working Group and Secretariat. Specifically, they made an interesting modification to article 28 of the ML. In short, article 28 determines: (a) the right of the parties to choose the rules of law applicable to the substance of a dispute,\textsuperscript{632} (b) the right of the arbitral tribunal to make the choice in the absence of a choice by the parties,\textsuperscript{633} and (c) the right of arbitrators to decide the dispute \textit{ex aequo at bono} or as \textit{amicable compositeur} if directed by the parties to do so.\textsuperscript{634} It is significant that the article was debated extensively, which indicated that the provisions of the final draft came as a compromise between at least two groups.\textsuperscript{635} One group was willing to give both parties and arbitrators the same power to determine the law applicable to the subject matter of a dispute. The other group wanted to limit the powers of arbitrators. In the final version of the ML the extent of the arbitrators' freedom to choose the rule applicable to the substance of the dispute (article 28(2)) was limited more than was the extent of the parties' freedom (28(1)). Indeed, the arbitrators had to refer to the conflict of laws rules of a particular national State, whereas the parties had the right to choose \textit{any rules}, not only rules of law, including the rules embodied in international conventions or even rules not

\textsuperscript{632} ML article 28(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 \textit{directly referring to the substantive law} of that State and \textit{not to its conflict of laws rules.}"[emphasis added].

\textsuperscript{633} ML article 28(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."[emphasis added].

\textsuperscript{634} ML article 28(3).

yet in force.\textsuperscript{636} Canadian provinces chose a more liberal approach recognising the right of the arbitral tribunal to refer directly to the rules of law it considers appropriate given all the circumstances surrounding the dispute.\textsuperscript{637}

Evaluation of the changes to the original text of the ML can also be done in the context of the acceptance of the basic principles of the ML.

2. The Basic Principles of the ML

The fundamental changes in 1986 to the Canadian legal framework for international commercial arbitration came as a consequence of the adoption of all the basic principles of the ML: party autonomy, limited court intervention, independence of the arbitral tribunal and procedural fairness.\textsuperscript{638} In sum, Canada did not put any limitation

\textsuperscript{636} See the Commission Report, A/40/17, par. 232, at 804-805.

\textsuperscript{637} See for example the relevant provisions in statutes of Alberta, British Columbia and Ontario:

R.S.B.C. 1996, c.233 section 28(3): “Failing any designation of the law under subsection (1) by the parties, the arbitral tribunal must apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.” [emphasis added].

S.A. 1986, c.I-6.6 section 7: “Notwithstanding article 28(2) of the International Law [ML-added], if the parties fail to make a designation pursuant to article 28(1) of the International Law, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances respecting to the dispute.” [emphasis added].

R.S.O. 1990, c.1.9 section 6: “Despite article 28(2) of the Model Law, if the parties fail to make a designation pursuant to article 28(1) of the Model Law, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances respecting the dispute.” 1988, c.30 s.6. [emphasis added].

on the basic principles of the ML. On the contrary, granting a number of additional
powers to arbitrators, Canada strengthened the powers of the arbitral tribunal and
accordingly limited the powers of the courts.

Party autonomy as a principle of contract law has been praised in English
common law for a long time.\(^{639}\) However, parties were for a long time precluded from the
right to remove a dispute from court jurisdiction. They were allowed to defer it by the
means of *Scott v. Avery* clause which would make arbitration a condition precedent to
litigation.\(^{640}\) Before the adoption of the ML the parties could not empower arbitrators to
act *ex aequo et bono*.

Since the adoption of the ML the whole system of arbitration has become driven
by arbitration agreement. Like the ML itself, the new Canadian legislative framework
was designed to assure the parties that their expectations would not be frustrated by
unexpected mandatory provisions of law.\(^{641}\) In other words, the ML and the new laws in
Canada empower the parties to determine substantive law and procedural law for
arbitration proceedings.

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\(^{639}\) On party autonomy and freedom of contract see in particular P.S. Atiyah, *The Rise and
Fall of Freedom of Contract* (Oxford: Clarednon Press, 1979) and J. Gordley, *The
See also comments on party autonomy by J. Swan & B.J. Reitter, *Contracts: Cases,
1989) at 8.

\(^{640}\) See Chapter Three of this thesis and related explanation of Canadian and English
approach, especially after the English *Arbitration Act 1979*, supra note 273, introduced
so-called exclusion agreements.

\(^{641}\) G. Herrmann, “The British Columbia Enactment of the UNCITRAL Model Law” in
As far as the principle of procedural fairness was concerned, the adoption of the ML did not broaden the right for natural justice that had already been established as the procedural imperative in common law.

The principle of limited court intervention is the most significant improvement to the old arbitration regime. Instead of the broad supervisory powers given by the Arbitration Act 1889, courts can now intervene only in situations specifically defined by the ML itself. Indeed, article 5 of the ML and corresponding articles in the Canadian statutes establish that "[i]n matters governed by this law, no court shall intervene except where so provided in this Law." At the same time, the new legislation provides for limited court assistance and control in a number of other situations. The ML, as adopted in Canada, limits court assistance to ordering a stay of proceedings when a valid arbitration agreement exists; to establishing arbitral tribunals when the parties fail to do so; to authorising interim measures; to taking of evidence; and to ordering the consolidation of arbitration. The nature of the changes introduced by the ML can be best observed with respect to the court’s power to stay proceedings. Unlike under the Arbitration Act 1889, which gave courts a discretionary power to stay proceedings if satisfied that there was no sufficient reason why the matter should not be referred to

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642 This categorisation of court intervention in arbitration is defined and explained in detail by Henri Alvarez, "Role of Arbitration" supra note 602 at 260-261.

643 Article 8 of the ML.

644 Article 11 of the ML.

645 Article 9 of the ML.

646 Article 27 of the ML.

647 Section 30 in provincial acts, not in the original ML text.
arbitration,\textsuperscript{648} the new provincial acts require a stay of proceedings if a valid arbitration agreement exists.\textsuperscript{649}

According to the new legislation, court control is limited to the courts' power to challenge and terminate the mandate or arbitrators;\textsuperscript{650} to review the tribunal's decisions about its own jurisdiction;\textsuperscript{651} to set aside awards; and to recognise and enforce awards.\textsuperscript{652} Changes in the court's role are particularly significant with respect to the power to set aside, recognise and enforce awards. The ML's solution in these situations duplicates those found in the \textit{New York Convention}. The Convention provides a list of reasons for setting aside or refusing recognition and enforcement of awards. However, a "special case" procedure with respect to questions of law was not listed.\textsuperscript{653} Moreover, the Convention was silent on the courts' power to remove an arbitrator or to set aside an award under the doctrine of misconduct\textsuperscript{654} and the courts' power to set aside an award for

\textsuperscript{648} The \textit{Arbitration Act 1889}, supra note 269, section 4: "court may make an order."

\textsuperscript{649} Note the differences in the provincial and federal approaches: according to the provincial acts (section 8(2)) the court shall make an order staying the proceedings, but according to the federal Act (article 8(1)), which duplicates the ML, the court shall refer parties to arbitration.

\textsuperscript{650} Articles 13 and 14 of the ML.

\textsuperscript{651} Article 16 of the ML.

\textsuperscript{652} Articles 34, 35 and 36 of the ML.

\textsuperscript{653} \textit{Arbitration Act 1889}, supra note 269, section 19:

"\textit{Statement of case pending arbitration}: Any referee, arbitrator of umpire may at any stage of the proceedings under a reference, and shall if so directed by the Court of a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of reference". For a discussion see H. Alvarez, "Role of Arbitration", \textit{supra} note 602 at 262.

\textsuperscript{654} \textit{Arbitration Act 1889}, supra note 269, provided in section 11:

(1) "Where an arbitrator or umpire has misconducted himself, the Court may remove
“errors of law on the face of the award.”655

The majority of Canadian court decisions on arbitration since 1986 indicate that courts have generally been supportive of arbitration under the ML despite the fact that its provisions greatly limit judicial powers.656 Yet, it seems that theoretical debate—over whether arbitration still owes a great deal of its distinctive characteristics to the compulsive power of courts—has been transformed into practical discussion. Indeed, problems usually arise with respect to court interpretations of courts’ discretion to stay proceedings657 and arbitrators’ right to rule on their own jurisdiction.658

Quebec did not adopt the ML, but its new 1986 law on arbitration used the ML as a pattern to change the Civil Code659 and the Code of Civil Procedure.660 Even though the reform of arbitration law in Quebec started in 1966, only after Zodiak661 did it become evident that additional changes were necessary to bring Quebec into a line with other modern legislations. The significant change was that the provisions on arbitration were

(2) “Where an arbitrator or umpire has misconducted himself, or an arbitrator or award has been improperly procured, the Court may set the award aside.”

655 For a discussion of the grounds for attacking an award see R. H. McLaren & E. E. Palmer, Q.C., supra note 287 at 117-122. To repeat, the court would set aside an award if a party managed to prove an error on the fact of the award, which meant that the error was not only an error in the award itself but also an error in the documents related to an award.

656 See Chapter Five of this thesis, section B: Canada: The First Adoption of the ML.

657 Article 8 of the ML.

658 Kompetenz-Kompetenz in article 16(1) of the ML.

659 Civil Code, supra note 372, articles 1926.1 to 1926.6.

660 Code of Civil Procedure, supra note 375.

661 Zodiak, supra note 391.
now included not only in the *Code of Civil Procedure* but also in the *Civil Code*, the key statute of all civil law legal systems. More important was that the new provisions of the *Civil Code* related to the basic principles of the ML. For example, the new provisions of the *Civil Code* brought a unitary structure to arbitration clauses—that is, the same regime for a submission and *clause compromissoire*.662 As in the common law provinces which adopted the ML, Quebec’s revised *Civil Code* provided for the right of the parties to determine the law applicable to the merits of a dispute and to decide on procedural rules. Parties could also empower arbitrators to act *ex aequo at bono*.

Important changes to the *Code of Civil Procedure* were made by implementation of the *New York Convention* into articles 948 to 951.2 in the Book Seven.663 In that way, a foreign award which met requirements of the *New York Convention* (incorporated in articles 950 and 951) would become enforceable in Quebec by way of motion for homologation (article 949.1) if it was not contrary to Quebec public order (article 949).

3. Establishment of Arbitration Centres in Canada

Arbitration centres in Vancouver and Quebec were established at the time of the adoption of the ML. Later, they joined the Commercial Arbitration and Mediation Centre for the Americas [hereinafter CAMCA] to "provide parties in the free trade area with an

662 *Civil Code*, supra note 372, article 1926.1.
663 *Code of Civil Procedure*, supra note 375, title “Of Recognition and Execution of Arbitration Awards made outside Quebec.”
efficient, international forum for the resolution of private commercial disputes.\textsuperscript{664}

The establishment of the BCICAC was heralded as a good start for expanding international arbitration in Canada and transforming Vancouver into a major Pacific Rim forum for non-state dispute resolution, but the Centre eventually experienced serious financial difficulties\textsuperscript{665} and had to be reconstituted. Specifically, the Centre was substantially reengineered in 1997 in order to regain support from the local community and to broaden its operations from arbitration to other forms of alternative dispute resolution (ADR). As part of its response to its difficulties, the Centre restricted some services\textsuperscript{666} and prepared a new programme primarily focused on domestic arbitration—The Trial Overflow Programme.\textsuperscript{667} This programme was supposed to help parties to resolve their disputes when congested courts result in considerable delay of trial dates.\textsuperscript{668}

Statistics on the Centre show that the BCICAC had primarily dealt with domestic cases even before the new programme was proposed. In both 1987 and 1988 the Centre

\footnote{CAMCA Mediation and Arbitration Rules, “Introduction” at 3. Full text of the CAMCA Rules is available online under "rules/international" <www.adr.org> (data accessed 15 October 1999).}

\footnote{According to Peter Grove, CA, Executive Director of the BCICAC, “[t]he lights were almost turned off at the British Columbia International Commercial Arbitration Centre in summer 1996 due to a loss of funding from government sources.” See P. Grove, Press Release for the American Bar Association Newsletter (July 1997) and one of his contributions to the BCICAC’s regular column in The Advocate—P. Grove, “A View from the Centre”, (1997) 55:2 The Advocate 263.}

\footnote{More on services and facilities provided by the BCICAC see P. Grove, “A View from the Centre”, (1997) 55:3 The Advocate 425.}

\footnote{P. Grove, “A View From the Centre” (1997) 55:4 The Advocate 563.}

\footnote{P. Grove, \textit{ibid.}}
registered 2 arbitrations. In 1989, the number was significantly higher—12 registered arbitrations. Data for 1990 reveals an increase in the total number of registered arbitrations—5 international and 25 domestic arbitrations. The trend in 1991 was a decrease in the number of international arbitrations (only 3) and an increase in domestic ones (44). In 1992, 7 international and 34 domestic arbitrations were registered. The survey data stops at mid-1993, by which time 11 domestic arbitration cases were registered. Figures for the period 1986-1994 were presented by Cecil Branson, Q.C., then the Executive Director of the BCICAC at the conference of the Oregon State Bar in May 1994. The Centre was involved in 28 international and 60 domestic arbitrations in this eight-year period. According to unofficial figures presented recently by the BCICAC, there were 10 international commercial arbitration files opened in 1994, 2 in 1995, 5 in 1996 and 3 up to July 1997. On the other hand, the number of domestic arbitration files was significantly greater: 44 in 1994, 38 in 1995, 51 in 1996, and, 21 up to July 1997.

Unfortunately, statistics from the Quebec National and International Commercial Arbitration Centre do not distinguish between domestic and international arbitrations. There were 134 arbitrations involving claims for a total of $175,965,696 between 1988 and September 12, 1997 (4 in 1988; 2 in 1989; 10 in 1990; 20 in 1991; 17 in 1992; 10 in

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671 Unofficial reports from the BCICAC were presented by Peter Grove, Executive Director of the BCICAC in July 1997 (on file with author).

672 Ibid.

It is possible to argue that these figures, in particular the decrease in international arbitration files over ten years, do not necessarily indicate that arbitration as a dispute resolution mechanism is losing popularity in Canada. It could, instead, be that parties are more often choosing *ad hoc* arbitration. These findings are undoubtedly also limited by the methodology chosen for the research.

Some might say that the crisis faced by institutional arbitration in Canada has resulted from the increase in the number of arbitration centres world-wide—the Parker School of Foreign and Comparative Law listed over 120 centres in 1992. 674 The list of choices in the Pacific Rim is also impressive. Between 1952 to 1993 every country in the region established its own arbitration centre. 675 It may be that diversity of legal cultures prevents parties from the Pacific Rim choosing Vancouver as a place for arbitration. 676

What, then, can be concluded from this incomplete array of facts? First, there is a greater tendency toward facilitating domestic arbitration and conciliation than promoting international commercial arbitration. As well, the supply side of international commercial arbitration has become very competitive world-wide. For these reasons, it seems that the

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673 The statistics were presented in September 1997 by Ms. Céline Vallière of the Quebec National and International Arbitration Centre (on file with author).


676 For example, Y. Taniguchi, "The Changing Attitude to International Commercial Dispute Settlement in Asia and the Far East" (Part 2, June 1997) *A.D.R.L.J.* 67 at 67: "We Asians feel more at home in Asia than in Europe or in America. Despite all kinds of differences we still seem to share more in common with other Asians than with non-Asians".
Canadian centres need to find their niche in the international arbitration market not only as institutions which provide services which *ad hoc* arbitration cannot provide (such as the quality of assistance and supervision and established rules and procedures⁶⁷⁷), but also as educational institutions able to change the legal cultures of arbitrators and business people.

**B. Hong Kong Brings the ML to Asia**

Hong Kong’s reception of the ML has gone through two stages. During the first period (1898-1997) the ML became Hong Kong legislation. Subsequently, Hong Kong emerged as one of the most important centres of international commercial arbitration. Hong Kong was the first Asian jurisdiction to adopt the ML.

During the second stage the ML was modified in many ways. The objectives were to preserve the independence of Hong Kong arbitrators from the influence of the Mainland, and to soothe growing concerns that the basic principles of Hong Kong’s legal system and its institutions would erode as China took over a control over the territory.

1. The Growth of the HKIAC from 1989 to 1997

Since its first significant departure from the English arbitration law and practice in 1982, Hong Kong has constantly attempted to modernise its arbitration law and to gain acceptance as an important international arbitration centre. Having the reputation of the freest and the most open international financial centre in the world, Hong Kong was already following a number of international trade standards, which facilitated the adoption of the ML. As already pointed out, Hong Kong’s Law Reform Commission had discussed the UNCITRAL’s standards on international commercial dispute resolution even before the ML was recommended for adoption by the 1985 United Nations Resolution. The reception of the ML was consistent with the earlier attempts of Hong Kong to step away from the English concept of arbitration. As already described, the earlier attempts resulted in the enactment of the 1982 Arbitration Ordinance. Five years later, the Report on the Adoption of the UNCITRAL Model Law of Arbitration in Hong Kong proposed the enactment of the ML to achieve two important legislative objectives: to encourage international arbitration as a way of dispute resolution and to advantage Hong Kong as a leading international commercial centre in the Far East.

Until April 1997 the law on international arbitration in Hong Kong closely

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678 See Chapter Three, section B for a discussion of ways in which Hong Kong moved away from the English Arbitration Act 1979.

followed the ML, except for two deletions and two additions which will be discussed in
the section below. In sum, the 1989 Arbitration Ordinance adopted the ML but deleted
Chapter VIII of the original ML text on recognition and enforcement of foreign arbitral
awards, and deleted the word “commercial” to extend the application of the ML to all
international arbitrations. Furthermore, the new ordinance modified provisions on the
powers of arbitrators by explicitly providing for the powers to order costs and interest.
Finally, the 1989 Arbitration Ordinance determined that in interpreting and applying the
provisions of the ML, arbitrators might refer to the report of the Secretary General of the
United Nations dated 25 March 1984, the report of the UNCITRAL on the work of its
eighteen session and the report of the Law Reform Commission of Hong Kong on the
Adoption of the ML. These additional documents specified in the Sixth Schedule of the
1989 Arbitration Ordinance are discussed in the next paragraphs of the thesis.

(i) Modifications and Additions to the ML

Hong Kong adopted the ML in its entirety as the Fifth Schedule to the Arbitration
(Amendment) (No. 2) Ordinance of 23 November 1989, which came into force on 6 April
1990. As already noted, the only part that was excluded from the application by virtue
of section 34C(1) of the Ordinance was Chapter VIII of the ML. To reiterate, articles 34-
36 of Chapter VIII, in fact, reproduce article V of the New York Convention and the rules

on recognition and enforcement of foreign arbitral award.\textsuperscript{682}

The first change caused by the adoption was of a structural nature. As opposed to the uniform system for international and domestic arbitrations established by the 1963 Arbitration Ordinance,\textsuperscript{683} the 1989 Arbitration Ordinance created a dual system. Part IIA provided for application of the ML for international arbitration. Part II, providing for application of the provisions of the 1963 Arbitration Ordinance, was to govern domestic arbitration. In that way, the application of the old 1963 regime for supervisory power of courts and the right to appeal issues of law was restricted to domestic arbitration.

However, the new 1989 Arbitration Ordinance gave the possibility of using the domestic arbitration regime for international disputes by opting out of the ML. Section 2M explicitly provided for a written agreement between the parties which will specify that:

"(a) this Part [Part II-addition mine] is to apply; or
(b) that the agreement is, or is to be treated as a domestic arbitration agreement; or
(c) that a dispute is to be arbitrated as a domestic arbitration."

The Hong Kong 1989 Arbitration Ordinance providing for the possibility of opting out the ML was not radical. Indeed, the UNCITRAL Working Group envisioned this option: the ML was drafted to promote the greater party autonomy, including the right of parties to decide whether to apply the ML or not. The possibility of opting out was also provided

\textsuperscript{681} Arbitration (Amendment) Ordinance, 1989, cap. 341 (no. 2 of 1989 H.K.).

\textsuperscript{682} Section 34C(1): "An arbitration agreement and an arbitration to which this Part [Part IIA-addition mine] applies are governed by Chapters I to VII of the UNCITRAL Model Law."

\textsuperscript{683} 1963 Arbitration Ordinance, supra note 451.
for in the 1989 Australian statute on arbitration, which adopted the ML.\textsuperscript{685} In 1993 Bermuda also adopted the same position.\textsuperscript{686} The Hong Kong Reform Commission took into consideration the influence of the English common law tradition on the one hand, and previous practice in Hong Kong on the other hand. Then it concluded that the possibility of opting out would make the new international arbitration regime attractive for the parties preferring more judicial control over arbitration.

However, the 1989 Arbitration Ordinance also provided for application of the ML to a domestic arbitration agreement if the parties to the dispute subsequently agreed in writing:

(a) that Part IIA is to apply;
(b) that the agreement is, or is to be treated, as an international arbitration agreement; or
(c) that the dispute is to be arbitrated as an international arbitration.\textsuperscript{687}

Paragraph (a) indirectly calls for the application of ML article 1(3) (as reproduced in the Fifth Schedule of the 1989 Arbitration Ordinance) in defining precisely that 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

\textsuperscript{684} 1989 Arbitration Ordinance, \textit{supra} note 681.

\textsuperscript{685} International Arbitration Amendment Act, 1989, \textit{supra} note 611, section 21.


\textsuperscript{687} The Hong Kong 1989 Arbitration Ordinance, \textit{supra} note 681, section 2L.
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.\footnote{688}

According to these two sections, the parties could only opt to apply the ML if the requirements of article 1(3) relating to the place of business, subject matter of the dispute or the test of substantiality as to their obligations were met.

For a busy international trade centre like Hong Kong the possibility to opt for the ML when both parties have a place of business in Hong Kong\footnote{689} is of great importance. It is not unusual that parties to disputes were Hong Kong companies, that their commercial relationship was established in Hong Kong, and that Hong Kong law was the applicable law to the contract. Yet, at the same time, a \textit{substantial part} of the parties’ obligation might be expected to be performed in or be linked to a country other then Hong Kong. Only when such a substantial part of an obligation is linked to another country may article 1(3)(b)(ii) of the ML enable the court to determine the international character of arbitration.

The second important characteristic of the Hong Kong’s version of the ML is that it modifies a number of the ML’s original concepts and thus extends the powers of arbitrators beyond the provisions of the ML. It is important to enumerate and evaluate

\footnote{688}{Article 1(3) of the ML.}

\footnote{689}{At the same time, a subject matter of a dispute is related to more then one country, or a substantial part of obligation is to be performed in other country or a substantial part of obligation is closely connected to another country.}
these modifications.

The definition of “commercial” is given in the Fifth Schedule of the 1989 Arbitration Ordinance which incorporates the full text of the ML. To re-iterate, article 1(1) of the ML sets out in a footnote sixteen examples of “commercial” transactions as follows:

- any trade transaction for the supply or exchange of goods or services;
- distribution agreement;
- commercial representation or agency;
- factoring;
- leasing;
- construction of works;
- consulting;
- engineering;
- licensing;
- investment;
- financing;
- banking;
- insurance;
- exploitation agreement or concession;
- joint venture and other forms of industrial or business cooperation;
- carriage of goods or passengers by air, sea, rail or road.

690

However, part IIA of the 1989 Arbitration Ordinance only refers to international arbitration, omitting the word commercial. Section 34C(2) of the Ordinance provides that “[a]rticle (1) of the UNCITRAL Model Law shall not have the effect of limiting the application of the UNCITRAL Model Law to international commercial arbitrations [emphasis added].” The reason for such a change came from the view that even a broad ML definition of commercial nature might soon become obsolete because of the diversity

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690 Footnote ** to article 1(1) of the ML as reproduced in the Fifth Schedule of the Ordinance.
of international transactions taking place in Hong Kong.

Hong Kong emphasised the necessity to preserve uniformity in interpretation of the ML by adding a provision on interpretation that refers to the documents specified in the Sixth Schedule.\(^{691}\) One may recall similar provisions in the Canadian federal statute giving a discretion to arbitrators to have recourse to certain international documents of UNCITRAL.\(^{692}\) It is noteworthy that the 1989 Arbitration Ordinance of Hong Kong makes it mandatory that the international origin of the ML and a need for uniformity in its interpretation be considered by those interpreting its language in Hong Kong. On the other hand, arbitrators may make the reference to other documents (the report of the Secretary General dated 25 March 1984,\(^{693}\) the report of the UNCITRAL on the work of its eighteen session from 3-21 June 1985\(^{694}\) and the report of the Law Reform Commission of Hong Kong on the Adoption of the ML\(^{695}\)).

\(^{691}\) Section 2(3): "In interpreting and applying the provisions of the UNCITRAL Model Law, regard shall be had to its international origin and to the need for uniformity in its interpretation, and regard may be had to the documents specified in the Sixth Schedule."[emphasis added]

\(^{692}\) Commercial Arbitration Act, R.S., 1985, c.17(2nd Supp.) section 4(2): In interpreting the Act, recourse may be had to:

(a) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, held from June 3 to 21, 1985; and

(b) the Analytical Commentary contained in the Report of the Secretary General to the eighteenth session of the United Nations Commission on International Trade Law.


\(^{694}\) Commission Report A/40/17 (issued in English on 21 August 1985).

\(^{695}\) The 1989 Arbitration Ordinance, supra note 681, section 2(3):

"In interpreting and applying the provisions of the UNCITRAL Model Law, regard shall be had to its international origin and to the need for uniformity in its interpretation, and
Section 34D of the 1989 Arbitration Ordinance provides for extended powers of arbitrators—that is, to award costs\(^{696}\) and interest\(^{697}\) unless otherwise agreed by the parties. This possibility is not provided for in the ML itself, but as previously noted, was discussed by the UNCITRAL Working Group which decided to leave for the adopting country to regulate the issue according to their needs and practices.\(^{698}\) Thus, the relevant provisions of section 34D(1)(a)(b) are added to the ML to avoid doubts that arbitrators have discretion to award the costs of the reference and award interest.\(^{699}\) This again was not a novelty. British Columbia also provided for such powers in arbitrators.\(^{700}\) Similar solutions can be found in other countries which adopted the ML—such as Nigeria, Russia and Australia, to name a few.\(^{701}\)

The New York Convention had been adopted as the Third Schedule to the 1975 Arbitration Ordinance.\(^{702}\) Under Part IV, foreign awards rendered in members to the New

\(^{696}\) The 1989 Arbitration Ordinance, supra note 681, section 34D(1)(a).

\(^{697}\) The 1989 Arbitration Ordinance, supra note 681, section 34D(b).

\(^{698}\) Indeed, the UNCITRAL Secretariat suggested the possibility for the arbitrators to request a deposit from the parties for fees and costs and an authorisation of the arbitrators to fix their own fees. See more in “Commentary on Matters not Addressed in the Final Text” in H. Holtzmann & J.E. Neuhaus A Guide to Model Law, supra note 40, at 1118-1119.

\(^{699}\) Note, however, that section 34D is repealed by the 1996 Arbitration Ordinance. But note also that the power to order costs and interest is now transferred to Part IA, sections 2GH and 2GJ of the 1996 Arbitration Ordinance, as a power given to both domestic and international arbitrators.

\(^{700}\) BCICAA, R.S.B.C. 1986. c.14 section 31(8).

\(^{701}\) For a detailed overview on the issue of costs and interests see P. Sanders, “Unity and Diversity”, supra note 7 at 31-33.

\(^{702}\) The 1975 Arbitration Ordinance, supra note 457.
York Convention would qualify for recognition and enforcement in Hong Kong as “Convention awards.” All other foreign awards would be governed by Part III (articles 35-40). According to section 2H of the 1975 Arbitration Ordinance, both “the Convention awards” and other foreign awards would be enforceable either by action or in the same manner as the awards of arbitrators. In addition, section 2H states that “an award or an arbitration agreement may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in terms of the award.”

By omitting the ML Chapter VIII in the Fifth Schedule of the 1989 Arbitration Ordinance Hong Kong preserved the reciprocity reservation for recognition and enforcement of foreign awards. Indeed, the New York Convention allows countries to limit recognition and enforcement upon the conventional requirements only to foreign awards rendered in member states of the Convention.703 On the other hand, article 36(1) of the ML governs recognition or enforcement of an arbitral award irrespective of the country in which it was made [emphasis added].704 This option was not found to a troubling one for Hong Kong for two reasons. Firstly, by the time the ML was adopted in Hong Kong, Hong Kong had already become a member of the New York Convention by the reason of the United Kingdom’s accession to the treaty. Secondly, China (which Hong Kong became a part of after the adoption of the ML) was also been a member of

703 The New York Convention, supra note 10,Article I (3): “when signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any state may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.

704 The ML article 36(1).
the New York Convention and the country producing most of the foreign awards sought to be enforced in Hong Kong.\textsuperscript{705} However, the transfer of sovereignty created another problem related to recognition and enforcement of Chinese arbitration awards in Hong Kong, and \textit{vice versa}. This problem arises from the fact that as of 1 July 1997 Hong Kong has to become a part of China and accordingly China might not recognize Hong Kong awards as being foreign in the context of the New York Convention. This problem will be further discussed in Chapter Five of the thesis.

(ii) Basic ML Principles Preserved

The above-presented summary of the main changes of the arbitration law arising from adoption of the ML suggests that Hong Kong not only preserved all the basic principles of the ML, but also strengthened the principle of party autonomy and extended the powers of arbitrators. Parties were given the right to opt out of the ML's application to international disputes on one hand, and to opt into the ML application for domestic disputes, on the other. In many ways the adoption of the ML could be seen as following the approach adopted by the 1982 Arbitration Ordinance. For example, the 1989 Arbitration Ordinance preserved the powers of arbitrators to act as conciliators, first introduced in 1982. In addition, the 1982 Arbitration Ordinance limited the possibilities for court intervention during arbitral proceedings and for judicial review of awards. However, after the adoption of the ML arbitrators have inherited new powers—to award

costs and interest. Fairness of procedure has now been secured not only by the strict application of the ML principles but by the additional provision of section 2F allowing foreign attorneys and advisors to appear before arbitral tribunals on behalf of their clients/parties to arbitration, even if such persons are not legally qualified under the \textit{Legal Practitioners Ordinance} (Cap 159).\textsuperscript{706}

(iii) HKIAC

During this first stage of the ML adoption, the Hong Kong International Arbitration Centre has emerged as one of the world's most attractive centres for dispute resolution. The popularity of the centre was partially due to the fact that Hong Kong itself emerged as a leading laissez-faire business centre, but also due the fact that the adoption of the ML created a stable and predictable legal framework which promoted greater party autonomy and limited significantly court intervention. In addition, a great number of knowledgeable, experienced bilingual Hong Kong arbitrators have gained the respect and confidence of foreigners. In addition, the HKIAC's panel lists arbitrators from most of the world's trading nations, including China since 1987.\textsuperscript{707}

\textsuperscript{706} But note that this liberal environment surrounds only international commercial arbitration and does not extend to appearance before the High Court of Hong Kong in any case related to international commercial arbitration. See R. Morgan, \textit{The Arbitration Ordinance of Hong Kong: A Commentary} (Hong Kong: Butterworths, 1997) at 56 [hereinafter \textit{Hong Kong Ordinance}].

\textsuperscript{707} According to Kaplan, Spruce and Cheng arbitrators from China were added to the panels after China acceded to the \textit{New York Convention}. See N. Kaplan, J. Spruce, T. YW
Statistics for the period following the adoption of the ML confirms an increase in
the number of requests for arbitration by the HKIAC. For example, in 1990 there were 54
requests. Robert Morgan reported that in 1991 the Centre received 94 new requests, in

2. Transition Period (1997-2047)

On 18 December 1996 the Legislative Council of Hong Kong passed amendments
to the 1989 Arbitration Ordinance.\(^{709}\) The change came in response to the proposal by the
Arbitration Law Committee to harmonise domestic and international arbitration laws and
to secure the independence of the arbitral tribunals from local courts following the July
1997 transfer of sovereignty. An additional motive for improving the 1989 Arbitration
Ordinance was to meet growing competition from other arbitration centres (especially
those in Beijing, Singapore and Sidney) and to catch up with the changes made in the
English Arbitration Act 1996.\(^{710}\) Unfortunately, the structure of the 1989 Arbitration

\(^{708}\) R. Morgan, Hong Kong Ordinance, supra note 706, at viii.

\(^{709}\) Arbitration (Amendment) Ordinance, 1996, no. 75 (H.K.) came into force on 27 June
1997 [hereinafter the 1996 Arbitration Ordinance], just before the transfer of sovereignty
to the PRC. Section 18 sets out that the 1996 Arbitration Ordinance applies all to
arbitration agreements, whenever entered into, but not to arbitrations which commenced
before 27 June 1997.

\(^{710}\) Robert Morgan says that despite the fact that the 1996 Arbitration Ordinance
Ordinance was preserved. Thus, the 1996 Arbitration Ordinance has become even more awkward for users than its predecessors. A significant number of sections were repealed, some parts were modified and as a result the contents appear in five parts with six schedules attached.

(i) Modifications of the ML and Changes of Domestic Arbitration Rules

Efforts to bring Hong Kong’s domestic and international arbitration law in harmony lead to application of some of the major principles of international arbitration to domestic arbitration and in modifications to the domestic arbitration regime. Two changes are of the greatest importance. First, stay of legal proceedings for domestic arbitration is now determined in accordance with article 8(1) of the ML. Section 6(1) of the 1996 Arbitration Ordinance reads:

represents the second stage in a process of separation from the English model, its amendments are largely based on modern English thinking. He primarily refers to the change of the written form requirement and harmonisation of domestic and international regimes (close to unification), which echoes the solutions of the English Arbitration Act 1996. See R. Morgan, “Hong Kong Arbitration in Transition: The Arbitration (Amendment) Ordinance 1996, Part I” (1998) 3 Asian Com. L. Rev. 55 at 58 and 69. See also M. Mustill, “Hong Kong 1996 - Too Many Laws” (1998) 6 Asia Pacific L. Rev. 1. Lord Mustill argues that the New English Arbitration Act “may prove to have an influence, direct or indirect, in the world of arbitration at large.” However, he also points at the fact that both Hong Kong’s and English arbitration statutes “have been heavily influenced by the UNCITRAL Model Law, and that they are proceeding in the same general direction, although by strikingly different routes.” See M. Mustill, ibid., at 1.

Part I contains basic concepts and definitions. Part I A relates to both domestic and international arbitration. Part II is on domestic arbitration, while Part IIA is on international arbitration. Part III governs enforcement of certain foreign awards. Part IV governs enforcement of New York Convention awards; and, finally, Part V consists of general provisions.
“Subject to subsections (2) and (3), article 8 of the UNCITRAL Model Law (Arbitration agreement and substantive claim before court) applies to a matter that is the subject of a domestic arbitration agreement in the same way as it applies to a matter that is the subject of an international arbitration agreement.”

Secondly, the harmonization of the international and domestic systems of arbitration had the effect of extending the powers of an arbitral tribunal in a domestic arbitration to determine its own jurisdiction. By the virtue of a new provision (section 13B) the *Kompetenz-Kompetenz* principle and the principle of severability of the arbitration clause became mandatory provisions for domestic arbitration as well. Section 13B is as follows:

"Article 16 of the UNCITRAL Model Law applies to an arbitral tribunal that is conducting arbitration proceedings under a domestic arbitration agreement in the same way as it applies to an arbitral tribunal that is conducting arbitration proceedings under an international arbitration agreement."  [712]

The balance of the 1996 *Arbitration Ordinance* modifies the international arbitration regime.

In order to secure the independence of the arbitral tribunal from courts the 1996 changes maximised the powers of HKIAC. The need to transfer more powers to the HKIAC was suggested in a number of reports by different international organizations and observers made during the period from 1985 and 1997 with respect to the fundamental principles of the *Joint Declaration* and the *Basic Law*. [713] To reiterate, the *Joint

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[712] 1996 Arbitration Ordinance, supra note 709, section 13B.

[713] For example the Report of the International Republican Institute (a part of the National Endowment for Democracy) as presented by Dick Thornburgh, “The Rule of Law in Hong Kong, Some Implications for US Policy” [hereinafter “The Rule of Law in HK]
Declaration is a binding international treaty signed by two sovereign countries (Great Britain and the PRC) and registered with the United Nations. On the other hand, the Basic Law is the law enacted by the National People's Congress of the PRC as the constitutional framework for Hong Kong as from 1 July 1997. The Joint Declaration and the Basic Law provided for a number of guarantees relating to the legal system of Hong Kong and an independent judiciary is one of them. In addition, Article 8 of the Basic Law guarantees the continuance of the common law legal system in Hong Kong for fifty years beyond 1997.

**Article 8 of the Basic Law**

"The Laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

The 1992 Report of the International Commission of Jurists [hereinafter the ICJ Report] noted that in practice, the PRC had constantly disregarded its obligations under


714 Joint Declaration, supra note 484.

715 Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the third session of the seventh National People's Congress and promulgated by Decree no. 26 of the President of the PRC on 4 April 1990, came into effect on 1 July 1997.

716 Others include: the use of both English and Chinese language in the courts; reliance on precedents from other common law jurisdictions; an independent public prosecution service; the ability of overseas lawyers and law firms to practice in Hong Kong; Hong Kong based Court of Final Appeal replace the Privy Council in London as the final appellate court for Hong Kong; and requirement that the International Convenant on Civil and Political Rights as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. See the Honourable J.F. Mathews, "The Legal System of the Hong Kong Special Administrative
the Joint Declaration and thus jeopardised the independence of the Hong Kong legislature. On the other hand, the Chinese Government found 25 existing Ordinances of Hong Kong wholly or in part contrary to the Basic Law.\textsuperscript{717} In addition, the ICJ Report registered at least 15 articles of the Basic Law inconsistent with the Joint Declaration.\textsuperscript{718}

In order to avoid overt supervision by the PRC of Hong Kong arbitral system, the 1996 Arbitration Ordinance vests the power to make default appointments of arbitrators in the HKIAC instead of the High Court. Moreover, section 34C(3) provides that the HKIAC, not the High Court, carries out both the function of appointment of arbitrators if parties cannot reach an agreement on tribunal or appointing authority (article 11(3)(4) of the ML). In addition, the 1996 Arbitration Ordinance vests among the general powers of domestic and international arbitral tribunals the powers to order security of costs, to order some interim and conservatory measures, and the power to act in an inquisitorial manner by directing discovery and production of evidence in order to ascertain the facts of a case.\textsuperscript{719} Furthermore, the power to extend time for the commencement of the arbitration proceedings was now referred to arbitrators, not to courts.\textsuperscript{720}

Hong Kong changed the requirements of the written form of arbitration agreements.\textsuperscript{721} Section 2AC of the 1996 Arbitration Ordinance specifically expands the

\textsuperscript{717} The ICJ Report is reproduced in D. Thornburgh, \textit{supra} note 713, at 17.

\textsuperscript{718} D. Thornburgh, \textit{supra} note 713, 19.

\textsuperscript{719} 1996 Arbitration Ordinance, \textit{supra} note 709, section 2GB.

\textsuperscript{720} 1996 Arbitration Ordinance, \textit{supra} note 709, section 2GD.

\textsuperscript{721} For further discussion of the “in writing” requirement see N. Kaplan, “Need for Writing”, \textit{supra} note 434.
definition of the agreement in writing to include arbitration agreements contained or evidenced in writing but not necessarily signed by the parties:

"(2) An agreement is in writing .... if -

(a) the agreement is in a document, whether signed by the parties or not; or

(b) the agreement is made by an exchange of written communications; or

(c) although the agreement is not itself in writing, there is evidence in writing of the agreement; or

(d) the parties to the agreement agree otherwise than in writing by referring to terms that are in writing...

(e) the agreement, although made otherwise than in writing, is recorded by one of the parties to the agreement, or by the third party, with the authority of each of the parties to the agreement...

(4) In this section 'writing' includes any means by which information can be recorded."

Form the above citation it seems that the 1996 Arbitration Ordinance offers a solution similar to that of the English Arbitration Act 1996, section 5:

(2) "There is an agreement in writing-

(a) if the agreement is made in writing (whether of not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(6) References in this Part to anything being written or in writing include its being recorded by any means."

In sum, the novelty of section 2AC, in comparison with article 7(1) of the ML, is that the former recognizes unsigned agreements and agreements recorded by only one of the
parties or by an authorized third party. The ML writing requirement (article 7(2)) encompasses only the situations in which there is a signed document in writing or in which the signatures are missing but the parties exchanged letters, telexes, telegrams, or other means of telecommunications that provide record of the agreement and confirm assent from each party. Under article 2AC(4) of the 1996 Arbitration Ordinance, an arbitration agreement in "writing" includes any means by which information can be recorded. The main goal of the new provision was clearly to keep the written form mandatory, but to allow any new recording technology to be introduced.

(ii) Basic Principles

The amendments contained in the 1996 Arbitration Ordinance improved the ML mechanism of dispute resolution by strengthening its basic principles. The Ordinance maximised party autonomy by providing that additional informal arrangements would meet requirements relating to there being an arbitration agreement. The Ordinance extended the powers of arbitrators in a number of ways previously described. Third, it established new tasks for the HKIAC. The latter two improvements led to further limitations on the powers of the court. However, all these changes have not removed doubts related to recognition and enforcement of Hong Kong awards in the PRC and about the role of the HKIAC in dealing with disputes involving parties from the PRC. At the same time, the Chinese arbitration centre in Beijing (CIETAC) has become the
busiest arbitration centre in Asia, with 700 disputes submitted to its arbitrators in 1997.\textsuperscript{722} It is hard to believe that any other centre would be able to exceed these figures in the near future.

C. The Russian Move Towards Establishing a Modern Arbitration Centre

The adoption of the ML by the Russian Federation occurred during the second phase of \textit{perestroika}. In addition to political and economic reforms during the first phase (1985-1990) a number of statutes relating to judicial reform were passed in the early 1990s. The most important tasks facing judicial reform in Russia were to establish an independent judiciary and due process, to define the jurisdiction of civil courts of general jurisdiction and \textit{arbitrazh}, and, finally, to revive arbitration in the traditional sense.

Having said that the Russian Federation has dramatically changed in the last decade, it is possible to conclude that after the \textit{LICA},\textsuperscript{723} the most important principles of arbitration will be implemented in a different context—that of a complete redefining of the political and legal system. Most importantly, under the new arbitration law the nature of arbitration changed from compulsory to voluntarily.

1. Modifications and Additions to the ML

In general, the significance of the *LICA*’s modifications to the ML can only be evaluated in the context of the Soviet legacy. Accordingly, even the changes which were “permitted” by the Working Group of the ML (such as those related to the authority in article 6 of the ML) have a particular meaning considering the whole Russian legal framework and previously established practice of arbitration. On the other hand, the comparison of the *LICA* with the ML reveals that the original text is only slightly modified to facilitate the country’s transition to a market economy and to reflect Russian legal culture. Ironically, even some unchanged ML provisions do modify (or at least intend to modify) Russian legal culture. For example, the *LICA*’s article 22 (like the ML) gives the right to parties to determine the language of arbitral proceedings. This significantly improves the position of foreign parties who were previously obliged to arbitrate in Russian.724

The idea behind reception of the ML was twofold: first, to provide foreign investors and domestic entrepreneurs with better protection of their contractual rights; and, second, to re-gain their confidence in Russian institutions.

723 *LICA, supra* note 9.

724 But see A. Koman “Arbitrating Among the Russians? Sixteen Issues a Western Party Must Consider Before Entering into Arbitration Proceedings” (1995) 42 Fed. Lawyer 26 at 29: "A Western party that neglects to stipulate the use of his own language in the arbitration clause has made a serious mistake. If the parties have not established a language for the proceedings, the court will decide the question. It is hard to imagine a case involving a Western party and a Russian party where the court would pick some
Most foreign investors could still find reasons to be concerned with the Soviet legacy—in particular, the fact that there continued to be a great discrepancy between the law as written and the law in practice in the former Soviet state. For that reason, investors will carefully look at the achievements of the *LICA* and judicial reform. In particular, they will scrutinise the behaviour of the MICAC and Russian courts of general jurisdiction in order to determine if the MICAC is acting as an impartial truly international arbitral tribunal and whether courts will recognise and enforce foreign arbitral awards against Russian entities. Enforcement of a foreign arbitral award in favour of a foreign entrepreneur has been refused only once since the *LICA*’s adoption—in the *Myrick International* case.

The impact of the Soviet legacy on new Russian entrepreneurs should also be taken into consideration. The *LICA* may appear to them as another set of rules imposed from above which does not reflect the current values of the Russian society. Indeed, the language other than Russian as the working language...

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725 See Chapter Three, section C on legal culture in Soviet state.

726 Professor Carbonneau, for example, is very pessimistic about the results of the Russian reform, in particular with the adoption of the ML. Without any further explanation or identification of cases considered in coming to such conclusion, the author simply says that the Russian view of arbitration has not been altered by the statute. Carbonneau insists that Russians still think of arbitration as litigation under local law before Russian commercial courts. He concludes that arbitral awards will face little likelihood of successful enforcement if rendered against a Russian party.” See T. Carbonneau, “Arbitral Justice: The Dismiss of Due-Process in American Law” (1996) 70 Tul. L. Rev. 1945 at 1964-1965.

727 *Myrick International Ltd. v. Ammyinter, Contintradel AG, Ammophos*, ICAC Case No. 286/1995 (12 April 1995). But note that the judgment of the court of general jurisdiction in the city of Cherepovets was appealed at the regional level in 1996. The appellate court confirmed the ICAC award in favour of a foreign party. See further discussion in Chapter Five of the thesis.
rules imposed from above by the Soviet state and the Communist Party dictated the behaviour of all economic entities for seventy years. The priority was to accomplish state economic plans. The state and the Communist Party itself were above the law and the judiciary. In this context, the LICA will be successful in transforming Russian ideas on arbitration only if it proves in practice that it can protect the interests of private entrepreneurs rather than those of the state.

(i) Scope of Application

The LICA first modified article 1 of the ML to extend its the scope of application. According to the Russian version of article 1(2) two kinds of disputes could be referred to an international arbitral tribunal: disputes between Russian and foreign entities and disputes between different types of Russian legal entities as long as one of them has foreign investments. The LICA article 1 (2) reads:

"Pursuant to an agreement of the parties, the following may be referred to international commercial arbitration:
- Disputes resulting from contractual and other civil law relationships arising in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated abroad; as well as
- Disputes arising between enterprises with foreign investment, international associations and organisations established in the territory of the Russian Federation; disputes between the participants of such entities; as well as disputes between such entities and other subjects of the Russian Federation law."

Article 1(2): Pursuant to an agreement of the parties, the following may be referred to international commercial arbitration:

- disputes arising between enterprises with foreign investment, international associations and organisations established in the territory of the Russian Federation; disputes between the participants of such entities; as well as disputes between such entities and other subjects of the Russian Federation Law.
The modification of article 1(2) was aimed at giving foreign investors the possibility of avoiding litigation in Russia and to overcoming the difficulties of the Soviet system of justice. Before 1987 disputes between joint ventures with the participation of the enterprises from other CMEA countries were resolved by the FTAC.\textsuperscript{729} On the other hand, disputes involving joint ventures from the capitalist countries were resolved either on the basis of bilateral treaties on cooperation and investment signed by the Soviet state and Western states or on the basis of contracts between Western companies and the foreign trade organisations [hereinafter FTOs]. In the former type of situations, it was most likely to get the third country institutional arbitration.\textsuperscript{730} In individual type of contracts the FTAC in Moscow would usually have jurisdiction over disputes. Only if the Western company was a multinational corporation or if the Western firm’s product was important for Russians was it possible to negotiate otherwise.\textsuperscript{731} Soviet courts would have jurisdiction to hear the case unless the parties to joint ventures had not agreed to arbitrate.

\textsuperscript{729} The 1972 Moscow Convention, supra note 556, determined that disputes between socialist enterprises should be subject to consideration in an arbitration proceedings (article 1(1)) before tribunal attached to the chamber of commerce in the country of the defendant or, by agreement of the parties, in a third CMEA country (article 2(1)).

\textsuperscript{730} For example, the model arbitration clause prepared by the American Arbitration Association and the USSR Chamber of Commerce and the Stockholm Chamber of Commerce in 1977 determined Stockholm as a place of arbitration. Note also that the Statute of the FTAC as adopted on April 1975 provided for the FTAC jurisdiction to resolve disputes arising “between the subjects of law of various countries when carrying out foreign trade” (article 1). Statute on the FTAC attached to the USSR Chamber of Commerce and Industry as adopted on April 16, 1975; for text in English see W. Butler, International Commercial Arbitration: Soviet Commercial and Maritime Arbitration, booklet 2 (New York: Oceana Publishing Inc., 1989) 125-126.

or a bilateral treaty provided access to an international tribunal. These solutions were summarised in article 20 of the 1987 Decree on Joint Ventures. 732

"The disputes of joint enterprises with Soviet State, cooperative, and other social organisations, disputes between themselves, as well as disputes between the participants of a joint enterprise regarding issues connected with the activities thereof, shall be considered in accordance with USSR legislation in the courts of the USSR or, by arrangement of the parties, in an arbitration tribunal."[all emphasis added].

Referring to the "courts of the USSR" article 20 implicitly called for courts of general jurisdiction and arbitrazh courts. To reiterate, only arbitrazh courts had experience in dealing with economic disputes. Ironically, jurisdiction of arbitrazh courts was limited in 1988, by the Statute on Arbitrazh Courts. 733 New provision allowed arbitrazh to deal with disputes involving only joint ventures with participation of the enterprises from the CMEA member states. 734 That brought disputes involving joint ventures with participation of Western capital before courts of general jurisdiction unless otherwise decided by parties. Such regime was inadequate and unattractive to investors unfamiliar with the Soviet laws and court system.

The 1987 Decree on Joint Venture indicated that foreign parties could get a case before "arbitral tribunal" but it failed to determine the types of tribunals that could be


chosen. *Treteiskii sud* as a form of traditional arbitration for domestic commercial disputes could theoretically deal only with a limited number of issues involving individuals. On the other hand, Soviet law had no provisions related to *ad hoc* international arbitral tribunals which explicitly means that such tribunals could not be established in the Soviet State. Given the status of subjects to Soviet Law by the 1987 *Decree on Joint Ventures*, foreign investors of two joint ventures were also not able to use the FTAC. Article 1 of the 1979 FTAC Statute provided that parties had to be “subject of law of various countries when carrying out foreign trade [emphasis added].”

The situation was improved in 1988 when the FTAC adopted a new statute and deleted from article 1 the rule that litigants have to be from various states. However, the scope of their activity still should be foreign trade.

For all the reasons outlined above, modification of article 1(2) should be understood as the real improvement of the position of foreign parties in Russia. Providing for the application of rules on international dispute resolution to domestic disputes, including those between two joint ventures, the *LICA* implicitly allows foreign partners of joint ventures to choose between submitting disputes to institutional or *ad hoc* international arbitral tribunals in Russia. In both cases, foreign co-venturers can avoid appearing before Russian courts.

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735 *Vedomosti Verchovnogo Soveta SSSR* (1987) no. 50, item 806.

736 *Statute on the Foreign Trade Arbitration Commission Attached to the USSR Chamber of Commerce and Industry*, 16 April 1975.
(ii) Supremacy of International Law

The Russian Federation attempted to create an attractive environment for foreign investors by increasing the respect it paid for international treaties. This is stipulated in article 15(4) of the 1993 Constitution of Russia:

"The commonly recognised principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of international treaty shall apply."\(^{737}\)

Article 1(5) of the LICA also provides for supremacy of international treaties over Russian Law, if such treaties are established subsequent to and if they differ from the rules of Russian Law.\(^{738}\) The criticism to this solution is twofold. First, it is possible to question the real effect of the supremacy of international law on the basis of previous practice of the Soviet state. Indeed, the supremacy principle was recognised earlier in Soviet law which provided that the rules of an international treaty or agreement to which the USSR was a party would have preference over rules otherwise applicable under Soviet civil legislation.\(^{739}\) The supremacy principle thus already existed (at least on the books) during the Soviet period. It was determined that if an international treaty to which the USSR was a party contained rules inconsistent with Soviet legislation, then the

\(^{737}\) The 1993 Constitution of the Russian Federation, supra note 565.

\(^{738}\) LICA, supra note 9, article 1(5): If an international treaty of the Russian Federation establishes rules other than those which are contained in the Russian legislation relating to arbitration (third-party tribunal), the rules of the international treaty shall be applied.

provisions of the international treaty should prevail.\textsuperscript{740} Moreover, Soviet law gave international treaties the force of domestic law, without the necessity of enabling legislation. However, the practice and theory of the Soviet state differed. It has already been mentioned that the USSR acceded to the \textit{New York Convention} in 1960. According to its provisions, rejection of recognition and enforcement of foreign arbitral awards is possible only in a limited number of situations and for specific reasons, public policy being one of them. While other countries rarely used the public policy clause to refuse enforcement of foreign awards, the Soviet courts relied on it often. As a result, from 1960 until 1992 no foreign arbitral award rendered in a Western country was enforced in the Soviet state!\textsuperscript{741}

In the context of the previous discussion, it is possible to conclude that modification of article 1(5) brought little change to Soviet law but only reiterated what was already accepted in theory. Since the first case of recognition of a foreign award came before the adoption of the ML in Russia, the \textit{LICA} should not be seen as the ultimate impulse for a different practice. It is rather that the adoption came as a part of the changes in the legal culture that had started with \textit{perestroika} in the 1980s.

The second criticism is based on the interpretation of the term “international treaty of the Russian Federation.” It is possible to debate whether this means an international treaty signed and ratified by the Russian Federation or a treaty concluded

\textsuperscript{740} W. Butler, \textit{Soviet Law}, supra note 508 at 57. But see discussion at \textit{ibid.}, 397-398.

\textsuperscript{741} Kaj Hober reports decisions of the Moscow City Court from 23 January 1992 enforcing an award rendered in London in favour a Scandinavian company on the basis of the \textit{New York Convention}. Hober reports on two more enforcement in the period of 1992-1993 before the adoption of the ML. See K. Hoher, “Enforcing Foreign Arbitral Awards in
among the countries that constitute the Commonwealth of the Independent States?

(iii) **Ad Hoc and Institutional Arbitration**

An important change to the Russian practice came with a minor modification of article 2(a) of the ML. In the *LICA*’s version it reads:

"For the purpose of the present Law:
- “arbitration means any arbitration (third-party tribunal) whether conducted by a tribunal set up specifically for a given case or administered by a permanent arbitral institution, in particular the Court of International Commercial Arbitration or the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation (Annexes I and II to the present Law)." [emphasis added]

In short, both the ML and the *LICA* refer to *ad hoc* and institutional arbitration.

But the *LICA*’s recommendation of the use of *ad hoc* arbitration is a precedent in Russian practice. As previously explained, the Soviet state never directly determined the use of *ad hoc* arbitration for international disputes. Even the use of domestic *ad hoc* arbitration was very limited on the books and neglected in practice. Moreover, only the *By-Law on Chosen Arbitration Courts attached to the 1964 Civil Procedure Code* provided for a possibility to establish such a tribunal, but only for pre-existing disputes, not for future

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742 But note the original article 2: For the Purposes of this Law (a): “arbitration’ means any arbitration whether of not administered by a permanent arbitral institution.”

ones. Further, the *By-Law* failed to explain whether its provisions refer to domestic arbitration only or to international as well. However, since no report was made on *ad hoc* international arbitrations established pursuant to the *By-Law*, it is possible to conclude that it was not intended to cover international disputes.

In addition to the rules on domestic *ad hoc* arbitration, only the *Geneva Convention 1927* as adopted in 1964 by the Soviet Union refers to *ad hoc* international arbitration.744 Unfortunately, the application of the *Geneva Convention 1927* is limited only to its member countries.745

For these reasons the *LICA* should be understood as the first statute introducing *ad hoc* arbitration in Russia. As a result parties who want to arbitrate in Russia are free to choose a tribunal other than the MICAC or the MAC. This modification further means that the parties acquired freedom to choose the rules of procedure for *ad hoc* tribunals avoiding the rules of the MICAC. Accordingly, parties would be able to avoid another peril that exists even after the *LICA*’s adoption—that is, having the President of the CCI

744 Article IV(1) of the *1927 Geneva Convention*, supra note 10:
“The parties to an arbitration agreement shall be free to submit their disputes;
(a) to a *permanent arbitral institution*; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution; [emphasis added]
(b) to an *ad hoc* arbitral procedure; in this case, they shall be free *inter alia* (I) to appoint arbitrators or to establish means for their appointment in the event of an actual dispute;
(ii) to determine the place of arbitration; and
(iii) to lay down the procedure to be followed by the arbitrators.”

745 Article I (1)(a) of the *1927 Geneva Convention*, supra note 10: “This Convention shall apply to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement their habitual place of residence or their seat in different Contracting States.”
as an appointing authority if the parties failed to appoint any of arbitrators or a tie-braker. This situation will be discussed in detail in the following section on the appointment of arbitrators.

(iv) Appointment of Arbitrators

Given the right to choose the appointing authority in article 6 of the ML, Russia conferred arbitration assistance and supervision on the President of the Chamber of Commerce and Industry of the Russian Federation or on the Supreme Court of Republics that constitute the Commonwealth of the Independent States.

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746 Note that this could be avoided in particular if the parties agree to choose the UNCITRAL Rules of Procedure, because the said Rules give them the right to determine well in advance the appointing authority. Even the 1927 Geneva Convention determines that an appointing authority shall be the President of the Chamber of Commerce of the member states. See article IV(2) of the 1927 Geneva Convention.

747 Article 6 of the ML: 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.]”

748 LICA, supra note 9, article 6: Authority for Certain Functions of Arbitration Assistance and Control

(1) The functions referred to in Articles 11(3), 11(4), 13 (3) and 14 shall be performed by the President of the Chamber of Commerce and Industry of the Russian Federation.

(2) The functions referred to in Articles 16(3) and 34 (2) shall be performed by the Supreme Court of a Republic forming part of the Russian Federation, the territorial, regional or city court, or the court of the autonomous region or autonomous area where the arbitration takes place.
This choice is consistent with Soviet legal doctrine and with the previous practice of appointment of arbitrators in the Soviet state. It also follows the ML proposal. As already explained, Soviet legal theory considered arbitration in general as a separate system of justice, parallel to the court system. The FTAC was considered as an “independent” institution for resolution of economic disputes. Moreover, Russia insisted that the FTAC was a separate social organisation with its own structure, hierarchy and assets. Being attached to the Chamber of Commerce and Industry (CCI), and independent from the court system, the FTAC managed its own list of arbitrators. Accordingly, the CCI, not the Supreme Court (or any other court authority) was to approve appointments. This doctrinal approach was expressed in the discussions of the Soviet representatives at the UNCITRAL Working Group. Professor Sergei Lebedev strongly favoured the Soviet idea of having another competent authority, not only a court, empowered to decide on appointment, removal, or challenge of arbitrators.\textsuperscript{749} The Soviet proposal was to include the expression "the court, courts or, where so indicated herein, another authority."\textsuperscript{750} The final version of the UNCITRAL were along the same lines—"the court, courts or, where referred to therein, other authority competent to perform these functions."\textsuperscript{751}

Law in theory does not always correspond to the law in practice. Such duality of the Soviet legal culture was often emphasised by the Western legal scholars as a legacy of the communist ideology.\textsuperscript{752} Law was a powerful instrument for the Communist Party

\textsuperscript{751} Article 6 of the ML.
\textsuperscript{752} For further discussion see O. Ioffe & P. Maggs, \textit{Soviet Law in Theory and Practice
which dominated the political process and controlled social organizations.\textsuperscript{753} The economy was based on state ownership of land, resources and factories. Economic organizations involved in domestic and international economic activity did not have independent economic decision-making power. The state \textit{arbitrazh} were just another court system,\textsuperscript{754} and the FTAC was attached to the CCI (directly controlled by the Ministry of Foreign Trade until 1974 and indirectly after 1974). Accordingly, the independence of the FTAC arbitrators in law becomes the antithesis of the independence of arbitrators in the traditional Western sense. The essence of such criticism is that FTOs, which were all members of the CCI, were able to become judges in their own cause. Indeed, they might, acting through the local chambers of commerce, appoint the arbitrators who would decide the dispute to which they were parties.\textsuperscript{755}

Soviet written law gave functions relating to the appointment of arbitrators to the FTAC whenever parties failed to reach agreement or when they mutually agree to grant personal selection to the FTAC.\textsuperscript{756} Nowadays, the \textit{LICA} gives both functions to the

\textsuperscript{753} O. Ioffe & P. Maggs, \textit{ibid.}, at 63-65 and 246-248.

\textsuperscript{754} See a discussion of the Russian Legal Culture in Chapter Three, section C of this thesis.


\textsuperscript{756} \textit{The Statue of the FTAC of 1932} article 5(2) gave the authority to the FTAC and article 6(1) to the Chairman of the FTAC. \textit{The Statue and the Rules of the Arbitration Court of 1988} transferred both functions to the President of the Arbitration Court.
President of the Chamber of Commerce and Industry. In short, the President of the CCI acts when a party fails to make his/her personal choice or when arbitrators chosen by the parties fail to reach agreement on a third arbitrator. The President of the CCI will choose the sole arbitrator when parties fail to reach an agreement. On the other hand, the 1995 Rules on the International Commercial Arbitration Court (referred in this section as MICAC, which also indicates that the court is seated in Moscow) confer both functions on the President of the MICAC. In both cases the outcome is similar: assistance in appointing arbitrator(s) is placed outside the court system and the principle of the independence of arbitrators is again established on the books.

Concluding that independence in appointment of arbitrators reflects attempts by drafters to avoid court intervention could be misleading. Russian legal practice reveals that the FTAC hardly had any contacts with the judiciary. There are no records on problems with voluntarily performance of the FTAC’s awards. In short, the FTAC itself operated as a completely compulsory authority with very rigid rules of procedure. Because of its mandatory character, the FTAC was understood in the West as a sort of a court.

LICA, supra note 9, article 6(1) says that “the functions referred to in Articles 11(3), 11(4).... shall be performed by the President of the Chamber of Commerce and Industry of the Russian Federation.”

LICA, supra note 9, article 11(3).

LICA, supra note 9, article 11(4).


Referring to the FTAC, Volker Viechtbauer says that it “[the CCI Court] has been
The importance of an independent judiciary and economy has been emphasised on a number of occasions by the leaders of the FTAC. Recently, the Chairman for the MICAC Vladimir Komarov insisted on the non-governmental status of the CCI and accordingly on the same status for the arbitration court. He based his statement on the fact that the MICAC "receives no financial support of any kind from the Russian government and receives only in-kind contributions from the CCI." The financial independence of the institution is not the only element of arbitrators' immunity to the influences of the old Soviet ideology of state monopoly over the economy and foreign trade. It has already been pointed that until the 1990s foreign experts were not listed (even though they were not been prevented) on the FTAC list. In addition, the parties, prevented from selecting "unlisted" arbitrators, could only rely on the independence of the Soviet arbitrators.

Even though the list has been expanded to include foreigners, old practices put some limits on the new solutions. For example, given the same appointing authority by the LICU as under the old FTAC Rules, the President will now choose an arbitrator from a list of 108, including 34 foreign nationals. Some of the listed foreign arbitrators are simply a specialised national court disguised as an arbitration institution." See V. Viechtbauer, "Arbitration in Russia" (1993) 29 Stanford J. Int’l L. 355 at 372

762 Mr. Alexander Komarov MICAC chairman at the meeting with representatives of the US embassy’s foreign commercial service, Market Reports (22 March 1995), online: Lexis, World Library.

763 See A. Komarov, ibid.


the best known Western experts for arbitration and Russian law (for example, William Butler, Kaj Hofer, Howard Holtzman, Peter Maggs and Werner Melis, to name a few). However, doubts could still be raised regarding the choice of the Russian arbitrators. Data available at the MICAC shows that all the Russian arbitrators on the list were educated in the spirit of socialist law and socialist principles and that they all practised or lectured on law during the Soviet era. Undoubtedly, it is difficult to deny the influence of the Soviet legacy on people who were part of the system for several decades. Soviet legal culture is described in the West as an “antithesis of a legal culture grounded in the rule of law,”766 and as reflecting a lack of commitment to Western notions of political freedom, pluralism, and individualism, utmost deference to authority and loyalty to politically influential individuals.767 FTAC (and its arbitrators) resolved a great number of cases, but the majority of them were decisions on contracts from non-market economies.

For all these reasons, foreign partners should make their choice of arbitrators timely, because only in that way will they be entitled to choose a person outside of the MICAC list. Otherwise, they could be locked into the choice of the President of the CCI appointing a Russian to a tribunal.768 Article 11(5) of the LICA, like the ML, provides that nobody can be removed as an arbitrator by reason of his/her nationality. However, foreign parties should take into consideration the fact that the LICA does not give a right to the

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766 K. Hendley, supra note 582.
768 Alan Koman, an American lawyer who practised in Moscow, for example, presumes that the President of the ICAC will choose a Russian for an arbitrator or the umpire authority. See A. Koman, supra note 724 at 28.
party to challenge an appointment made by the Président of the CCI.\textsuperscript{769} Undoubtedly, the possibility of an all-Russian tribunal raises questions as to the impartiality of arbitration in Russia even after the adoption of the ML.

Beyond the above question of the qualifications and experience of judges, arbitrators and lawyers in Russia, a problem may also appear with regard to the appointment of new arbitrators by parties in cases where the parties have realised that an inadequate person has been appointed. Russia simply duplicates article 12 of the ML. In sum, the grounds for a challenging procedure comply with the basic requirements for exercising justice as imposed by the principles of natural justice known to the common law countries. Given the list of grounds for challenge in article 12(2) (\emph{justifiable doubts as to impartiality or independence} of arbitrators and \emph{lack of required qualifications} [emphases added]), both Russian and foreign parties to arbitration improved their positions in comparison to those grounds provided for before the adoption of the ML. Not only do parties lack the right to challenge independence, impartiality and qualifications of arbitrators, they also lack the protection provided for on the basis of the principle of disclosure. In contrast, the \textit{LICA}'s article 12(1) established on behalf of arbitrators a duty to “disclose any circumstances which may give rise to justifiable doubts as to [their] impartiality or independence.” Despite all these improvements, a problem might appear if the President of the CCI chooses a replacement for an arbitrator whose impartiality or independence is challenged. As previously mentioned, there is no further challenge available to such a choice.

\textsuperscript{769}See article 11(5) of the \textit{LICA, supra} note 9, and the ML.
(v) Law Applicable to the Substance of Disputes

One might welcome the acceptance of the ML recipe of avoiding renvoi effects in the application of conflict of laws rules. The LICA implemented the ML article 28(1) providing that arbitrators are to directly refer to the substantive law designated as the applicable law. However, LICA specifically denied the right of arbitrators to act ex aequo at bono and to apply lex mercatoria.

The LICA failed to modernise its rules on the application of substantive law. Instead of total adherence with the ML article 28, the LICA omitted paragraph 3 relating to the right of the tribunal to act as amiable compositeurs, deciding ex aequo at bono when expressly authorized to do so by the parties. Thus, the legislators decided to follow the line of Soviet legacy which placed arbitrators in a position to settle a dispute only on the basis of the principles of the applicable law (Russian or foreign, whatever chosen by the parties or the arbitrators themselves) but not, for example, using general principles of law or lex mercatoria.

However, there was a theoretical possibility of deciding on the basis of principles of equity and justice provided for in domestic arbitration (treteiskii sud). Unfortunately, there is no record that a domestic arbitration ever made a decision relying on those principles.

Foreign partners unfamiliar with Soviet law, or with civil law in general, should carefully choose the law to govern their dispute. They should not leave the choice of law to the tribunal. This is because the tribunal will always apply Russian conflict of law rules to find out whether Russian or foreign law governs the dispute. It is important to
know that, in the past, in most decisions involving the validity of an arbitration agreement the FTAC in Moscow applied Soviet law with no indication whether such application represented the *lex causae* or the *lex fori*.\(^{770}\) Soviet doctrine seemed to hold that the validity of an arbitration agreement should be decided according to the laws of the place of arbitration.\(^{771}\) For example, in the *Oskar A. Maier v Cogis*\(^{772}\) case, the FTAC found the Italian law as the *lex citus* even though the contract itself did not specify the situs. The FTAC held that the signatures of the parties revealed that the contract had been concluded in Milan and, accordingly, Italian law was the proper law of the contract. Moreover, the FTAC, making no distinction between law of contract and law of arbitration agreement, applied the law of the contract to the validity of arbitration agreement.

In addition to the perils discussed above, parties from common law countries have to take into consideration the fact that Russian arbitrators were for a long time banned from interpreting foreign law and that they were inexperienced in applying case

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\(^{770}\) S. King-Smith, *supra* note 688 at 64.

\(^{771}\) D.F. Ramzaitsev, “The Application of Private International law in Soviet Foreign Trade Practice” (1961) J.Bus. L 343 at 351. Ramzaitsev, who served as a member of FTAC as well concluded that “an arbitration agreement providing for the hearing of a disputed by the Foreign Trade Arbitration Commission is held to be valid if it meets the requirements of Soviet legislation for the validity of an arbitration agreement.” See D. Ramzaitsev, *ibid.* And S. Lebedev “USSR” Arbitration Supp. 4 (1985) in National Reports volume IV, *ICCA International Handbook on Commercial Arbitration*. Of the same opinion is Kaj Hober, a distinguished international trade lawyer who is currently on the list of arbitrators of the ICAC in Moscow. See K. Hober, *supra* note 515 at 133: “The law chosen by the parties as the law applicable to the arbitration agreement will be applied. Failing such choice of law, the Soviet arbitrator applies Soviet law to this issue since Soviet law will be considered as *lex fori*, or *lex arbitri*."

In the past, the FTAC arbitrators primarily dealt with Swedish or Swiss law. The increase in international transactions in the 1990s brought many changes in contract drafting, including a change in the determination of the substantive law. Many specialised transactions involve application and interpretation of foreign laws, such as US intellectual property legislation and English hydrocarbon legislation.

(vi) Recognition and Enforcement of Arbitral Awards

Acceding to the New York Convention in 1960, Russia made a reservation with respect to the recognition and enforcement of arbitral awards rendered in countries not participating in the Convention. The LICA does not change the Convention's regime on recognition and enforcement of foreign arbitral awards in Russia, nor does it change the enforcement regime provided for in any other bilateral treaty signed by Russia. However, some problems related to interpretation of the LICA's provisions may occur because two critical points relating to the recognition and enforcement of foreign arbitral awards are

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773 See for instance the FTAC's interpretation of English contract law only on the basis of legislation (giving to reference to precedents or common law) in Romulus Films Ltd. (England) v. V/O Soveksportfil'm and a commentary of the case in C. Semmner application of English law in “The Case For FTAC Arbitration of Disputes Between Soviet Enterprises and American Firms”(1975) 14 Col. J. Trans.L. 310 at 335-338.

774 C. Semmler, ibid., at 330: “The FTAC will apply Swedish law of the Swiss Code of Obligations when stipulated; so far there is no record of any application of American Law.”

not settled by the *LICA*. One relates to determination of the enforcing authority and another relates to the meaning of public policy as a ground for non-recognition and enforcement.

A foreign party will not learn from the *LICA* how to direct a request for the recognition and enforcement of an arbitral award and what the time limit is for recognition and enforcement. The competent court and the procedure for the recognition and enforcement of foreign arbitral awards are set out in the *Decree No. 9131* from 1988.\(^{776}\) *Decree No. 9131* directs that the correct court is a Russian court of general jurisdiction at the location of the defendant's property or management body.\(^{777}\) Courts which historically lacked experience with international commercial issues got exclusive jurisdiction over setting aside, recognition and enforcement of arbitral awards. Three-year time-limits for recognition and enforcement were determined in the *Civil Procedure Code*.\(^{778}\) Recognition and enforcement of arbitral awards rendered by the MICAC should follow the "same procedure as in the execution of judgments."\(^{779}\) The revised *Civil Procedure Code* of 1991 provides that the execution of court and arbitral awards are to be

\(^{776}\) *Decree No. 9131-xi of the Presidium of the Supreme Soviet of the USSR*, 21 June 1988, sections 2, 8 and 9.

\(^{777}\) The 1988 *Decree, ibid.*, authorised the following courts of general jurisdiction to execute arbitral awards: "the supreme court of the union republic (in republics not divided into regions), the supreme court of the autonomous republic, territorial, regional, or city court, the court of an autonomous region or court of autonomous national area at the place of residence (or location) of the debtor, and if the debtor has no place of residence (or location) in the USSR or the place of residence of the debtor is unknown, at the place where his property is located."

\(^{778}\) Article 437 of the *Code of Civil Procedure, infra* note 806.

\(^{779}\) Article 58 of the *Principles of Civil Procedure of the Soviet Union and the Union*
carried out by bailiffs of the local courts where the debtor or its property is located.\textsuperscript{780} It should be noted that enforcement of the arbitrazh courts' judgments is governed by of the Arbitrazh Procedure Code 1995.\textsuperscript{781} Article 197 provides for the execution of those judgments by "all state bodies, bodies of local self-government, and other bodies, organisations, officials and citizens of the entire territory of the Russian Federation."

According to the New York Convention and the ML, public policy is a ground for refusing to recognize and enforce a foreign arbitral award.\textsuperscript{782} However, lack of statutory interpretation of the "public policy" notion in Russia could diminish the effectiveness of arbitration and give a chance for judges to "shop around" for a definition which would then be a basis to refuse to recognize and enforce a foreign award rendered against a Russian company.

In former CMEA countries the issue of judicial enforcement of an arbitral award was not a critical one because of the nature of the relationship between the member states of the bloc. According to the Moscow Convention "it [was] inconceivable that a government foreign trade corporation[s] would refuse to follow an arbitration decision of a Socialist tribunal."\textsuperscript{783} However, article 58 of the Fundamental Principles of Civil Procedure Legislation of the USSR stated that awards of an arbitration court would be

\textit{Republics}. For text in English see (1963) 7 Law in Eastern Europe 299.

\textsuperscript{780} J. I. Huhs & R. A. Beridze, \textit{supra} note 775.

\textsuperscript{781} The Arbitrazh Procedure Code 1995, or Arbitral Procedure Code, \textit{infra} note 801, Section IV: Execution of court acts.

\textsuperscript{782} Article V (2)(b) of the New York Convention, \textit{supra} note 10, and article 35 of the ML.

\textsuperscript{783} F. A. Orban III, \textit{supra} note 731 at 379.
enforced in the same way as that provided for a court judgment. Several features regarding the enforcement of arbitral awards in the former USSR are remarkable. It is noteworthy that there were no reported cases of refusal by the Soviet party to voluntarily perform an award in favour of a foreign party when rendered by the arbitral tribunal in the USSR (usually FTAC). Problems started after the adoption of the ML. In a number of recent cases decided by the MICAC the Russian entity has refused to fulfil the award voluntarily. For example, on February 11, 1997 the MICAC rendered an award against Ryazanski Chai, a Russian tea company taken over by the well-known Alfa Group. According to the award, California based Vandy Corporation was owed $U.S. 193,850 by the Russian partner. Instead of paying its debts, the import director of Alfa Group said that he would rather wait to see the case come before the Russian courts, where his lawyers could easily deal with the issue. He declared that the MICAC decisions are not binding on him because the MICAC “has no power, and besides there is no mechanism for execution.”

Despite implementation of the New York Convention, there has been no report of an enforcement of a foreign arbitral award in the USSR. It is estimated that so far about 90 per cent of the disputes before the Arbitration Court attached to the USSR Chamber of

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784 §40 (2). Execution of Award of the Reglement of the Arbitration Court, says:

Awards not executed voluntarily within the specified period shall be executed in accordance with law and international agreements.

785 K. Hober, supra note 555.

786 See the reports of E. Arvedlund, “Court Decision No Help to Tea Trader”, The Moscow Times (24 July 1997) and “Court Speaks, but Who Obeys?,” Moscow Times (16 September 1997), online: LEXIS, News Library, Mostms file.

787 E. Arvedlund, ibid.
Commerce and Industry involve parties from CMEA countries, whereas only 10 per cent are disputes between Soviet parties and parties from non-CMEA countries\textsuperscript{788}. As previously explained, awards rendered by tribunals of other CMEA countries were always voluntarily performed by Russian entities. But problems started to appear in the late 1980s when Russians started to get involved in foreign trade with non-CMEA countries and started to arbitrate in the West. Examples from recent Russian practice include enforcement of two awards decided by an arbitral tribunal in Stockholm that caused concerns for Western investors. In the \textit{Subway Sandwich Shop} case an award rendered in Stockholm in 1998, in favour of American partners, has not yet been enforced in Russia despite the fact that Russia's Supreme Court on April 22, 1998 upheld the arbitral award against the Russian partner\textsuperscript{789}. In the \textit{Aerostar} case problems with enforcement of three Stockholm international arbitration awards in Russia frustrated the Canadian company IMP to such extent that it applied for enforcement in Canada and obtained a decision from a Quebec court to seize a Russian jet with 50 passengers at Montreal's Dorval airport on 23 March 1998\textsuperscript{790}. Like in \textit{Alfa} case, a Russian manager here relies on the weakness of the Russian enforcement mechanism, Konstantin Gerchin, \textsuperscript{788} W. A. Timmermans, "The New Statute on the Arbitration Court at the USSR Chamber of Commerce and Industry," (1988) 5 J. Int'l Arb. 100.  
the financial director of the joint venture has said: “We did not pay the sums awarded by
the Swedish court before, and we do not plan to pay this time either.”\textsuperscript{791} Apparently, the
Russian partner Aeroflot paid \$ U.S. 1.4 million and promised to pay the rest by April 3,
1998 to IMP Group Ltd. of Halifax, Nova Scotia.\textsuperscript{792} In a series of complex proceedings
before Stockholm arbitral tribunals three awards were rendered in favour of IMP. The
first two awards were for \$U.S. 3.5 million and \$U.S. 4.5 million but were never
collected by the Canadians. The last award, rendered in November 1997, is valued at
\$U.S. 22 million in damages.\textsuperscript{793}

The weakness of the Russian court system to enforce international (and domestic)
awards could easily diminish the importance of article 35 of the ML as implemented in
Russian law and could further discourage foreign companies to deal with Russians.

2. Basic Principles

In sum, the \textit{LICA} restored the most important principles of arbitration in the
traditional sense that had existed in Russian written laws for a number of decades. It has
already been explained that the principle of party autonomy was limited in a number of

\textsuperscript{791} S. Rao, \textit{ibid.}, section 1337.

\textsuperscript{792} M. Gray & B. Bergman, “A Market Where Anything Goes; Canadians Confront
Moscow’s Business Perils”, \textit{Maclean’s}, (13 April-1998); online: LEXIS, World library,
file Cunws.

\textsuperscript{793} S. Rao, \textit{supra} note 790.
ways during the Soviet period. In short, the FTAC was the mandatory forum for resolution of international trade disputes among the CMEA if the defendant was a Soviet enterprise; parties could not choose arbitrators other than those listed at the FTAC; the language of arbitration was Russian; and the procedural rules were the FTAC rules, etc.

The principle of independence of arbitrators was accepted only with respect to court interference into arbitration proceedings, but not with respect to the Communist Party influence on arbitrators. Even though not considered to be state employees (like judges in civil courts) arbitrators were a part of the Soviet state bureaucracy. For decades the FTAC arbitrators were appointed by the Soviet Chamber of Commerce and Industry (CCI), an organisation linked to the Ministry of Foreign Trade. In the following headings on the appointment of arbitrators the issue of the state and the Party intervention in arbitral proceedings will be explored in detail.

Even though not directly addressed in domestic laws until 1988, the principles as to severability of arbitration clauses entered the legal system through Soviet accession to various international treaties, primarily the New York Convention and the Geneva Convention 1927. In general, the principle of separability, or that the arbitration clause

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794 See Chapter Three, section C of this thesis on Russian legal culture.
795 Article 1(3) of the Rules of the International Arbitration Court 1988: “An arbitration clause shall be considered to have legal force independently from the validity of the agreement of which it is a component part.”
796 Article V(1)(a) of the New York Convention, supra note 10, gives the right to the court of the country where recognition and enforcement is sought to refuse such recognition and enforcement only in a limited number of situations, one of which is when the arbitration agreement (not the main contract!) is invalid under its governing law.
797 Article V(3) of the 1927 Geneva Convention, supra note 10, only implicitly support severability of arbitration clause providing that “[s]ubject to any subsequent judicial
is juridically independent of the main contract, was obeyed in the FTAC’s practice.798

The principle of Kompetenz-Kompetenz was not explicitly recognised in Soviet laws on arbitration but Soviet scholars emphasise that the principle was accepted in practice and that the FTAC and MAC arbitral tribunals decided upon questions of their jurisdiction.799 In addition, the Soviet participation to the European Convention800

control provided for under the lex fori, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction (Kompetenz/Kompetenz) and to decide upon the existence or the validity of the arbitration agreement (separability) or of the contract of which the agreement forms part.”[emphasis added]

798See for instance V/O Eksportles v. S.A. Lemayer Frères (Belgium) from 1952, V/O Sojuznefteeksoprt v. Moroni & Keller (Italy) from 1964 published in English in W. Butler, International Commercial Arbitration: Soviet Commercial and Maritime Arbitration, booklet 2 (New York: Oceana Publishing Inc., 1989). See also the FTAC award of 29 January 1974, that is, the Tarapore case in which the FTAC upheld its jurisdiction on the basis of the fact that the invalidity of the main contract would not nullify the arbitration clause. The most famous 1984 FTAC’s case (no.109/1980 of July 9, 1984) on the Russian recognition of separability is All-Union Foreign Trade Association “Sojuznefteexport” v. JOC Oil Ltd. (1993) XVIII Y.B. Comm. Arb. 92-110. Here, the FTAC was explicit: [8] “Predominant in the literature is the recognition of the autonomy of an arbitration agreement, its independence in relation to the contract. Such is the point of view of the overwhelming majority of Soviet authors who have expressed themselves on this subject.” Accordingly the tribunal decided that despite the fact that the main contract was invalid according to Soviet Law (because of a lack of proper signatures) arbitration clause, being a separate provision unaffected by requirements of two signatures, was valid and enforceable. Both Tarapore and JOC cases are discussed in details in A. Gardner, “The Doctrine of Separability in Soviet Arbitration Law: An Analysis of Sojuznefteexport v. JOC Oil Co. (1990) 28 Col. J. Trans. L. 301 at 316-317. But note that in practice the FTAC ruled against the principle in Oscar Maier v. Cogis case. Here the FTAC decided on applicable law to the question of validity of arbitration clause on the basis of law applicable to the main contract.


800 European Convention, supra note 93, article V(3):”the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own
indirectly introduced the principle into Soviet law.

There is a considerable uncertainty with respect to the concept of "court" as used in Russian law. Article 2 of the LICA on definitions and rules of interpretation explains that "court" means a respective organ of the judicial system of a state but offers no further determinations. The issue of determination of a competent court is an important one primarily because of the complexity of the court system in Russia. For persons unfamiliar with the complex structure of Russian courts it is unclear which court, for example, would have jurisdiction to enforce arbitral awards, and which court would have jurisdiction to order interim measures. In a number of situations functions of particular state courts in arbitral proceedings are defined in laws other than LICA.

To reiterate, there are state arbitration courts with jurisdiction traditionally limited to economic disputes (arbitrazh) and there are courts of general jurisdiction in civil and criminal issues (the Supreme Court; territorial, regional, or city courts; or courts of the autonomous region or area). Article 22(6) of the Arbitration Procedural Code 1995, determines that arbitrazh or economic courts can deal with commercial disputes with the participation of organisations and citizens of the Russian Federation, as well as foreign organisations, foreign citizens, and persons without citizenship engaging in entrepreneurial activity in Russia, unless otherwise provided for in an international treaty of the Russian Federation. In addition, according the Russian Code of Civil Procedure, courts of general jurisdiction have jurisdiction to decide disputes involving foreign parties. Thus, these two statutes indirectly determine the court which will act in jurisdiction..."
accordance with article 8 of the ML and stay proceedings if “an action is brought in a matter which is the subject of an arbitration agreement.”

The failure to determine the type of courts ordering interim measures related to arbitration proceedings is another pitfall of the LICA. Instead, the LICA article 9 only duplicates the relevant ML provisions but offers no further details on procedure. The UNCITRAL’s Working Group explained in 1978 that judicial assistance is needed “to safeguard property which is the subject matter of an arbitration, or when witnesses fail to appear voluntarily or to present necessary evidence.” Arbitration taking place in Russia may, at the request of a party, order interim measures of protection. Undoubtedly, a party will seek court assistance if the interim measure sought is directed towards third persons, and especially when the protection of assets is at issue. Andrei Yakovlev points out that these judicial powers await clarification by the Supreme Arbitrazh Court of the Russian Federation. This is because both courts of general jurisdiction and arbitrazh

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801 Federal Law No. 70/F3, passed on 5 May 1995, came into effect on 1 January 1996.
802 LICA, supra note 9, article 9: “It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, a court to order interim measures of protection and for a court to make a decision granting such measures.”
804 LICA, supra note 9, article 17.
805 A. Yakovlev, supra note 799, at 40.
courts\textsuperscript{807} may be asked to issue preliminary injunctions.

The same uncertainty over the jurisdiction of courts of general jurisdiction and arbitrash exists in relation to assistance in taking and securing evidence for arbitration purposes. Both the Civil Procedure Code and the Arbitral Procedure Code provide for such court intervention.\textsuperscript{808} On the other hand, the only reference that the LICA makes to the question is provision for Russian courts to assist arbitrations taking place in Russia.\textsuperscript{809}

Regardless of those uncertainties with respect to the type of court which shall assist arbitration, the LICA defined the relationship between courts and arbitrators in a new way. According to the Rules of Procedure governing arbitration established on the grounds of the Moscow Convention,\textsuperscript{810} arbitration was seen as a "self-contained system." Bringing Russian arbitration closer to the traditional concept of an independent tribunal supported by the system of national courts, the LICA changed the former legal regime in Russia significantly.

\textsuperscript{807} Arbitral Procedure Code, supra note 801, articles 75(1) and 76.

\textsuperscript{808} Code of Civil Procedure, supra note 806, articles 57-59 and Arbitral Procedure Code, note 801, articles 53 (2), 55, 71 and 72.

\textsuperscript{809} LICA, supra note 9, Article 27.

\textsuperscript{810} Section 27. Evidence of the Rules of Procedure for Cases in the FTAC attached to the USSR Chamber of Commerce and Industry (confirmed 25 June 1975):

1. The parties should prove those facts to which they refer both on the grounds of their demands or objections. An arbitration tribunal may require the submission of other evidence by the parties. It shall have the right to designate at its discretion the conducting of expert examinations and to request the submission of evidence by third persons.
3. International Commercial Arbitration Court in Moscow and St. Petersburg

Since section 3 of Chapter Three described the establishment of the Moscow Arbitration Court and explained its transformation over the years of Leninist and Stalinist governments, this section will only focus on the expansion of the MICAC activities since the adoption of the ML. It is important to remember that the MICAC is one of the oldest arbitration centres in the world. Regardless of its unpopularity among Western companies in the past, it is one of the busiest arbitral centres today. Statistics of the MICAC for 1992-1996 shows that the Court accepted 2457 cases for arbitration. In 1996 there were 1403 cases under consideration. Most often the parties are firms from Western Europe (46%) and, not surprisingly, from Eastern Europe (14.6% and other CIS states (12.6%). This position has been achieved not only because of Russian adoption of the ML but also because of the liberalisation of foreign trade and Russian democratisation. In addition, the rules of the MICAC have changed significantly to allow parties to choose arbitrators outside the Court’s own list of arbitrators. Another reason for this arbitration expansion is the fact that the MICAC’s awards have been always easier to enforce in Russia than awards from foreign centres.

Despite these advantages for the MICAC, some disadvantages should not be overlooked. The costs of arbitral proceedings before MICAC exceed those of some other European centres, such as Helsinki and even Stockholm. Russian is also still the official language of the centre. In addition, it is expected that the new international arbitration centre (court) established in 1997 in St. Petersburg will soon produce more competition
with the MICAC. At the time of writing there have been no reported cases from the arbitration centre in St. Petersburg.

D. Conclusion

This chapter examined the hypothesis that the ML has been incorporated in different ways in Canada, Hong Kong and Russia because these three countries had different pre-existing legal frameworks which developed out of different legal cultures. The first section of the chapter examined the reception of the ML in Canada at the legislative level. The second section overviewed the reception of the ML in Hong Kong, and the last section explored the way in which Russia incorporated the ML into its law. The analysis of the phenomenon of reception in all instances encompasses the same elements. These are: the legislative processes of reception and the influence of external factors on the reception.

The study of the legislative processes in the three countries shows that Canada, Hong Kong and Russia had similar intentions at the legislative level in adopting the ML. All three countries wanted to modernize their old laws on arbitration and promote their own arbitration centres as important venues for the resolution of international disputes. These goals are clearly addressed in the reports of reform commissions (Hong Kong) and the preambles of statutes (Canadian provinces and Russia). Canada simultaneously

81 On the file with author.
implemented both the *New York Convention* and the ML and thus implemented a major renovation of its old legal framework. Hong Kong was the first Asian jurisdiction to adopt the ML. This adoption was consistent with the reputation of Hong Kong as the most open international financial and trade centre which had already adopted many other international trade rules. Finally, Russia, struggling with the legacy of the Soviet State, needed the authority of the UN drafters of the ML to re-gain the confidence of foreign investors in its new market institutions.

The analysis of the legislative process reveals that the three countries initially modified the ML along the lines of the UNCITRAL Working Group's suggestions. The only significant actual modifications were regarding the choice of the substantive law, as explained, for example, in the section on the Canadian experience. Only the 1996 amendments of the Hong Kong regarding an arbitration agreement in writing actually go beyond what were suggested changes by the UNCITRAL Working Group and beyond the requirements of the *New York Convention*. In this context, the ML proved to be sufficiently flexible to fit the needs and traditions of all three countries. However, the analysis of the Russian reception of the ML indicates that evaluation of the impact of the ML on adopting countries has to go beyond a simple comparison of the original text and the local law adopting it. In the context of Russian experience, such comparison will describe the ML reception as a duplication of the external model. Unfortunately, this says little about the integration of new ideas as to party autonomy or independence of arbitrators into Russian ways of thinking about law. As previously mentioned, a long history of ignorance and non-application of statutes in Russia results in a system where legal practice and written laws significantly diverge.
The conclusion from this chapter's analysis is that the interaction of the received law and the pre-existing laws is not limited to the changes in legislation. On the contrary, the real interaction will often happen later on, at the level of interpretation and application of the new rules.

The influence of external factors on the legislative process emphasizes two influential factors. The first factor is the impact of international documents (such as the *Geneva Protocol 1923*, the *Geneva Convention 1927*, the *New York Convention* and the UNCITRAL Arbitration Rules) on the reception of the ML. The comparative study confirmed that the international regime of recognition and enforcement of foreign arbitral awards at the law-making level directly influenced all countries as members of the *New York Convention*. Second, this chapter illustrated the influence of certain political and economic events, which happened (or were about to happen) within the three countries and their region at the time of the ML reception. For example, the development of the Pacific Rim markets and a change in Canada-United States trade law fostered adoption and modification of the ML in Canada (in particular, incorporation of the provision on conciliation) and led to the establishment of the BCICAC. The transfer of Hong Kong sovereignty from Britain to China impacted amendments of the 1989 *Arbitration Ordinance* by transferring powers to appoint arbitrators from the High Court to HKIAC. Once again, this chapter suggests that the same model law applied to different environments would yield differing results in practice. Chapter Five will further explore the application and interpretation of the ML by national courts in the three countries.
A. Introduction

The preceding chapters of this thesis have given a historical overview of the ML, the pre-existing legal cultures in Canada, Hong Kong and Russia and have analysed the methods of legislative reception of the ML in the three countries. Several conclusions stem from these chapters. The first one is that the ML is an international instrument of a unique nature. As previously pointed out, the ML was drafted by world experts in international arbitration. Their intention was to create a statute in flexible form, which would preserve the principles of party autonomy, independence of arbitral tribunals, limited court intervention and procedural fairness. The second conclusion is that each country included in this study has a different legal system and has thus taken a different path in its development of international trade and international commercial arbitration. The third conclusion is that because of the differences in their legal frameworks and in the levels of development achieved in their practice of arbitration, the ML has been adopted differently in the three countries.

Initial modifications to the ML by Canada, Hong Kong and Russia did not exceed those envisioned by the UNCITRAL Working Group at the time of drafting the ML and they confirmed the transferability of the ML to different legal environments. However, the detailed analysis of modifications at the law-making level (Chapter Three) also suggested that some of the changes, when interpreted in the context of the legal culture of
the particular adopting country, resulted in the ML being applied quite differently.\textsuperscript{812} For this reason, it is important to look broadly at the ways in which the courts in the three countries have interpreted and applied the provisions of the ML; and that will be the major focus of this chapter. An attempt will be made to show the impact of the pre-existing legal system and previously established practice on the interpretation and application of the ML and to predict the future development of arbitration in each of the three countries.

In summary, Canada and Hong Kong received common law from England but they did not follow the path of development of English arbitration law. As previously explained, even though in England the relevant statute had been amended several times, Canada failed to modernise its provincial statutes which were based on the English \textit{Arbitration Act 1889}.\textsuperscript{813} Constitutional complexity\textsuperscript{814} and much closer links to the United

\textsuperscript{812} The dependence of law on social context was emphasised early by a number of philosophers such as David Ricardo and Baron de Montesquieu. Montesquieu, for example, said that law depends on time, place and circumstance. For that reason, laws which may appear on the surface to be the same may have different effects in practice. See, in particular, C. Montesquieu, \textit{The Spirit of Laws}, Books XXVI-XXIX, vol.2 (London: The Colonial Press, 1900). Ricardo explained that legislation would be a comparatively easy science if it were not so much influenced by the characters and dispositions of the people from whom it is to be undertaken. See P. Sraffa, ed., \textit{The Works and Correspondence of David Ricardo} (Cambridge: University Press, 1962) at 204.

\textsuperscript{813} \textit{Arbitration Act 1889}, \textit{supra} note 269:

\textsuperscript{814} To repeat, arbitration and enforcement of arbitration awards were seen as a part of Provincial jurisdiction in the context of \textit{The Constitution Act 1867}, subsections 92(13) and 92(14). On the other hand, the Federal government has the power to enter into treaty obligations, but these obligations must be implemented by provincial legislation if they involve matters within provincial jurisdiction. Only if the subject matter falls within federal competence, may the Federal government enact legislation. As a result of such division of powers between the federal and provincial legislatures, the ML and the \textit{New York Convention} were implemented at both levels.
States market than to any other, had isolated Canada from the trends towards harmonization of the rules of international trade law. For instance, Canada was one of the last major trading countries to ratify the New York Convention.\textsuperscript{815} For all these reasons, accession to the Convention and reception of the ML was seen as an “arbitration revolution”\textsuperscript{816} in Canada. It should be noted that reception of both the Convention and the ML occurred at times of heightened consciousness of Canada’s international trade relations—when the country signed (or was just about to sign) major regional international trade agreements (the United States-Canada FTA in 1985 and NAFTA in 1992\textsuperscript{817}). Accustomed to the broad supervisory powers established by the old statutes, Canadian courts faced a sudden change of their role after the ML was adopted in 1986. The first section of this chapter will show how the Canadian courts have accepted limitations on their jurisdiction and how support for international commercial arbitration has grown among Canadian judges.

The second section of this chapter will explain how judges in Hong Kong responded to adoption of the ML and how practical considerations led to further

\textsuperscript{815} New York Convention, supra note 10.


\textsuperscript{817} United States-Canada Free Trade Agreement, 2 January 1985, 27 I.L.M. 281; NAFTA, supra note 96.
modifications of the 1989 Arbitration Ordinance. As already explained in Chapter Three, even before its adoption of the ML, the Hong Kong approach to international commercial arbitration had gone beyond changes made in England. The increase in international trade in Asia and Hong Kong's reputation as a world centre committed to laissez faire economic principles were factors which made that forum an important dispute resolution centre. It should also be noted that, during its colonial days, Hong Kong had established a solid infrastructure for both litigation and arbitration. The court system was modelled on that of England. Judges and lawyers were well educated in common law and experienced in dealing with complex international transactions. In addition, many of those professionals knew and understood the Chinese language and customs. Reception of the ML was, for all these reasons, expected to strengthen Hong Kong's position of the world's laissez-faire capital and to foster development of the Hong Kong International Arbitration Centre. The references below to Hong Kong court decisions will confirm the strong commitment of Hong Kong judges to promote international commercial arbitration and to interpret the principles of the ML very liberally. However, Hong Kong's political position changed significantly after reception of the ML and the transfer of sovereignty to the PRC which has had a considerable impact on the interpretation and application of the ML. This will be the major theme of the second section of this chapter.

In Russia, even though the ML was adopted almost word for word, it brought about more changes to the pre-existing system of arbitration than in any other adopting

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818 1989 Arbitration Ordinance, supra note 681.
country. Russia had established two international arbitration centres long before adoption of the ML and was a signatory to all the major international conventions on arbitration (the *European Convention* and the *New York Convention*819). However, a great number of Western companies did not consider Russia to be an efficient, reliable and unbiased venue for the resolution of international trade disputes. Disregard for the rule of law, the complexity of the Russian court system, the tripartite system of arbitration and the unstable political situation were additional reasons for foreigners to seek remedies in Stockholm, or sometimes Paris, rather than to accept an arbitration venue in Russia. Reception of the ML in Russia was, therefore, intended to help attract foreign investors by rebuilding their confidence in Russian institutions. The following discussion in section D on Russian court practice in regard to international trade disputes will reveal that the legislative change was just the initial step in a long process of internal change to the entire system of adjudication. This will lead to the conclusion that the process of modernising the law on arbitration is ongoing and that the commitment of the government and parliament to the laws of international trade is yet to gain the support of the court system.

Briefly, this chapter examines the contribution of courts in Canada, Hong Kong and Russia to the development and harmonization of the laws of international commercial arbitration, as well as the question of the interpretation and application of the ML in domestic law. It analyses the relationship between courts and arbitral tribunals focusing on the enforcement of agreements to arbitrate, jurisdiction to order interim measures and

the enforcement of arbitral awards. In conclusion, this chapter suggests that it is difficult to predict the extent to which harmonization and unification of the rules on arbitration can be achieved by reception of the ML. It is revealed that internal factors, such as the pre-existing legal framework and legal culture of the adopting country, contribute significantly to diversity in application of the ML. Knowledge of legal history and culture may greatly help in predicting such modifications. On the other hand, diversity in application and interpretation may also be a result of external factors. In that case, predictions with respect to the level of harmonization likely to be achieved by the ML are more difficult to make.

B. Canada: The First Adoption of the ML

So far, Canada has produced the largest body of case law on the ML and the Canadian experience has been an important test of its basic principles. The summary of court decisions provided in this section confirms that the Canadian courts have become supportive of the commitment of the legislature to follow the international trend of

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820 To repeat, the main task of UNCITRAL, as determined in chapter II, par. 8 of the Resolution 2205/21 (17 December 1966) is to carry out the process of progressive harmonization and unification of law of international trade, including the law on arbitration. Harmonization of law leads to achievement of harmony or similarity in the laws of two or more states, whereas unification leads to elimination of divergences. See, E. Ustor, supra note 84.
emphasising party autonomy and a lower level of court intervention in arbitration proceedings. However, this support has developed over a decade of experience in dealing with arbitration agreements and awards. At times during the decade, even more than they had done previously, the courts sought a solution in court practice at the international level. The following cases will illustrate how the Canadian judges have overcome the traditional common law bias against arbitration.

1. In the Beginning

Since Canada was the first country to adopt the ML, Canadian courts were the first to deal with disputes arising out of arbitration agreements or awards. The lack of precedents led Canadian judges to pave their own path to co-operation with the new legislation. The first departure from previous practice was in the courts’ interpretation of article 8 of the ML and their understanding of the supremacy of the principle of party autonomy.

As previously explained, reception of the English *Arbitration Act 1889*\(^{821}\) had established the discretionary powers of the courts in Canada to stay proceedings and refer parties to arbitration. In contrast, the ML mandates that courts stay proceedings.

**Article 8 ML**

(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

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\(^{821}\) *Arbitration Act 1889*, supra note 269.
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. [emphasis added]

Not surprisingly, therefore, in the beginning, the courts had not been consistent in following the ML principle of protecting private interests and enforcing arbitration agreements.

(i) Importance of the Intention of the Parties to Arbitrate

The first courts to apply the ML in Canada were in British Columbia and Ontario. In two cases based on very similar facts and involving the interpretation of two statutes based on the ML, the two courts reached different results and gave conflicting perspectives on the public policy considerations that surround reception of the ML. In November 1988, in *ODC Exhibit Systems LTD. v. Lee*\(^{822}\), the British Columbia Supreme Court refused to stay proceedings under section 8 of the *BCICAA* (which implements article 8 of the ML\(^{823}\)). The case involved the termination of a distributorship agreement concluded between a Canadian distributor and a Swedish company. The distributorship agreement provided for arbitration in Sweden and, upon its termination, the parties concluded a conciliation agreement which also contained an arbitration clause. The Canadian company went to court claiming that the Swedish company had conspired and


\(^{823}\) Note a difference in section 8(1) of the *BCICAA* (to repeat, *BCICAA* is the abbreviation for the British Columbia *International Commercial Arbitration Act*, supra note 613). Unlike the ML, which suggests a referral to arbitration, the *BCICAA* refers to a
committed fraud in British Columbia and that the British Columbia court, not an arbitral tribunal in Sweden, should have jurisdiction to hear the case. Mackoff J., delivering the judgment of the British Columbia Supreme Court, dismissed the application of the Swedish company to stay the action. First, he held that since the distributorship agreement had been terminated, the arbitration clause could not survive it and thus became irrelevant for the dispute. As regards the arbitration clause in the conciliation agreement, Mackoff J. held that the action did not arise out of that agreement but out of allegations of conspiracy and fraud and because of the elements of these torts, the Court found that the case did not fit the requirement of section 8(1) that the Act [that is the BCICAA] applies only to proceedings in a Court in respect of a matter agreed to be submitted to arbitration and thus the Court could not stay the proceedings. The Supreme Court made no reference to the fact that the parties undoubtedly intended to arbitrate, not litigate, and that this intention was expressed in both the distributorship and conciliation agreements. The Court also made no reference to the intention of federal and provincial legislatures in Canada to support international pro-arbitration trends.

In December 1988, in Boart Sweden AB v. NYA Stromnes AB, the Ontario High Court was dealing with an application to stay proceedings in another case involving a Canadian company and a Swedish company. The dispute arose over the termination of a distributorship agreement which contained an arbitration clause. The Canadian distributor claimed in tort that the Swedish company had acted fraudulently and conspired to bring

824 ODC, supra note 822, at 293.

about the termination of the distributorship contract. The Swedish company applied for an order staying the action. The Canadian company argued that the Swedish company waived its right to arbitration because it had brought an action in the courts of Sweden with respect to the dispute. Further, the Canadians argued that the parties involved in the action in Ontario were not parties to the arbitration agreement and that economic torts alleged in the Ontario action were not recognised in Swedish law. Finally, the Canadian company argued that, on grounds of public policy, the Court should refuse a stay. Campbell J. interpreted article 8(1) of the ML to mean in the matters which are subject to an arbitration agreement the court had to stay proceedings unless it finds the arbitration agreement null and void.\footnote{826} He further assumed that the question of nullity included the waiver of the right to arbitrate and public policy contraventions of the forum state (Ontario).\footnote{827} Campbell J. held that the Swedish company’s limited involvement in the court proceedings in Sweden could not be regarded as a waiver. As to the public policy considerations, Campbell J. found that certain tort claims involving the two parties were outside the arbitration agreement, and that the law of Sweden did not recognise them as causes of action. However, he held that it would be contrary to the public policy of Ontario (and Canada) not to refer the claims of breach of the international contract to arbitrators. Thus, referring to public policy considerations respecting the intention of the parties, he ordered the stay of proceedings:

"Public policy carries me to the consideration which I conclude is...

\footnote{826} Article 8(1) mandates that if the matters are subject of the arbitration agreement and if a party makes a timely application, the court must refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

\footnote{827} Boart Sweden, supra note 825 at 302.
paramount having regard to the facts of this case, and that is the very strong public policy of this jurisdiction that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract.\footnote{Boart Sweden, \textit{ibid.}, at 302-303.}

Briefly, Campbell J. decided to stay proceedings pursuant to article 8 of the ML in matters which were the subject of an arbitration agreement. Furthermore, Campbell J. accepted an argument made by the defendants that in certain circumstances the court can stay the action if the subject matter is outside of the scope of the agreement. That is, proceedings could be stayed until the arbitration in Sweden could be completed in order to avoid multiplicity of proceedings.\footnote{See, Boart Sweden, \textit{ibid.} at 304. Campbell J. explicitly said that “[i]t would be mischievous to continue to litigate, pending arbitration, matters which depend so much on the facts which form the basis of the arbitration” \textit{Ibid.}, at 305.} Here Campbell J. relied on discretionary powers given in the \textit{Courts of Justice Act} \footnote{\textit{Court of Justice Act}, S.O. c. 11.} to a court “to decide, on its own initiative or on motion by any person, whether or not a party \textit{may stay any proceeding in the court on such terms as are considered just}” [emphasis added].\footnote{Boart Sweden, \textit{ibid.}, at 302-303.}

In summary, in the \textit{ODC} case the Supreme Court of British Columbia went on to analyse in detail two contracts concluded between the parties with no reference to public policy considerations in favour of arbitration and the intention of the parties to arbitrate, despite it being clearly set out in two agreements. The court instead chose to apply traditional contractual analysis. In contrast, in \textit{Boart Sweden}, the Ontario Supreme Court insisted on holding the parties to their contracts and upheld their intention to arbitrate. As to public policy, the Ontario Supreme Court concluded that it had to take into
consideration the legislative policy to give support to international commercial
arbitration. It is interesting to notice that the British Columbia judgment had been
delivered three weeks before the Ontario judgment and that the Ontario court did not
make any reference to the former judgment. Subsequently, in 1992, the British Columbia
Court of Appeal in Sandbar Construction Ltd v. Pacific Parkland Properties Inc.
followed the approach taken by the Ontario court in Boart Sweden and directly pointed to
the previously cited words of Campbell J. on public policy considerations.

(ii) Lack of Domestic Practice; Courts Referring to Foreign Case Law

Because of the lack of precedents deriving directly from the application of the
ML, Canadian courts sometimes tried to fill interpretation gaps with academic analyses
and case law from other jurisdictions. In this context, two decisions are illustrative. In
1988, the Supreme Court of Canada decided an appeal from the Quebec Court of Appeal
judgment in Sport Maska Inc. v. Zittrer a case involving an action for damages against
defendants who denied an intention to arbitrate. The Supreme Court of Canada ruled on
the Quebec decision only two years after that province reformed its arbitration rules in the

831 Section 119, Court of Justice Act, S.O. c. 11.
833 Sandbar Construction, ibid., at 81-82.
Civil Code\textsuperscript{835} and the Code of Civil Procedure.\textsuperscript{836} The Supreme Court held that, in order to determine whether the intention of the parties was to arbitrate or only to obtain the opinion of experts, it would be essential to distinguish arbitration from an expert opinion. In arriving at the conclusion that the existence of a dispute is a pre-condition of arbitration, Madam Justice L’Heureux-Dubé, in her concurring opinion, thoroughly examined French, Quebec, English, American and Canadian common law and practice on the issue. She supported the majority decision of the Court that the agreement of the parties in the case was only to obtain the opinion of experts, rather than to arbitrate. She based her opinion on contractual analysis, without reference to any public policy considerations.\textsuperscript{837}

In 1994, the Saskatchewan Court of Appeal in \textit{BWV Investments Ltd. v. Saskferco Products Inc.}\textsuperscript{838} carried out an unprecedented overview of international practice. In a case that involved building liens and related remedies, a dispute arose with respect to a construction contract. When the major subcontractor commenced an action under the Saskatchewan \textit{Builders’ Lien Act}\textsuperscript{839} despite the fact that there was an arbitration agreement referring all disputes to the ICC tribunal in Zurich, the contractor applied for a stay of court proceedings under article 8(1) of the ML. In the first decision in Saskatchewan on the application of the ML, the Chief Justice of that Province’s trial

\textsuperscript{835} \textit{Civil Code, supra} note 372.

\textsuperscript{836} \textit{Code of Civil Procedure, supra} note 375.

\textsuperscript{837} \textit{Sport Maska} became the leading Canadian case for making distinction between an arbitration award and an expert opinion.

court addressed whether the International Commercial Arbitration Act could override the application of the Builders' Lien Act. Finding no legislative direction for interpretation on this issue, he held the arbitration agreement void under the Builders' Liens Act which provides that any agreement to waive rights under that Act is void.

The Chambers judge relied on the public policy objectives behind the Builders Lien Act when refusing to stay the proceedings and refer the dispute to arbitration. On appeal, the Saskatchewan Court of Appeal granted a stay and relied on the public policy it saw behind the enactment of the ML, growing international support for international commercial arbitration and support of arbitration in current English, French and American practice. The Court of Appeal emphasised that it was important to take into consideration the intention of the parties to arbitrate as well as prevailing trends in support of international commercial arbitration. More importantly, supporting arbitration despite provisions in the provincial builders' lien statutes which preclude contracting out

843 BWV Investments Ltd. v. Saskferco Products Inc., supra note 838 at 590: “The objectives behind the ICAA/EFAA legislative schemes that have arisen in each province can be succinctly stated: (1) to give effect to the intentions of the parties in choosing to submit to arbitration; (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 (4) by encouraging the use of international commercial arbitration as a dispute resolution alternative, to encourage international commercial activity.”
844 BWV Investments Ltd. v. Saskferco Products Inc., ibid., at 585: “The rise of international commercial arbitration is marked by the dozen of international conventions that have been negotiated and signed, including the UNCITRAL’s Model Law.”
of the statutory scheme of remedies for lien holders was confirmed by superior courts in British Columbia, Alberta and Ontario. Thus, superior courts in Canada have favoured international public policy, which supports international arbitration as a method of settlement for lien claims over domestic public policy which mandates recourse only to lien law.

(iii) Maritime Disputes as Tests for the ML

It should be noted that between 1986-1988 the federal courts dealt on several

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845 *BWV Investments Ltd. v. Saskferco Products Inc.*, ibid., at 585-587.

846 *Sandbar Construction*, supra note 833. A dispute arose when the plaintiff contractor was asked to suspend work on a project which was agreed upon in a written contract including an arbitration clause. The plaintiff filed a builders' lien and the defendant brought an action. Then the plaintiff delivered a notice of request to arbitrate pursuant to an arbitration agreement and applied for a stay of court proceedings under section 15 of the *BCCAA*. The Supreme Court of British Columbia stayed the proceeding and held that it would be consistent with the *Builders' Lien Act* that an arbitrator should assess amount owing. *Ibid.* at 233.

847 *Kvaerner Enviropower Inc. v. Tannar Industries Ltd.* [1994] 9 W.W.R. 228 (Alta Q.B.). In this case the parties had a construction contract governed by Maryland law. When a dispute arose, the respondent filed a builders' lien. The decision of the Chambers Judge that the application for the enforcement of the lien rights would be accepted was upheld by Alberta Court of Appeal. The Court emphasised that even though Maryland law governed the contract, it did not prevent respondent from enforcing its Alberta lien. However, the Court of Appeal explicitly said that the *Builders Lien Act* was not to be interpreted so as to prohibit the arbitration of disputes involving lien claims and decided accordingly to stay the proceeding.

848 *Automatic Systems Inc. v. Bracknell Corp.* (1994) 18 O.R. (3rd) 257 (C.A.). Note that in *Automatic Systems* the Ontario Court of Appeal explicitly cited Campbell J. in *Boart Sweden* emphasising the very strong public interest that the parties should held to their contract to arbitrate. The Court held that arbitration and lien legislation can co-exist.
occasions with the application of the ML in maritime disputes.\textsuperscript{849} Even though initially
the courts were eager to stay proceedings and refer the parties to arbitration, it was not
clearly settled whether such an attitude was due to the mandatory requirements of article
8 of the \textit{Commercial Arbitration Act} or to the discretionary power of the courts provided
for in the statute governing federal courts, the \textit{Federal Court Act},\textsuperscript{850} section 50(1):

"The Court \textit{may, in its discretion}, stay proceedings in any case or matter,
(a) on the ground that the claim is being proceeded with in another court
or jurisdiction; or
(b) where for any other reason it is in the interest of justice that the
proceedings be stayed." \textsuperscript{[emphasis added]}

In 1989, in \textit{Navionics Inc. v. Flota Maritima Mexicana S.A.},\textsuperscript{851} the Federal Trial
Court, from which a stay of proceedings was sought, held that it was unnecessary to
decide the matter on the basis of section 8 of the \textit{Commercial Arbitration Act}.\textsuperscript{852} In short,
a dispute arose out of a charter-party which contained an arbitration clause and arbitrators
were appointed by the parties. The plaintiff then started court proceedings, whereupon the
defendant applied for a stay of proceedings pending arbitration. The Court held that the
issue should be decided pursuant to section 50(1)(b) of the \textit{Federal Court Act}.
Accordingly, it relied on its discretionary power under the \textit{Federal Court Act} to stay
proceedings in the interest of justice and not on its mandatory duty, established by the
ML, to protect the rights of private parties to arbitrate whenever the strict requirements of


\textsuperscript{852} \textit{Commercial Arbitration Act}, supra note 616.
article 8(1) are met. Thus, the Federal Trial Court failed to promote application of the ML.

Three years after Navionics, in Miramichi Pulp & Paper Inc. v. Canadian Pacific Bulk Ship Services Ltd, the Federal Trial Court ruled differently, showing a new tendency to stay proceedings in favour of arbitration. In this case, despite the fact that the contract and the bill of lading issued on the basis of that contract contained an arbitration clause, the plaintiff brought a claim for damages based on breach of contract and negligence. The defendants applied to stay the proceedings. A Senior Prothonotary ordered a stay of proceeding on the basis that the parties had agreed to arbitrate. He took into consideration the interests of justice as per section 50(1)(b) of the Federal Court Act but emphasised the importance of the court's mandatory duty to stay proceedings pursuant to article 8(1) of the ML. The plaintiff then applied to have the stay of proceedings set aside. In denying this application, the Federal Court confirmed that the

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853 The same reasoning is used in 1993, in Nanisivik Mines Ltd. v. F.C.R.S. Shipping Ltd., (1993) 59 F.T.R. 272 by the motion judge of the Federal Court, Trial Division, who ruled along the lines of Navionics. That is, the Court ordered a stay of proceedings but relied on its inherent discretion pursuant to section 50(1) of the Federal Court Act, rather than on its mandatory duty under article 8 of the ML. However, this decision was appealed by, the Federal Court of Appeal (1994) 113 D.L.R: (4th) 536. Mahoney J.A. held that the international community has arrived at a consensus that compliance with commercial arbitration agreements is to be enforced by the courts provided they are in writing, not null and void nor inoperative nor incapable of performance. He further held that all of the policy considerations are in favour of the mandatory legislative requirement of article 8(1) that the action must be stayed. Once a reference to arbitration has been made, there is no residual discretion in the court to refuse to stay all proceedings between the parties, even though there may be particular issues between them that are not subject to the arbitration. Ibid., at 545.

most important factor was that the parties had clearly agreed to arbitrate.

*Boart Sweden* and *Miramichi Pulp* confirmed that the Canadian courts were eager to recognise the importance of the intention of the parties to arbitrate and to accept the supremacy of the party autonomy principle. The judges showed respect for arbitration agreements and stayed proceedings whenever the requirements of article 8 of the ML were met. However, when it came to explaining this position, the courts were inconsistent. It seems that the lack of relevant precedents and the relatively short existence of the new arbitration regime forced the courts to look for ideas outside the ML.

(iv) A Seminal Decision: The *Quintette Case*

The case of *Quintette Coal v. Nippon Steel Ltd.* is, undoubtedly, central to an appreciation of the attitude of the Canadian judiciary towards international commercial arbitration. The case, which arose out of a lengthy arbitration between a large Canadian coal producer and a consortium of Japanese steel manufacturers, has been discussed in detail by several Canadian scholars and practitioners. *Quintette* is considered to have

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been a test of several important principles of the ML in general and the BCICAA in particular. Initially, the parties even had difficulty establishing the arbitral tribunal, because they could not agree upon a third arbitrator to chair the arbitration. Under the BCICAA\textsuperscript{857} the Chief Justice of the British Columbia Supreme Court appointed the third arbitrator, Nathan Nemetz, former Chief Justice of the British Columbia Court of Appeal, to chair. Notwithstanding the fact that Mr Nemetz was an experienced arbitrator, his appointment was controversial because it created an all-Canadian arbitral tribunal and thus the possibility to question the impartiality of the arbitrators who were all of the same nationality. After this case, the Legislative Assembly in the Province reacted promptly. In order to prevent the creation of a tribunal with all of its members of the same nationality as one of the parties to the arbitration, section 11 of BCICAA on appointment of a third arbitrator was brought in the line with article 11(5) of the ML.\textsuperscript{858}

The second test of the Canadian implementation of the ML in Quintette was actually the first test in Canada of the constitutionality of the new legislation. Specifically, Quintette filled a petition in the British Columbia Supreme Court in June 1988 questioning the authority of the arbitral tribunal to rule on its own jurisdiction and to order interim measures, arguing that these powers contravened section 96 of the

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\textit{provided for a panel of three arbitrators to resolve disputes related to the contract. When the market price of coal went down, the matter went to arbitration.}
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\textsuperscript{857} Section 11(4) of the BCICAA, S.B.C. c. 14.

\textsuperscript{858} Article 11(5) of the ML: "...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 ad 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."
Constitution Act 1982. The British Columbia Supreme Court rejected both claims and emphasised the contractual nature of arbitration and the importance of upholding the intention of the parties to have their dispute resolved outside the court system. Gow J. concluded that the fact that in the territory within which a private arbitral tribunal functions there was a statute providing a procedural structure, did not convert it into a statutory tribunal, and that, accordingly, the arbitral tribunal was not a provincial statutory body within the meaning of the Constitution Act. The trial judge then returned the dispute to the arbitral tribunal and after 142 days of hearings in Vancouver and Tokyo it made an award fixing (lowering) the price to be paid to Quintette by the Japanese Steel companies.

The third important test of Quintette was when Quintette submitted an application to set aside the award to the British Columbia Supreme Court. The award was challenged under section 34(2) of the BCICAA. Specifically, Quintette claimed that the arbitral tribunal had exceeded the jurisdiction conferred upon it by the arbitration agreement when it fixed the coal price. Esson, C.J.S.C., dismissed the application. In an appeal of this order, the British Columbia Court of Appeal reiterated the importance of upholding the parties intention to arbitrate. Gibbs J.A., referred to the judgment of Esson, C.J.S.C., at trial, which had cited the decisions of the New Zealand Court of Appeal in CBI NZ Ltd

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859 Quintette, supra note 855.. See also R. K. Paterson, “Canadian Developments”, supra note 602 at 581.

860 "But section 96 [of the Constitution Act-added] has never been construed (and cannot be) as forbidding two or more citizens from appointing another as their 'private judge' to resolve their dispute..."

861 Ibid., at 134 and 137.
v. Badger Chiyoda\textsuperscript{863} and the U.S. Supreme Court in Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc.\textsuperscript{864} in order to emphasise the existence of a worldwide trend towards restricting judicial control over arbitration.

Quintette has become a cornerstone in the practice of Canadian courts respecting the interpretation of the ML. It confirmed that courts in Canada were willing to follow the approach taken in other countries to minimise court intervention in arbitral proceedings.

2. The Coming of Age of the ML\textsuperscript{865}

After initial inconsistency with regard to the enforcement of arbitration agreements and the judicial review of arbitral awards, Canadian case law in the mid-1990s started to show greater respect for the legislative commitment to support

\textsuperscript{862} Quintette, supra note 855.

\textsuperscript{863} CBI NZ Ltd v. Badger Chiyoda [1989] 2 N.Z.L.R. 669 at 687-88: “Development and trends in other jurisdictions weigh heavily against invoking public policy considerations to justify such curial intervention in New Zealand in the case of international commercial arbitration...As to that, the trend in international commercial arbitrations is clearly towards giving greater emphasis to party autonomy and contracting judicial control over the legal content of the reference and the award.”

\textsuperscript{864} Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc. [1985] 473 US 614 at 629: “...we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in the domestic context.”(per Blackmun J.)

international trade. Increasing involvement of Canadian companies in complex international transactions led to intensified activity by the courts to assist in arbitral proceedings. In this section some of the positions taken by superior, provincial and federal courts in Canada will be presented in order to confirm that the courts have taken a pro-arbitration attitude. It will be shown that in a number of critical situations in which the parties failed to define the scope of an arbitration agreement the courts have shown a clear tendency to refer them to arbitration unless it could immediately be seen than the issues fall within court jurisdiction. In other words, the courts preferred to have parties arbitrate rather than to allow them to litigate.

(i) What is a “Commercial” Transaction?

Lack of a more specific definition of the term “commercial” in the ML allows courts of adopting countries to utilize different interpretations, wide or narrow. Canadian courts dealing with the “commercial” nature of disputes established that an international contract of employment is not of a commercial nature and thus cannot be heard before international arbitration, but that it could still be tried before domestic arbitration. In *Borowski v. Heinrich Fiedler Perforiertechnik GmgH*\(^{866}\) there was an alleged breach of a contract of employment, which provided for arbitration by the American Arbitration Association in Georgia. The plaintiff applied to an Alberta court for an interim order

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restraining the defendants from removing assets from the province of Alberta. The
defendant then moved to stay the court proceedings, insisting on arbitration in Georgia.
The court held that an international contract of employment is not a “commercial”
contract within the meaning of article 1(3) of the ML and the provisions of the
International Commercial Arbitration Act of Alberta. However, it went on to explain that
the arbitration clause was not invalid at common law and, relying on the domestic
arbitration statute, ordered a stay of court proceedings with respect to the issue of
termination of employment.

In Carter v. McLoughlin66\textsuperscript{7} the Ontario court, General Division, dealt with an
application for the enforcement of an American award rendered in a dispute over a
contract for the sale of a personal residence. The McLaughlins, who sold a house in
Minnesota, moved to Ontario and refused to pay the amount awarded by the arbitrator in
Minnesota to the Carters, the buyers, for the cost of replacing the septic system sevicing
the property. Then, the Carters sought enforcement in Canada. The threshold issue for the
court in Ontario was whether the arbitration agreement and the award were commercial
within the meaning of the ML and the related Ontario statute. Since the original footnote
to the ML explaining the notion of commercial was not included in the Schedule to the
International Commercial Arbitration Act66\textsuperscript{8} of Ontario, additional references were
necessary. The Court took the Analytical Commentary contained in the Report of the

\begin{footnotesize}
\textsuperscript{66} Carter v. McLoughlin (1996) 27 O.R. (3\textsuperscript{rd}) 792 (Gen. Div.). Also reported in (1996) 4
A.D.R.L.J. 324.

\textsuperscript{68} R.S.O. 1990, c.I.9.
\end{footnotesize}
Secretary General to the eighteenth session of UNCITRAL\textsuperscript{869} into primary consideration, and held that the award should be viewed as "commercial" for the following reasons: first, the transaction was done in a business-like way, with the assistance of professional realtors; second, it involved a large sum of money; and third, the transaction was of a commercial nature despite the fact that it was performed by the parties who were not-commercial persons.

The above-mentioned interpretations of the "commercial" nature of transactions given by the courts in Alberta and Ontario suggest that the lack of precise definition in the ML and the Working Group's view that the term should be given a broad interpretation are not sufficient guidelines in practice. In the absence of a precise definition, the term remains to be defined by the courts in accordance with the national legislations.\textsuperscript{870}

(ii) The Broad Meaning of the Term "Agreement In Writing"

As previously mentioned, the meaning of "agreement in writing" as provided for in the ML appears to be restrictive in some adopting countries. However, it was argued that the desired uniformity with the \textit{New York Convention} imposes certain limitations on

\textsuperscript{869} \textit{Supra} note, 119.

\textsuperscript{870} However, the UNCITRAL Working Group suggested that the term "commercial" should be given a wide interpretation fearing that the reliance on national law definitions in some civil law countries might restrict the application of the ML only to transactions between merchants (commercial persons) or to only transactions dealt with in their
the ML provisions. In this context, the written form requirement was recently re-examined by the courts in Canada. A 1996 decision of the Saskatchewan Court of Appeal suggests a tendency towards a liberal interpretation of the written form requirement. In *Schiff Food Products Inc. v. Naber Seed & Grain Co.*, a dispute arose with respect to the performance of an offer which contained an arbitration clause. A foreign food company offered to buy oregano upon sample approval. It sent the spice company an offer incorporating the arbitration clause and the spice company sent to the food company a spice sample but never signed any of the documents. The spice company was advised orally by the broker that the sample had been approved and that the contract had been confirmed. Later, the spice company reported to the food company that it was encountering problems with supplies. The food company then initiated arbitration and was, indeed, awarded damages by the arbitration tribunal. The Court, ruling on the application for recognition of the award, held first that the offer made by the food company, which incorporated an arbitration clause, was a standard form contract. It then moved on to interpret section 7 of the Saskatchewan *International Commercial Arbitration Act* and the requirement of a written form, recognising the existence of various interpretations of “agreement in writing.” Finally, taking into consideration the development of electronic international business transactions, the Court adopted a liberal interpretation of “written form” requirement in the ML and allowed the application for commercial codes. See in particular Commission Report A/40/17 paras 19-22 and 26.


*Article 7 (2) of the ML mandates the written form of an arbitration agreement. It...
recognition of the award. The importance of this decision is in the fact that it creates the possibility of arbitrating a whole range of new transactions which emerge from the use of new technologies and new methods of communication. A restrictive interpretation of the written form requirement would have left many of these disputes arising from such business transactions to the courts.

(iii) Resolved Dilemma: No Residual Jurisdiction of the Courts

The controversy which arose in British Columbia over whether, notwithstanding article 8(1) of the ML, the courts retain residual jurisdiction to refuse to stay proceedings was finally resolved by the Supreme Court of Canada in January 1998. The first judge to use the concept of residual jurisdiction was Hinkson, J.A. of the British Columbia Court of Appeal in Gulf Canada Resources Ltd. v. Arochem International Ltd. He established a three-condition test in order for the applicant to be automatically granted a stay of proceedings: "[I]f the court concludes that one of the parties named in the legal

further explains that an agreement is in writing if it is embodied in:
- a document signed by the parties;
- in an exchange of letters, telex, telegrams of other means of telecommunications 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.

Also, the same article provides that the reference in a contract in writing to a document containing and arbitration clause constitutes an arbitration agreement.

proceedings is not a party to the arbitration agreement or if the alleged dispute does not come within the terms of the arbitration agreement or if the application is out of time, the court should not grant the application. In the *Gulf Canada* decision, Hinkson, J.A. indicated that residual jurisdiction to ensure this test has been met should only be a *limited jurisdiction* of the court to rule over stay of proceedings applications. He then explained that a court should refuse to grant the application for a stay only if it is *clear* that one of the parties involved in the action was not a party to the arbitration agreement, or if the alleged dispute is outside the scope of the arbitration agreement or if the application is not submitted in time.

This definition of residual jurisdiction was subsequently misinterpreted as containing a sort of "residual discretion" by some Chambers judges in British Columbia, when they refused to stay proceedings where all the parties and issues were seen as outside the scope of the arbitration agreement. However, there is no reference anywhere in the Court of Appeal's decision in *Gulf Canada* to the term "discretion". Those lower courts failed to distinguish between a residual *jurisdiction* to ensure that the conditions for a stay had been met and a *discretion* which permits the court to exercise its privilege in deciding whether in its view a stay should be granted. The Court in *Gulf Canada* went on to point out that "[c]oncerning section 8(1) in relation to the provisions of section 16 and the jurisdiction conferred on the arbitral tribunal [...] it is not for the court on an

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875 *Gulf Canada, ibid*, para 36. at 120.

876 See, for example *Afton Operative Corporation v. Canadian National Railway Company et al* [unreported], 13 January 1994, Vancouver registry no. C921353. Even the Saskatchewan Court of Appeal in *BWV Investments Ltd., supra* note 843, at 577 and 595 refers to the "residual jurisdiction."
application for stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal." In other words, where it is *arguable* that one of the parties to the court proceedings is a party to the arbitration agreement or where it is *arguable* that the dispute is within the terms of arbitration agreement, then the court should not order the stay of the arbitral proceedings.

This approach of the British Columbia courts was not accepted by other courts. For example, the Federal Court of Appeal in *Nanisivik Mines Ltd. v. F.C.R.S. Shipping Ltd.* found that even if some of the issues involved in a dispute were not subject to arbitration the court had no residual discretion to refuse to stay all proceedings in a case in which the parties had agreed to arbitrate.

In *City of Prince George v. McElhanney Engineering Services Ltd.*, the British Columbia Court of Appeal read section 15 (1) of the *BCCAA*, which corresponds to article 8(1) of the ML, as the basis for the non-discretionary, not the residual, jurisdiction of the court. It decided that this meant that the court's jurisdiction is limited to

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877 *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2nd) 113 at 120.


879 *City of Prince George v. McElhanney Engineering Services Ltd. and A. L. Sims and Sons Ltd* (1995), 9 B.C.L.R. (3rd) 368 (C.A.)

880 *BCCAA*, S.B.C. 1986 c.3.

881 See E. Chaisson, "A Precipe Avoided: Judicial Stays and Party Autonomy in International Arbitration" (1996) 54 The Advocate 62 at 65: "The decision of the Court of Appeal in *The City of Prince George*, while important for its disposition of the residual
determining whether the prerequisites of section 15(1) have been met. Referring to several authorities, the Court of Appeal found that, "as a general principle, the mere fact that there are multiple parties and multiple issues which are interrelated and some, but not all, defendants are bound by an arbitration clause, is not a bar to the right of the defendants who are parties to the arbitration agreement to invoke the clause." The Court also held that "if those prerequisites clearly have not been met, then the court should refuse a stay. If it is arguable whether the prerequisites have been met, then the stay should be granted and the issue can be resolved in arbitration." In other words, the Court held that the arbitration tribunal should be allowed to rule on its jurisdiction.

Since that decision, further clarification has been added by a recent decision of the Supreme Court of Canada. In Burlington Northern Railroad Company v. Canadian National Railway Company, the Supreme Court of Canada set aside the judgment of the British Columbia Court of Appeal, restoring the order of the Chambers judge, Thackray J. to stay the action. In a short judgment, the Supreme Court relied on the opinion of a dissenting judge, Cumming J.A., which emphasised that the role of the court when ruling on an application for a stay of action should be limited to verifying the existence of two imperative conditions of article 8 of the Commercial Arbitration

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882 City of Prince George v. McElhanney Engineering Services Ltd. supra note 879, at 380.
883 Ibid., at 386.
The first condition is that the action concerns a matter which is the subject of an arbitration agreement. The second condition is that the party requesting the reference to arbitration must do so not later than when submitting the first statement on the substance of the dispute. Thus, the Supreme Court gave a narrow interpretation to article 8(1) of the ML, suggesting that parties cannot agree on conditions which go beyond the law and broaden the scope of the court's jurisdiction under article 8(1) to grant a stay. In other words, article 8(1) mandates courts to stay proceedings once they find that a valid arbitration agreements exist and that a time condition for a stay of proceedings has been met. There is no residual discretion for courts to refuse a stay of proceedings. This decision of the Supreme Court of Canada provides important support for the policy of both the New York Convention and the ML to restrict intervention of the courts and prioritise the authority of arbitral tribunals.

The conclusion that can be drawn from the practice of Canadian courts is that they tend to interpret the requirements of article 8 of the ML in a way that gives maximum support to arbitration and respect for the Kompetenz-Kompetenz principle as defined in article 16 of the ML. Even if there is doubt as to whether the subject matter of a dispute falls under an arbitration agreement, the Canadian courts have tended to stop the proceedings and let the arbitrators determine whether or not they have jurisdiction to decide the case.

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886 Article 8(1) Commercial Arbitration Code.
Moreover, the courts in Canada in a number of cases have given support to the parties’ agreement to arbitrate even when the main contract containing the arbitration clause was terminated. In *Globe Union Industrial Corp. v. G.A.P. Marketing,*887 *Hebdo Mag. Inc. v. 125646 Canada Inc.*888 and *Roy v. Boyce,*889 courts in British Columbia dealing with applications for stay of proceedings have found that arbitration agreements survived the termination of the main contract.890 This approach of the Canadian courts differs from the traditional common law understanding of severability of the arbitration agreement. To reiterate, English law established partial severability, because it held that an arbitration agreement was severable from the main contract only if the main contract itself was valid. In *Heyman v. Darwins Ltd.*,891 the House of Lords held that the arbitral tribunal could rule on its jurisdiction to decide a dispute arising out of such valid contract. By the doctrine of severability of the arbitration agreement provided for in the ML, the arbitration agreement and the main contract are totally separate agreements and, accordingly, an arbitral tribunal has jurisdiction to rule on its own jurisdiction even if the

890 It is important to notice that *Globe Union* was an international arbitration and thus decided in the context of sections 8(1) and 16 of the BCICAA, which correspond articles 8(1) and 16 of the ML. On the other hand, *Hebdo Mag. and Roy v. Boyce* were domestic arbitrations governed by BCCAA. However, they were related to section 15 which repeats article 8 of the ML. In *Hebdo Mag* the court ruled that the plaintiff had to show that an arbitration agreement was null and void and that the whole transactions confirm that the intention of the parties was that the arbitration agreement was to survive the main agreement. In *Roy v. Boyce* the court, ordering the stay, held that the question of the existence of the main contract should be decided by arbitration first and litigation second.
main contract is not valid.

(v) Courts’ Involvement with respect to Interim Measures: Support for Arbitration

It has already been mentioned in Chapter Three that the ML intentionally omitted to clarify interim measures of protection which may be ordered by courts on one hand and those which may be ordered by arbitrators on the other. Article 9 of the ML explicitly gives a party the right to seek interim measures of protection from the court.892 On the other hand, Article 17 empowers arbitrators to grant interim measures of protection as well.893

Evolution of interim measures of protection in English law (in particular, pre-judgment attachment, referred to in England as Mareva injunctions,894 and Anton Piller

892 Article 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 such measure." [emphasis added].

893 To repeat, article 17 empowers arbitrators to grant interim measures of protection at the request of a party and to require any party to provide appropriate security in connection with such measures.

894 A Mareva injunction is an order to temporarily freeze assets (tangible or intangible, realty or personalty) which are required to satisfy a judgment or expected judgment and to prevent their dissipation within the jurisdiction or removal from the jurisdiction of the Court, but giving the plaintiff no security over the property frozen. See Mareva Compania Naviera SA v. International Bulkcarriers SA (the Mareva case) [1975] 2 Lloyd’s Rep. 509. For further readings on Mareva injunctions see in particular R. Ough, The Mareva Injunction and Anton Piller Order; Practice and Precedents (London: Butterworths, 1987), M. Hoyle, The Mareva Injunction and Related Orders (London: Lloyd’s of London Press Ltd., 1985), D. McAllister, Mareva Injunctions, 2nd ed. (Toronto: Carswell, 1987).
orders revelation that until the 1970s courts could not grant such temporary injunctions preventing a defendant from disposing or removing his/her assets from the jurisdiction before judgment was rendered. After the 1975 Mareva case courts were permitted to issue interlocutory orders whenever they found a possibility that a debtor would dispose of his assets before a judgment was rendered. The applicability of Mareva injunctions was extended to arbitration by Brandon, J., in the 1979 case of the Rena K. There were two restrictions on the use of Mareva injunctions in international commercial arbitration: first, that arbitration is to be held within the jurisdiction of the English court, meaning the arbitration is taking place in England under English procedural rules, and second, that the assets are actually within the jurisdiction of the English court.

An Anton Piller order is a form of discovery which entitles the plaintiff or intended plaintiff to search for articles which are or may be the subject of litigation and evidential material which may be relevant to the action or proposed action, and, if he finds it, to inspect it and remove it to the safe-keeping of his solicitor or the court, to prevent its removal, destruction or concealment by the defendant. See R. Ough, *The Mareva Injunction and Anton Piller Order; Practice and Precedents* (London: Butterworths, 1987) at 3. See also *Anton Piller KG v. Manufacturing Processes Ltd* [1976] Ch 55.

Lister & Co. v. Stubbs, 45 Ch.D.1 (C.A. 1890). However, this rule was subject to several exceptions in admiralty and matrimonial cases and cases in which the plaintiff claimed a trust or some actual proprietary right or interest which attached to the money itself or the asset or thing which was subject of the action. See W. Shenton, “Attachments and Other Interim Court Remedies in Support of Arbitration; The English Courts” (1984) 12 Int’l Bus. Law. 101 at 101 and 104.


*Rena K.* [1979] Q.B. 377; [1979] 1 All E.R. 397. Brandon J. said: “[...] I see no good reason in principle why it should not also be available to provide a plaintiff, whose action is being stayed ... in order that the claim may be decided by arbitration in accordance with an arbitration agreement between them, with security for the payment of any award which the plaintiff may obtain in the arbitration.” See *ibid.*, at 407.
Notwithstanding the importance of these measures in general, it may be assumed that parties will seek interim measures of protection from the court either because it is the exclusive power of the court to order such protection or the arbitrators may have the authority to grant interim measures, but only the court has the power to enforce them. This was often a reason to question the effectiveness of arbitration and its independence from courts. Moreover, it sheds more light on the issue of concurrent power of arbitrators and courts.

Besides the fact that arbitration lacks the enforcement mechanisms possessed by courts, the problem of the arbitrator ordering interim measures lies in the private nature of arbitration itself. Since arbitration is established on a consensual basis, its measures are directed only to the parties to the arbitration agreement. In contrast, the court's orders can be addressed to anyone within its broader, non-consensual jurisdiction, not only the parties in the case before the court. It is beyond doubt that court-ordered interim measures are important as arbitral tribunals have no authority of enforcement against the assets of

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899 The availability of interim measures as pre-award attachments is of great importance for international arbitration because of the fact that a party may use the time which elapses during the establishment of tribunal and tribunal’s decision to order interim measures to conceal or dissipate assets from the host country so that there is nothing against which to execute. One of the ways to hide the assets can be to transfer them to sister companies which are not parties to the arbitration agreement and which are established in third countries. Interim measures are also aimed at the protection of the whole institution of arbitration where a defendant resides in a jurisdiction where there is a risk of unenforceability of arbitral awards or interim measures due to a weak legal system or an unstable business environment; see D. Yakovlev, "International Commercial Arbitration and Russian Courts" (1990) 13 J. Int'l Arb. 37, at 49.

900 For instance, a Mareva injunction, or an injunction to attach bank accounts.

the parties. However, it is still possible to question whether these measures are always
necessary in arbitration for at least three reasons. First, the parties can put in their
arbitration agreement security clauses, such as, for example, escrow accounts, instead of
waiting for the court or the tribunal to secure the assets during the pre-award period.
Second, as the New York Convention allows a party to enforce an award in 120 countries,
it thus makes the concealment or dissipation of assets of a losing party more difficult.
Third, it is possible to argue that ex parte interim measures, such as Mareva injunctions,
Anton Piller orders and garnishment orders⁹⁰² may appear unfair and unreasonable to
respondents. In this context, interim measures deprive (or limit) their property rights
indefinitely pending arbitration (which, after all, may end in an award unfavourable to the
applicant).

The New York Convention provides for recognition and enforcement of arbitral
awards between member states, but makes no specific reference to interim measures.⁹⁰³
However, the ICSID Rules confers the power on the arbitrators to grant interim measures
and the possibility for courts to order interim measures, but only if explicitly provided for

⁹⁰² A statutory means by which a person’s property, money or credits in possession or
under control of, or owing by another are applied to payment of the former’s debt to a
third person by proper statutory process against debtor and garnishee. See Court Order
Enforcement Act, R.S.B.C 1996, c. 78. In practice, in this process the third party is
simply notified by the court “to retain something (money or goods) he or she has that
belongs to the defendant (debtor), to make disclosure to the court concerning it and to
dispose of it as the court shall direct.” See J. A. Yogis, Q.C., Canadian Law Dictionary,

⁹⁰³ See C. Brower & M. Tupman, “Court-ordered Provisional Measures under the New
Pre-Judgment Attachments and Temporary Injunctions in International Commercial
Arbitration Proceedings: A Comparative Analysis of the British and American
by the parties in their arbitration agreements. The ICC Rules give both arbitrators and courts powers to make interlocutory orders.

The ML does not indicate which measures of protection parties can request from a court or from an arbitral tribunal. Article 9 of the ML only explains that such court-ordered interim measures are compatible with the existence of arbitration agreements. On the other hand, article 17 of the ML speaks about interim measures of protection that the tribunal may consider necessary, even if the tribunal may only make such order at the request of a party. Holtzmann and Neuhaus, when commenting on article 9, emphasise that the UNCITRAL Working Group did not want to limit the ML to any particular kind of interim measure. The Working Group only suggested the following measures: measures to conserve the subject matter of the dispute, measures to protect trade secrets and proprietary information, and measures to preserve evidence and pre-award

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906 Article 9 of the ML (and s. 9 in provincial acts): "It is not incompatible [emphasis added] with an arbitration agreement for a party to request, before or during arbitral proceedings, for a court an interim measure of protection and for a court to grant such measure."

907 Article 17 of the ML: "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."
attachments to secure an eventual award and similar seizures of assets.\footnote{H. Holtzmann & J. Neuhaus, \textit{A Guide to ML}, supra note 40, at 332.}

As explained in previous paragraphs, since 1975, common law courts (including those in Canada) have often ordered interim measures related to preventing transfer of assets, preserving the status quo, and taking and preserving evidence.\footnote{D. A. Redfern, "Arbitration and the Courts: Interim Measures of Protection—Is the Tide About to Turn?" (1995) 30 Texas Int'l L.J. 71, at 78.} Since 1985, Canadian courts have responded positively to parties' request to order interim measures, but have shown a considerable reluctance otherwise to intervene in arbitral proceedings.

In \textit{Delphi Petroleum Inc. v. Derin Shipping and Trading Ltd},\footnote{\textit{Delphi Petroleum Inc. v. Derin Shipping and Trading Ltd} [1993] F.C.J. No. 1270; 3 December 1993 (1995) XX Y.B. Comm. Arb. 274.} the Federal Court of Canada, refused to order interim measures that would secure the evidence of a witness, referring to article 9 of the federal \textit{Commercial Arbitration Act} and to the \textit{travaux préparatoires} of the ML. In particular, reference was made to the UNCITRAL Working Group's interpretation of articles 9 and 27 (on courts' assistance in taking evidence). In \textit{Delphi}, the plaintiff asked for an interim measure in order to secure the evidence of a third party which was material to the plaintiff's claim.\footnote{\textit{Ibid.}} The Court ruled that article 9 authorised it to make an interim award although the Court's actual decision was based on the \textit{travaux préparatoires} on article 27 of the ML.

that is the Commercial Arbitration Code. A dispute arose over a charterparty agreement which provided for arbitration of disputes in London. After the arbitration began, the Greek ship owners commenced an action and sought and obtained an interim order (garnishment) to secure funds for payments of demurrage costs for a cargo unloading delay caused by a Canadian charterer. The Canadian charterer then moved to set aside the garnishee order and to stay the action pending the London arbitration. The parties never disputed that they had agreed to arbitrate and that the action should be stayed. The disputed issue was whether the garnishee order should be set aside.

The British Columbia Supreme Court in Trade Fortune first analysed sections 9 and 17 of the BCICAA.\textsuperscript{913} The Supreme Court determined that “section 9 prevails over section 17 since section 9 clearly states that it is not incompatible with the arbitral proceedings for the plaintiffs to seek an order for protection in this court.”\textsuperscript{914} The Supreme Court did not elucidate why interim measures should be ordered by courts and not by arbitrators, if the parties had decided to arbitrate, if the arbitration was ongoing and if the governing law (section 17(1) of the BCICAA) empowered the arbitrators to order a party to take an interim measure of protection necessary in respect of the subject matter of the dispute. Instead, it focused more on the question as to whether a garnishee order could be included within the words “an interim measure of protection” in section 9. As in the Delphi case, in Trade Fortune, the British Columbia Supreme Court examined

\textsuperscript{71.}
\textsuperscript{913} S.B.C. 1986, c.14.
\textsuperscript{914} Trade Fortune, supra note 912, at 120.
the travaux préparatoires of the ML\textsuperscript{915} to conclude that the concept of protection in section 9 includes garnishment as a pre-judgment order to secure funds for payment of the future arbitral award. The Court held that a garnishment would not obstruct the arbitration and dismissed the application of the Canadian defendant to set aside the garnishing order but did order a stay of the court action in favour of arbitration.

The most recent case on the applicability of interim measures demonstrates the tendency to invoke section 9 to establish court jurisdiction to order interim measures without sufficient examination of the parties' intention to arbitrate. In December 1998, in Silver Standard Resources Inc. v. Joint Stock Co. Geolog\textsuperscript{916} the British Columbia Court of Appeal considered the availability of a Mareva injunction and a garnishment, ordered \textit{ex parte}, in the context of the court's obligation to stay proceedings pursuant to section 8 of the BCICAA. A dispute between a British Columbia company (Silver Standard Resources) and a Russian company (Geolog) arose over the repayment of loans and some other payments made by Silver Standard Resources on Geolog's behalf for exploring and exploiting gold and silver in Siberia. The framework contracts provided for arbitration in Sweden. Under a separate agreement, Geolog, on behalf of another unrelated Russian company, sold to the Canadian company, Cominco Ltd., some concentrate which was shipped to British Columbia. Cominco paid Geolog, on behalf of the other Russian company, only a part of the agreed price. When Silver Standard brought an action for the

\textsuperscript{915} In particular, the British Columbia Supreme Court referred to H. Holtzman & J. Neuhaus, \textit{Guide to ML, supra} note 40, at 332 and to R. Paterson and B. Thomson, Q.C., \textit{UNCITRAL Arbitration Model in Canada, supra} note 133 at 118.

repayment of loans in British Columbia, it also applied for and obtained an *ex parte* Mareva injunction against Cominco, in order to prevent Cominco from making further payments to Geolog, and a garnishee order requiring Cominco to pay monies owing Geolog into court. Geolog and Dukat (the other Russian company which was owed payment for ore concentrate it had supplied to Geolog) applied to set aside the Mareva injunction and garnishment and applied for a stay of court proceedings. The Chambers judge stayed the action pursuant to section 8 of the *BCICAA*. He found, however, that the Court had the power to maintain the Mareva injunction notwithstanding the stay, but held that the balance of convenience and justice between the parties and between the plaintiff and third parties\(^9\) favoured lifting the Mareva injunction. For the same reasons, that is, that the action was stayed and that the balance of convenience and justice did not suggest that there was an intention on Geolog’s part to avoid repayment of the loan to Silver Standard, the Chambers judge also released the garnishment order. Silver Standard appealed.

The Court of Appeal held that the Chambers judge erred in holding that the granting of the stay of proceedings under section 8 of the *BCICAA* meant that the garnishment order should be released\(^8\) and in equating the test for obtaining a Mareva

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\(^9\)Shaw J. (in chambers) explained that the dominant reasons for concluding that it was not just and convenient that a Mareva injunction issuewere: “(1) the monies sought to be attached by the injunction will be taken to Russia by Geolog in the ordinary course of business; (2) there is not evidence of any scheme by Geolog to avoid payment of any judgment that might be rendered in British Columbia; and that the evidence indicates a high likelihood that the rights of a third party, Dukat GOK, will be affected by the Mareva injunction.” See para. 62 in Justice Shaw’s judgement (in Chambers) in *Silver Standard*, *ibid.*.

\(^8\) *Silver Standard*, *ibid.*, para. 37.
injunction with that of obtaining a prejudgment garnishment order. The Court of Appeal chose the direction given by Trade Fortune, in which it was found that the court had jurisdiction to grant a garnishment order whether or not a stay was granted, and concluded that the garnishment before the judgment should not have been released. The Court of Appeal also pointed out the importance of distinguishing between the tests for the granting of a Mareva injunction (an equitable remedy) from the granting of a garnishment order (a statutory procedure). In the view of the Court of Appeal, a test of the balance of convenience between the parties with an emphasis on the intention of a defendant to remove its assets from the jurisdiction, should be used to decide on granting a Mareva injunction. It noted that this test was endorsed by the Supreme Court of Canada in Aetna Financial Services Ltd. v. Feigleman, and had been applied by many courts in British Columbia. The Court also went further and suggested that this test should be applied in the future with a “relaxed approach” which would give provincial superior courts the possibility of considering a wide variety of circumstances when deciding on the release of an injunction. On the other hand, the court has a wide discretion to decide to release a garnishment order “if it considers it just in all the circumstances” [emphasis added]. The Court of Appeal found that the defendants (Geolog and Dukat) had failed to show that it would be “just in all the circumstances” that the order be released. In

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919 Silver Standard, ibid., para. 38.
920 Trade Fortune, supra note 912.
923 Section 5(2) of the Court Order Enforcement Act, R.S.B.C. 1996, c.78.
conclusion, the Court of Appeal decided to restore the garnishment order and upheld the
decision of the Chambers judge setting aside the Mareva injunction.

In a number of cases courts in Canada were requested to order interim measures
even before the arbitral tribunal had been established or before the actual beginning of
arbitration.

In Relais Nordik Inc. v. Secunda Marine Services Ltd. the Federal Court (Trial
Division) held that mandatory injunctions might be granted even before the beginning of
an arbitration but such orders could not be used to obtain a court decision on the merits of
a dispute. In other words, the Court concluded that article 9 of the Commercial
Arbitration Code does not allow a court ordering interim measure to deal with the
substance of a dispute when a valid arbitration agreement exists.

In TLC Multimedia Inc. v. Core Curriculum Technologies Inc., the plaintiff,
TLC Multimedia Inc. sought an interlocutory injunction restraining CCT and its
employees and agents from representing themselves as authorised distributors and
resellers of TLC’s software products pending the final determination of an arbitrator in
Boston. Even though TLC issued an arbitration demand, the arbitration tribunal had not
been appointed by the time the interlocutory measure was sought, nor had the defendant,
CCT, filed its defence in the arbitration. The court relied on section 9 of the BCICAA which
provides that “it is not incompatible with an arbitration agreement for a party to

925 TLC Multimedia Inc. v. Core Curriculum Technologies Inc. [Unreported], 7 July 1998,
BC Supreme Court, Vancouver registry C982834.
926 BCICAA, R.S.B.C. 1996, c.233.
request from a court, before or during arbitral proceedings, an interim measure of protection, and for a court to grant that measure. The defendant argued that, according to the Distribution Agreement between the parties and the applicable law of Massachusetts, it would be more appropriate for the arbitral tribunal to decide on interim relief.

The Court found section 9 of the BCICAA to be sufficient ground for its jurisdiction, but decided not to grant interim measures. The conclusion that section 9 provides for court jurisdiction to grant interim measures was also found by the same Court in *Trade Fortune*. *Moreover, the conclusion was further supported by the English court decision in *Channel Tunnel Group v. Balfour Beatty Construction Ltd.* and the decision of the Supreme Court of Canada in the *BMWE v. Canadian Pacific Ltd.* case.*

As in the case of *Trade Fortune*, the Supreme Court in the *TLC* case relied on the ML travaux préparatoires as presented by Holtzmann and Neuhaus and concluded the court had jurisdiction to grant interim measures notwithstanding that the dispute has been submitted to arbitration in Boston. It then used a three-stage test to decide whether to

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927 BCICAA, *ibid.*, section 9.
928 *Trade Fortune, supra* note 912.
931 H. Holtzmann & J.E. Neuhaus, *A Guide to ML, supra* note 40, at 332: “Article 9 codifies the dual principles that, first, a party does not waive its right to go to arbitration by requesting (an obtaining) interim measures of protection from a national Court, and second, the national Court is not prevented from granting such measures by the existence of an arbitration agreement... The Working Group agreed that interim measures by a national Court were compatible with arbitration.”
grant the relief sought by TLC. The Supreme Court of British Columbia examined evidence that there was a serious question to be tried, that the applicant would suffer irreparable harm if the application were refused and that the balance of convenience favoured the granting of an interlocutory injunction. The Supreme Court then denied the application for the interlocutory injunction, finding sufficient evidence only for the first of the three-stage tests.

The few Canadian decisions on interim measures are disappointing for their sparse discussion and analysis of the power to order interim measures of courts and arbitral tribunals. In particular, ordering *ex parte* interim measures of protection might have been addressed more thoroughly. We still await clarification that under the ML courts have jurisdiction to order interim measures in support of arbitration. For example, interim measures of protection that are sought by an *ex parte* application cannot be ordered by the arbitral tribunal. By ordering *ex parte* measures the arbitral tribunals would also contravene the basic principle of arbitral proceedings—that is, the right of all the parties of the proceedings to be heard. It is also important to emphasize that interim measures of protection ordered by the arbitral tribunal cannot be appealed, while *ex parte* interim measures of protection ordered by the courts may be appealed and discharged before expiring.

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933 Reference was given to application of the three-prong test by the Supreme Court of Canada in *R.J.R.-MacDonald Inc. v. Attorney General of Canada* (1994) 111 D.L.R. (4th) 385.
As far as the enforcement of foreign arbitral awards is concerned, it should be mentioned that the Canadian courts have rarely used public policy as the basis of preventing recognition and enforcement of an award. In other words, the courts in Canada have given strong support to the principles of both the New York Convention and the ML. In *Murmansk Trawl Fleet v. Bimman Realty Inc.*, 934 Somers J. ordered enforcement in Ontario of a final arbitral award rendered in New York. The Court held that the fact that the plaintiff had failed to obtain confirmation of the award under New York law should not lead to a refusal to enforce the award. The Court's reasoning was based on the ground that, in order to secure enforcement of the award in another jurisdiction (in this case, Ontario) it is not necessary to obtain confirmations of the foreign award in the country where it was rendered. The Court also held that the public policy favouring arbitration and disfavouring delays in the enforcement of arbitral awards contributes to the efficiency of the arbitration system.

In *Schreter v. Gasmac Inc.*, 935 recognition was sought in Ontario of an arbitral award rendered in Atlanta, Georgia, and confirmed by a Georgia court. In responding to a procedural challenge, Feldman J. decided an interesting issue concerning the merger of an arbitral award into a court judgment. Specifically, the Ontario Court (General Division) found that it would be contrary to the ML to treat the confirmation of an arbitral award as

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creating a judgment that should be enforced as a foreign judgment. It is important to note that Feldman J. emphasised that

"[T]he purpose of enacting the ML in Ontario and other provinces was to "establish a climate where international commercial arbitration can be resorted to with confidence by parties from different countries on the basis that if 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 35.""936

The Court also rejected a second defence that enforcement should be refused on the grounds that the arbitral tribunal had denied a natural justice because it had not given its reasons for the award. Feldman J. did point out the importance of reasons for the award.937 The reasons for the award provide the basis for challenge of a factual or legal conclusion in certain circumstances, and they enable the parties to determine if the award deals with a dispute beyond the terms of the submission938 or if its recognition or enforcement is contrary to the public policy of Ontario.939 However, he ruled that it was not an issue for the Ontario court to decide since the absence of reasons was not regarded as a serious error by the Georgia court where the award was confirmed. Finally, Feldman J. dealt with the issue of public policy in the context of the argument that the awarded sum represented an acceleration of future damages. Confirming the American award, the Court emphasised that the arbitral award did not violate Ontario's basic notions of morality and justice. The judgment on the public policy issue by the Ontario Court is important for two reasons. The first reason is that the judgment in Schrecter confirmed

936 Schrecter v. Gasmac Inc., ibid., at 504.
937 Ibid., at 505.
938 Article 36(1)(a)(iii) of the ML.
the position that the public policy argument should be construed narrowly and applied only where enforcement could violate Ontario's "most basic notions of morality and justice." The second reason is that the court expressed reluctance to reopen the merits of an arbitral award on legal issues decided in a foreign jurisdiction where there had been no misconduct, reasoning that reopening the merits could bring the enforcement procedure of the ML into disrepute.

The public policy issue was considered by the Ontario court in *Arcata Graphics Buffalo Ltd. v. Movie (Magazine) Corp.* The award sought to be enforced included interest at a monthly rate which was, according to the respondent, contrary to the limits on interest rates stipulated by Ontario law. For that reason, the respondent argued, enforcement of such an award would be contrary to article 36(1)(b)(ii) of the ML and the Ontario legislation. It is interesting that the court upheld the award, explaining that an award is contrary to public policy only if it is contrary to the morality of the state in which it is to be enforced.

In *Kanto Yakin v. Can-Eng Manufacturing Ltd.*, the Ontario Court granted an application for recognition and enforcement of an award rendered in Tokyo and dismissed the arguments of the Canadian respondent. The argument against recognition

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939 Article 36(1)(b)(ii) of the ML.
941 *Schrechter v. Gasmac Inc.*, supra note 935; at 508.
was based on several grounds, including public policy, non-arbitrability of the dispute, and the Japanese claimant's failure to file a duly certified copy of the award. The defendant argued that, because of the Japanese claimant's fundamental breach of the agreement, the dispute was not capable of being settled by arbitration. White J. held that according to the principle of severability of the arbitration clause and following the Kompetenz-Kompetenz principle (article 16 of the ML), the tribunal, not the court, should rule on its own jurisdiction. White J. also held that international public policy favoured international commercial arbitration over national public policy and he, therefore, dismissed the claim that enforcement of the award would leave the respondent without any chance to get damages for the claimant's fundamental breach of the agreement.

In Food Services of America Inc. (Amerifresh) v. Pan Pacific Specialties Ltd., enforcement of an arbitration award rendered in the United States was sought in British Columbia pursuant to section 35 of the BCICCA and section 4 of the FAAA. Despite the fact that both parties to the arbitration agreement had expressly waived the right to oppose enforcement of the award, the respondent argued that enforcement should be denied for the following reasons: first, because the petitioner, not being registered under the British Columbia Company Act, was prohibited by section 337 of the Act from bringing enforcement proceedings in British Columbia; and, second, because the arbitrators made three separate errors which rendered the arbitral proceeding "not in

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944 [Unpublished] 19 February, 1997; B.C. Supreme Court (Drossos J. in Chambers)
945 S.B.C. 1986 c.14
946 Foreign Arbitral Awards Act, S.B.C. 1985 c.74.
947 R.S.B.C., 1979, c.59.
accordance with the agreement of the parties. The three errors were that the arbitrators had failed to deliver reasons for their award, had failed to decide the dispute in accordance with the law and had failed to follow the correct procedure following a challenge to the arbitrators' impartiality.

On the basis of a narrow interpretation of section 337 of the British Columbia Company Act, Justice Drossos concluded that the petitioner was not prohibited from bringing enforcement proceedings under the British Columbia Company Act. He found that section 337 of the Act applies only to proceedings brought by a foreign company to enforce a contract and that enforcement of an international arbitration award does not meet this test. He also held that the parties had waived the right to oppose enforcement and relied on the narrow scope for judicial intervention approved by the British Columbia Court of Appeal in Quintette Coal Ltd. v. Nippon Steel Corp.

"It is meet, therefore, as a matter of policy to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimise judicial intervention when reviewing international commercial arbitral awards in British Columbia. That is the standard to be followed in this case." 949

948 Section 36(1)(a)(v) of the BCICAA.

949 Quintette, supra note 855, at 229. Quintette Coal was the first major case where the Canadian courts were to determine this approach toward international public policy in the context of the setting aside of awards. Indeed, Quintette submitted an application on the grounds of s. 34(2)(iv) of the BCICAA, claiming that, in rendering an award which fixed the base price of coal, the arbitrators had exceeded the scope of the submission. Since this case has been discussed in great detail in several articles, the facts of the case and the BC Court of Appeal ruling on issues other than the judicial review of the award stricto sensu will be omitted. In short, the Court of Appeal upheld the lower court's decision to support the arbitration and to reject the application to set aside the award. In arriving at this decision In Quintette (1992) 7 O.R. (3rd) 608 (Gen. Div.), Justice Gibbs recalled Justice Blackmun in Mitsubishi [1985] 473 US 614 and noted the worldwide trend toward limited court intervention in arbitral proceedings.
Justice Drossos was also of the view that the failure to give reasons was not sufficient reason to refuse enforcement of an award. He quoted the decision in Schreter v. Gasmac Inc\(^{950}\) and concluded that a failure to give reasons for an award is not a reason itself to refuse the enforcement.\(^{951}\) In summary, Justice Drossos ordered enforcement of the award and ruled that the Court should defer to international arbitration awards unless the existence of one of the reasons for refusal of recognition and enforcement (under sections 35 and 36 of the BCICA\(A\)) is proved by the respondent.

3. Conclusion

Due to the inexperience of Canadian courts in dealing with complex international commercial disputes and the worldwide lack of experience in interpretation and application of the ML, Canadian courts were initially inconsistent in their interpretation of the provisions of the ML. However, since this initial phase, the decisions of Canadian courts have clarified most of the issues and confirmed their consistent strong pro-arbitration approach.

This section argued that there is a generally accepted pattern of interpretation of

\(^{950}\)Schreter v. Gasmac Inc.[1992]O.R. (3\(^{rd}\)) 608, (1992) DLR (4\(^{th}\)) 365 at 375: "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."

\(^{951}\)Justice Drossos here cited B. Casey, *International and Domestic Commercial Arbitration* (Toronto: Carswell, 1997) at 10-5: "The failure to give reasons is not a reason in and of itself to refuse enforcement of an award and the burden is on the respondent to show that it fits within one of the subsections of s.36."
article 8(1) of the ML favouring the granting of stays of court proceedings provided the basic requirements are met. It is significant that some courts used international legal precedents to interpret domestic arbitration (ML) provisions on the stay of action.\footnote{See, for example, \textit{Stancroft Trust Ltd. v. Can-Asia Capital Co.} (1990) 43 B.C.L.R. (2nd) 241, \textit{Queensland Sugar Corp. v. Hanjin Jedda} (1995) 6 B.C.L.R. (2nd.) 289.}

The cases on compatibility of arbitration and builders' lien legislation mentioned in this section reveal strong support for arbitration. Indeed, the courts in British Columbia,\footnote{\textit{Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.} (1992) 66 B.C.L.R. (2nd) 255.} Alberta,\footnote{\textit{Kvaerner Enviropower Inc. v. Tanar Industries Ltd.} [1994] 9 W.W.R. 228, \textit{Bird Construction Co. v. Tri City Interiors Ltd.} (1 May 1994) Edmonton Registry, (Alta, C.A.).} Saskatchewan\footnote{\textit{BWV Investments Ltd. v. Saskferco Products Inc.} (1994) 119 D.L.R. (4th) 577.} and Ontario\footnote{\textit{} have all found that an arbitration agreement is not null and void because of the mandatory nature of builders (construction) lien legislation. On the contrary, courts have held that domestic legislation should not deprive the parties of their right to arbitrate in international disputes. The ML and the UNCITRAL Working Group papers did not deal with this problem at all. Thus, the solution established by Canadian court practice is useful precedent for other ML adopting countries.

The compatibility of court-ordered interim measures with the ongoing arbitral proceedings has received very little attention in Canada. The cases analysed in this chapter illustrate that the position of the courts (especially those in British Columbia) is to rely on the jurisdiction given to them in article 9 of the ML.

Finally, it is important to note that the Canadian courts have quickly responded to
the implementation of the *New York Convention* and the enforcement provisions the ML favouring the recognition and enforcement of foreign and international arbitration awards. More importantly, Canadian court decisions reported since 1986 reveal no willingness to use public policy as a basis to refuse recognition and enforcement.

**B. Hong Kong's Search for Adequate Dispute Resolution Mechanisms**

The reception of the ML in Hong Kong was aimed at achieving at least three goals. The first goal was to modernise the legislative framework for international commercial dispute resolution because the amendments to the old English model proved to be inadequate to deal with new types of disputes and too complicated for foreign users. The second goal was to advance Hong Kong as a modern arbitration centre operating under internationally acceptable rules and within a legal framework which accommodates many legal cultures. The third goal was to create a law which would make Hong Kong distinct from the PRC and enable its independent operation during the transition period following the transfer of sovereignty. The following section analyses the courts' cooperation with arbitral tribunals and attempts to test how support from the judiciary facilitated achievement of the above-mentioned goals.

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1. Courts as Initiators of Legislative Changes

Reception of the ML in Hong Kong appeared to be a logical step in the process of legislative reform, providing the territory with the flexible legal framework necessary to maintain its status as the laissez-faire international financial centre of the world. As already explained, the number of international transactions involving Western and Asian partners had been increasing constantly. These transactions sometimes produced disputes and the courts would have been overloaded had not the HKIAC and *ad hoc* arbitration proven to be reliable alternatives. However, rebirth of the arbitration centre in Beijing (CIETAC), adoption of the ML in other countries and establishment of arbitration centres in other Asian cities have created competition for Hong Kong and HKIAC. These challenges to Hong Kong’s status as the leading centre for arbitration in Asia have been addressed in a timely manner by the courts of Hong Kong. The courts have given full support to arbitral tribunals and have initiated many changes and improvements to the *1989 Arbitration Ordinance* under which the ML was adopted. Accepting the ML as a “set of minimum standards and requirements”\textsuperscript{957} for arbitration procedure, the Hong Kong courts took the initiative in proposing new solutions to the legislature. A great sensitivity to the needs of business people, an understanding of the political environment and the ability to predict some of the impact which the transfer of sovereignty has had on international commercial arbitration are among attributes of the Hong Kong judiciary that will be illustrated below.

\textsuperscript{957} R. Morgan, *Hong Kong Ordinance*, *supra* note 704 at 456.
From the beginning, interpretation of the ML has been governed by the 1989 *Arbitration Ordinance*. Indeed, Part I on citation and interpretation provided in section 2(3) that arbitral tribunals and courts interpreting and applying the provisions of the ML should take into consideration the international origin of the ML and the need for uniformity in interpretation. In addition, arbitral tribunals and courts may refer to the documents specified in the Sixth Schedule of the 1989 *Arbitration Ordinance*. In other words, the ML is to be interpreted and understood in the same manner as other international conventions on arbitration, primarily the *New York Convention*. The directions given in the 1989 *Arbitration Ordinance* confirm Hong Kong’s commitment to the philosophy of the ML and re-emphasise the need for progressive harmonization and unification of international commercial arbitration.

(i) Broad Definition of the Term “International”

In order to secure better protection of foreign investors and give full support to the principle of party autonomy, the courts in Hong Kong accepted a very broad definition of “international disputes”. For practical purposes, all those disputes that the parties have decided to consider international are accepted and treated by the courts as being international. For example, in *Lucky-Goldstar International (H.K.) Limited v. Ng Moo Kee Engineering Limited*\(^\text{958}\) the High Court construed the parties’ decision to have

arbitration take place outside of Hong Kong to mean that they had decided on international arbitration. However, it was in 1991, in *Fung Sang Trading Ltd. v. Kai Sun Sea Products & Food Co. Ltd.* that the standards for “international arbitration” in Hong Kong were finally established. The case involved two Hong Kong companies, each with a place of business in Hong Kong. The arbitration clause incorporated in the sale contract provided for the application of Hong Kong law and for Hong Kong to be the place of arbitration. However, the court accepted the plaintiff’s argument that this should be seen as an international arbitration within the meaning of article 1(3) of the ML because a substantial part of the contractual obligation was to be performed in China. Again, in *Katran Shipping Co. Ltd. v. Kenven Transportation Ltd.*, the High Court felt that the fact that a substantial part of the obligation was to have been performed outside Hong Kong was a clear indication that the arbitration was “international.” The interpretation of “international” as given by the courts of Hong Kong follows the UNCITRAL Working Group’s explanation of the spirit of ML and gives undisputed support to international comity. It also shows a great understanding by the Hong Kong judiciary of international trends.


(ii) Interpretation of the “Agreement in Writing”: Broadening the ML Definition

One of the most important judges in Hong Kong in connection with the process of broadening the ML definition of “agreement in writing” was Neil Kaplan, who has been committed to the promotion of international commercial arbitration during his service as a judge of the High Court, later, as a co-author of books on Hong Kong court decisions on arbitration, and also as a practitioner, arbitrator and lecturer. Neil Kaplan initiated the modification of provisions relating to the written form requirement. He rightly pointed out that the outdated requirement serves well in old-fashioned economies where transactions are concluded in direct negotiations around the table but that it might become obsolete in modern times when most transactions are conducted electronically without direct contact by the parties. Kaplan insisted that the fear that removal of the requirement would lead to insecurity surrounding transactions was overstated.

Before the 1996 Arbitration Ordinance changed the requirement for written form, the courts in Hong Kong were not unanimous in interpreting article 7(2) of the ML. For example, in two 1992 shipping cases, the High Court of Hong Kong reached different decisions. In Pacific International Lines (PTE) Ltd. & Another v. Tsinlien Metals and Minerals Co. Ltd.\(^ {962}\) a dispute arose over the breach of a charter-party which was not signed by both parties. The charter-party included an arbitration clause. This was the first

\(^{961}\) Katran Shipping Co. Ltd. v. Kenven Transportation Ltd., ibid., at 176.

time that a court in Hong Kong had dealt with article 7(2) of the ML. The Court first examined the question of the existence of a charter-party when it was signed by only one party. It held that the additional documents (telexes) clearly confirmed that the two parties were negotiating a charter and that it could be concluded that they had agreed on the terms of charter and had accordingly, met the requirements of article 7(2).

Only two months later, in *Hissan Trading Co. Ltd. v. Orkin Shipping Corporation*, the High Court of Hong Kong dealt with an arbitration agreement incorporated in a bill of lading not signed by one of the parties. There were three charter-parties, all of them referring to arbitration in Japan. When the vessel carrying the gypsum from Thailand to Japan sank, a dispute arose in relation to a cargo claim made under a bill of lading. Even though the bill of lading incorporated a reference to arbitration on its face, the plaintiff claimed that the arbitration clause did not meet the requirement for written form since it had not been signed by both parties to the dispute. In interpreting article 7(2) of the ML, the High Court first referred to the documents of the Sixth Schedule, but then applied the test of the English case "Eleftheria." Accordingly, the Court held that it was within its discretion to grant a stay unless a strong cause for not doing so was shown by the plaintiff. Kaplan J. was satisfied with the arguments presented by the plaintiff and dismissed the defendant’s application for a stay on the grounds that because the bill of lading was not signed by both parties there was no written agreement.

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to arbitrate.

In *William Co v. Chu Kong Agency Co Ltd and Guangzhou Ocean Shipping Co.* 966 the High Court also ruled on an arbitration clause incorporated in a bill of lading and not signed by both parties. Even though it referred to the *Hissan* case, the court took into consideration letters exchanged by the parties and dated after the bill of lading. Holding that such a record of agreement was sufficient in the context of the written form requirement of article 7(2), the Court granted the stay.

In 1994, a number of cases indicated that the courts found the requirement for written form to be too rigid. In *Oonc Lines Limited v. Sino-American Trade Advancement Co. Ltd.* 967 the defendant objected to the plaintiff’s request for the High Court to appoint an arbitrator, the grounds for the objection being that the defendant had never signed the charter-party containing the arbitration agreement. The Court held that a record of communications exchanged by the parties constituted sufficient proof of their intention to arbitrate. In *Gay Constructions Pty.Ltd. and Spaceframe Buildings (North Asia) Ltd. v. Caledonian Techmore (Building) Limited and Hanison Construction Co. Ltd.* 968 the Court took the same position. Kaplan J. held that despite the fact that an arbitration clause was signed by one party and not by the other, the letters they exchanged provided sufficient


record of the contract and arbitration clause.

In *H. Small Limited v. Goldroyce Garment Limited*\(^{969}\) a different judgment was reached by the Hong Kong High Court. The plaintiff did not produce an alternative record of agreement but pointed to the implementation of the contract as proof of the existence of an arbitration clause. The parties had a previously established business relationship. The disputed arbitration clause was part of a purchase order sent to the defendant by the plaintiff. The defendant insisted that the contract and arbitration clause did not exist because he had not signed the purchase order. The plaintiff claimed that there was enough evidence that the requirements of article 7 of the ML had been met: first because a former employee of the defendant had told the plaintiff that the defendant had not signed the order and, second, because the defendant had delivered the goods. However, the High Court found the first argument inadmissible, as hearsay, and the second insufficient in the context of article 7. The High Court held that because of the principle of severability, the existence of an arbitration agreement had to be proved otherwise than by the existence of the main contract. In other words, even though the conduct of the parties might be sufficient to prove the existence of the main contract, it was not sufficient to confirm existence of the arbitration clause, which had to be in writing and signed by the parties or proved by some other written record of the agreement.

The rigidity of the "written form" requirement seems especially burdensome, because the acceptability of an oral form of the main contract is widely acknowledged.

However, for reasons of certainty and conformity with the provisions of Article II of the _New York Convention_, the "written" requirement has been retained by most adopting countries. The High Court of Hong Kong was the first to object to the rigidity of the stipulation of a written form of an arbitration agreement. According to retired High Court Judge Neil Kaplan, who had dealt with most of the related cases, the application of article 7(2) of the ML was the most difficult and frustrating problem which came before him.970 Referring to the _Small v. Goldroyce_ case, Kaplan summarised precisely what kind of peril the requirement may lead to in practice:

"Why if one party is sent a contract which includes an arbitration clause and that party acts on that contract and thus adopts it without any qualification, should that party be allowed to wash his hands of the arbitration clause but at the same time maintain an action for the price of the goods delivered or conversely sue for breach?"971

In response to the criticism stemming from the courts, the _1996 Ordinance_ liberalised the requirements. It should be noted, though, that much of the Hong Kong discussion of the "written" requirement focussed on how the ML itself was limited by the requirement of written form provided for by the _New York Convention_.972 The _New York Convention_ has just celebrated its fiftieth birthday. There is no doubt that international trade has changed significantly during these fifty years. In the same way that the creation of the ML has modernised various national regimes on international arbitration, further modification of the ML may enable the legal framework to keep up with changes in

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970 N. Kaplan, "Need for Writing", supra note 450, at 9.
971 N. Kaplan, _ibid._
972 See Article II (2) _New York Convention_: "The term 'agreement in writing' shall include an arbitral clause in a contract of an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."
international commerce itself. If other countries decide to follow Hong Kong in this direction (as Germany already has⁹⁷³) then it is possible to say that the new pattern is emerging not from the ML but from its modification.

(iii) Interim Measures and *Kompetenz-Kompetenz*

The balance between assistance to the arbitral tribunal and supervision of the arbitration process has been established in practice by the courts when ruling on ordering interim measures by the courts and arbitral tribunals (articles 9 and 17 of the ML) and on the application of the principle of *Kompetenz-Kompetenz* (article 16). Since the ML does not specify any interim measure which may be ordered by courts, in Hong Kong the issue is governed by the *Rules of the Supreme Court*.⁹⁷⁴ In general, the court has to be satisfied that the subject matter of the dispute will disappear or may deteriorate if the order is not made and that the measure which is sought is available under the Hong Kong Law.⁹⁷⁵

The position of Hong Kong courts with respect to courts ordering Mareva

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⁹⁷⁴ *Rules of the Supreme Court 1988*(Cap. 4) Order 29 at A106.

injunction was established in *Katran Shipping Co. Ltd. v. Kenven Transportation Ltd.*\(^7\) The case was also interesting because the court had first to decide on the applicability of the ML since both parties were Hong Kong companies with places of business in Hong Kong. The court considered that a substantial part of the charter-party had to be performed outside Hong Kong which satisfied the requirements of the ML article 1(3)(b)(ii) to treat arbitration as “international”. Accordingly, the court moved on to interpret articles 9 and 17 of the ML. It confirmed that a Mareva injunction was covered by the provisions of article 9 because it was intended to protect the plaintiff until the award was rendered by “reducing the risk of the amount of claim being dissipated or otherwise put out of the plaintiff’s reach before the resolution of the dispute.”\(^7\) It is noteworthy that the court also considered the interpretation of article 9 as provided for in Holtzmann and Neuhaus *Guide to the UNCITRAL Mode Law* to emphasise that the provisions should not be limited to any particular kind of interim measures.\(^8\) On the contrary, when the injunction was sought in support of arbitration outside Hong Kong, the court in Hong Kong did not follow interpretations of Holtzmann and Neuhaus but relied on English case law.\(^9\) Thus, in *Interbulk (HK) Limited v. Safe Rich Industries*\(^10\) the court held it had no jurisdiction to order an injunction in Hong Kong for pending arbitration outside Hong Kong despite the comments that article 9 should be interpreted

\(^7\) *Katran Shipping Co. Ltd. v. Kenven Transportation Ltd.*, supra note 960.


\(^10\) In particular, the court referred to the Court of Appeal in *Channel Tunnel Group v. Balfour Beatty* [1992] 2 W.L.R. 241.

to have extra-territorial effect.

It is significant that the courts in Hong Kong emphasise the importance of Kompetenz-Kompetenz but at the same time emphasise that the arbitral ruling on their own jurisdiction is not final but subject to judicial review. In Fung Sang Trading Ltd. v. Kai Sun Sea Products & Food Co. Ltd. the High Court, dealing with an application to appoint an arbitrator because the defendant had failed to do so, gave its interpretation of Kompetenz-Kompenenz under article 16(1) of the ML. Kaplan J. explained that the tribunal's decision on its jurisdiction given in article 16(1) of the ML is neither exclusive nor final but subject to immediate, but final, review under article 16(3). Moreover, Kaplan J. emphasised that the tribunal decision may be later examined in an application to set aside the award under article 34 of the ML. He then went on to review in detail the English law on Kompetenz-Kompetenz and the doctrine of severability, as partially recognised since Heyman v. Darwins and later re-examined in Harbour Assurance Co (UK) Ltd. v. Kansa General International Insurance Co. Ltd. Kaplan, J. concluded that


983 See Fung Sang ibid., at 99.


the approach in English law is that the jurisdiction of arbitrators is greater in cases governed by international law than in those governed by domestic law. Kaplan, J. also concluded that "the arbitrator can rule on the question as to whether he has jurisdiction but he cannot make a binding and final decision on that issue as the matter can always be taken to court either by direct challenge or at the setting aside or enforcement stage." 986 This position should not be seen only as a result of the impact of common law tradition in Hong Kong but also as an attempt to provide a maximum of protection for parties from the misuse of powers by arbitrators.

(iv) Enforcement of Foreign Arbitral Award When the ML Application is Excluded

It was explained in Chapter Three, section B, that Hong Kong did not adopt Chapter VIII of the ML which contains articles 35 and 36 on recognition and enforcement of foreign arbitral awards. These two articles essentially repeat the New York Convention. However, unlike the New York Convention, the relevant ML provisions are not subject to the reciprocity reservation. That means that national courts of countries adopting the ML will recognize and enforce any arbitral award, irrespective of the country in which it was made, if it meets the requirements for recognition and enforcement provided for in articles 35 and 36 of the ML. In practice, the difference is significant. A foreign award which might not be recognised and enforced in Hong Kong, because of the reciprocity

986 Fung Sang, supra note 982, at 102.
requirement, would have qualified for recognition and enforcement under articles 35 and 36 of the ML. Given its position as a party to the *New York Convention* by the reason of the United Kingdom’s accession in 1975, subject to the reciprocity reservation, Hong Kong could not override that requirement. This dependent position of Hong Kong was reviewed in length in *Tiong Huat Rubber Factory (Sdn) Bhd. v. Wanh-chang International (China) Company Limited and Wah-chang International (Hong Kong) Corporation Limited*. In this case, Kaplan J. clearly regretted such dependency and even indicated that the same result would come after 1 July 1997 and the transfer of sovereignty to the PRC. In other words, even though Hong Kong would remain a party to the *New York Convention*, the reciprocity requirement would also remain, since the RC acceded to the *Convention* in 1987 limiting the recognition and enforcement of foreign awards to those made in the territory of another contracting state.

2. Perils to Hong Kong Legislative and Judicial Independence

Since its adoption of the ML in 1993, Hong Kong—Special Administrative Region of the PRC, has reported more than fifty cases to the UNCITRAL bureau in Vienna. Case law in Hong Kong reveals that, before the July 1997 transfer of sovereignty,

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sovereignty, the ML worked as a framework for the resolution of international commercial disputes.\textsuperscript{989} Even though the majority of cases dealt with court orders for a stay of proceedings, there has been a remarkable increase in cases on the interpretation of article 7(2) which provides for the requirement for written (and signed) arbitration agreements.\textsuperscript{990} Since July 1997 another controversial issue related to the ML and the \textit{New York Convention} has arisen: the problem of recognition and enforcement of PRC arbitral awards in Hong Kong and \textit{vice versa}. Some writers report millions of dollars of business lost due to this problem.\textsuperscript{991} Because agreement has not yet been reached between the PRC and Hong Kong, whenever dealing with mainland clients Hong Kong legal firms have started to opt for Singapore as a venue.\textsuperscript{992} The following sub-section will deal with the most recent cases which reveal that most of the problems caused by the transfer of sovereignty are not being settled and that the reluctance of the PRC government to define its position may damage the reputation of Hong Kong as a centre which produces awards enforceable worldwide.

While Hong Kong was a British colony, PRC awards, when sought to be recognised and enforced, qualified before the Hong Kong courts as foreign awards.


\textsuperscript{990}Article 7(2) of the ML: "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.

\textsuperscript{991}K. Cooper & J. Moir, "Millions 'Lost' as Settlements Go to Singapore", \textit{South China Morning Post} (30 November 1998) 3.

\textsuperscript{992}Ibid.
Accordingly, the provisions of the *New York Convention* governed these awards. The same regime of recognition and enforcement is provided for in the ML. Even though the *Joint Declaration* and the *Basic Law* guarantee the application of common law principles in Hong Kong for 50 years after the transfer of sovereignty, they do not guarantee that Hong Kong and the PRC will be treated in international treaties as separate countries. Based on the relationship established by the *Joint Declaration* and the *Basic Law*, the PRC and Hong Kong became one and the same country on 1 July 1997. Therefore, it is possible to assume that paragraph 1 of Article I of the *New York Convention* of which China, too, is a member, does not apply to the recognition in Hong Kong of awards made in China, and *vice versa*. China has not adopted the ML and awards rendered in Hong Kong under the umbrella of both the *New York Convention* and the ML may be treated as domestic awards in Mainland China. Thus, the application of the *New York Convention* is specifically excluded in those cases involving the recognition and enforcement of awards and the importance of the ML adopted in Hong Kong is diminished.  

(i) The *Heibe* Case: Reliance on the “One Country, Two Legal Systems” Principle

As previously noted, there are still no guidelines from the Chinese authorities as to what regime should apply to enforcement of Hong Kong arbitration awards in

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993 Note that the ML articles 34-36 duplicate the basic principles on recognition and enforcement of foreign awards as set out in the *New York Convention*. 

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mainland China and CIETAC\textsuperscript{994} awards in Hong Kong. The Hong Kong Court of Appeal has, however, dealt, with this issue in the extraordinary case of \textit{Heibei Import & Export Corp. v. Polytek Engineering Co. Ltd.}\textsuperscript{995} Briefly, a dispute arose between Polytek Engineering Company (HK) and Hebei Import & Export Corporation (PRC) over equipment that Polytek delivered to the Chinese factory. CIETAC rendered an award in 1996 in favour of Hebei and Hebei applied in Hong Kong for the enforcement of the award. The leave was granted. However, Polytek applied to the Beijing no. 2 Intermediate Court to set aside the award. After failing to set aside the award in Beijing, Polytek applied to set aside the leave for enforcement in Hong Kong. The Court of Appeal in Hong Kong found the award in violation of the public policy of Hong Kong and decided on 16 January, 1998 to grant the request to set aside the leave for enforcement. At the time of this dissertation, the case was to go to the Final Court of Appeal.

While reiterating that “the relevant time to decide whether an award is a Convention award is the time when a party seeks to enforce it,”\textsuperscript{996} the Court of Appeal in \textit{Heibei} concluded that any CIETAC award rendered prior to 1 July 1997 should be treated as a Convention award in Hong Kong even if the application for it to be set aside or to be enforced has been made after the resumption of Chinese sovereignty over Hong Kong. In

\textsuperscript{994}CIETAC stands for the China International Economic and Trade Arbitration Commission, which has been operating under this name since 1989. CIETAC was formerly known as the Foreign Trade Arbitration Commission (FTAC from 1954 to 1980), or the Foreign Economic and Trade Arbitration Commission (FETAC from 1980 to 1989).


\textsuperscript{996} \textit{Ibid.}, at 668.
the case at issue, the Court of Appeal emphasised the facts that the CIETAC award had been rendered as early as 1996 and that the High Court of Hong Kong had granted leave for enforcement prior to 1 July 1997. It treated the CIETAC award as a foreign award and dealt with the request to set aside the leave for enforcement on the basis of the New York Convention. In reviewing the Polytek case, the Court of Appeal gave an important indication of how future cases might be treated. Hypothesising on the case of an award for which an application for recognition and enforcement in Hong Kong is made after the transfer of sovereignty, the Court of Appeal, pointing out that the Basic Law defines China as the “one country, two legal systems,” implicitly suggested that Hong Kong is still a separate legal system and that it would deal with the matter accordingly.997

(ii) The NG Case: The Heibei Guidance Revised

The implications of the transfer of sovereignty were also examined in NG Fung Hong Limited v. ABC.998 In this case, however, the application for enforcement of the

997 The Court of Appeal, in judgment delivered by Chan CJHC: ""However, it is quite clear that under the ‘one country, two systems’ concept, Hong Kong has a different legal system. If it is the intention of the Convention, as we think it is, to facilitate the recognition and enforcement of arbitral awards made in a territory where there is one legal system in another territory with a separate (or even different) legal system, it would seem that a purposive meaning should be given to the words ‘domestic’ awards’ in the second sentence of Art. I. In that case, it can be strongly argued that a Beijing award would not be considered as a domestic award in Hong Kong and hence the Convention should also apply to it after 1 July 1997.” [emphasis added] As reported in (1998) XXIII Y. B. Comm. Arb. 666 at 668-669.

998 Ng Fung Hong Limited v. ABC, High Court of the SAR Hong Kong, Court of First
CIETEC award was brought after the resumption of sovereignty by China over Hong Kong. Findlay J. of the Court of First Instance called Ms Teresa Cheng, an expert in arbitral law, to argue on the status of the PRC awards in Hong Kong after 1 July 1997. Relying on the opinion of Ms. Cheng, Findlay J. concluded that the CIETEC award could not be a Convention award because Hong Kong and mainland China had ceased, as of 1 July, 1997, to be separate parties to the New York Convention. Contrary to the interpretation of the “one country, two legal systems” concept suggested by the Court of Appeal in the Hebei case,999 Findlay J. restricted the application of section 2GG of the 1996 Arbitration Ordinance to awards rendered in Hong Kong. As a result, a party who wants to enforce a mainland award in Hong Kong can only do so by action on the basis of the award. It is important to note that Justice Findlay said that he had reached this decision with some regret and that he called it an “inconvenient” conclusion, obviously having in mind the possible consequences of this case on future cases with the same subject matter and the same facts.

3. Conclusion

In concluding this section on Hong Kong, it is possible to argue that not all the


999 That is, that in the context of the said principle it can be argued that a Beijing award would not be considered as a domestic award. As reported in (1998) XXIII Y.B. Comm. Arb. 666 at 669.
goals of the 1989 legislative reforms have been accomplished. However, the efforts of the Hong Kong government and judiciary are indisputable. In the first years after the adoption of the ML, Hong Kong emerged as a world-class centre for dispute resolution. But, its political circumstances changed creating problems which could not have been considered by the UNCITRAL Working Group when it drafted the ML. Being a common law territory, Hong Kong took advantage of the fact that its courts have an active role in creating legal rules and that precedents may be used to fill the gaps in statutes. In this context, the High Court of Hong Kong made a major contribution to the further development and modernization of the ML by applying the ML to domestic conditions.

It is also important to recall that English common law was exported from England to Hong Kong by the export of the English language, English lawyers, English teachers, English legal institutions and court structures. However, the law and lawyers in Hong Kong have become exposed to other ideas as well (English positivism met traditional Confucianism), different politics (Hong Kong was a British territory surrounded by the Asian states), different histories and different cultures. Thus, the absorption of the common law by the Chinese population in Hong Kong took a different direction than its absorption in Canada and elsewhere. For the same reasons, the development of the common law in Hong Kong differs from the development of the common law in England. After the transfer of sovereignty, the rationale for holding onto the common law disappeared. The removal of the British administration may lead to a restoration of Chinese traditions in Hong Kong. Recent developments in connection with the enforcement of Chinese arbitration awards in Hong Kong have re-affirmed some fears about the future of the rule of law and the ML in Hong Kong. However, the ML was not
created to resolve esoteric political problems, such as the status of Hong Kong within the PRC. The way in which the problem of enforcement of Chinese awards in Hong Kong and vice versa is resolved will, however, impact on the future of the ML. If enforcement under the ML and the New York Convention proves to be impossible, other countries seeking solutions inside the framework of the ML to their specialized legal problems, will discover that they must look elsewhere.

D. Russian Style Market Economy

The problem that Russia has experienced with the ML has been primarily with respect to the enforcement of arbitral awards. As already suggested in Chapter Three of the thesis, these enforcement problems started after the adoption of the ML. In a number of cases decided recently by the MICAC, the Russian party refused to fulfil the award voluntarily. It should be noted that there have been no reported cases of refusal by a Soviet party to voluntarily fulfil an award in favour of a foreign party when the award had been rendered by an arbitral tribunal (usually the FTAC) in the USSR.\textsuperscript{1000} On the other hand, the practice of refusal by a Soviet party to voluntarily fulfil an award rendered by an arbitral tribunal in the West was established during the cold-war era. The refusal by Russian courts to recognise and enforce western awards in Russia was also a part of the Soviet legacy.

\textsuperscript{1000}K. Hober, “Arbitration in Moscow,” \textit{supra} note 555.
1. *New Law v. Old Culture*

It is difficult to make an evaluation of the Russian experience in interpretation and application of the ML because, despite the fact that legislative progress has been made, little has been achieved in changing the old Soviet practice of distributing partial information and reports on court practice. As in the era of the Soviet Union, court decisions on arbitral proceedings appeared outside Russia heavily edited and without much detail. Institutions dealing with international commercial arbitration on behalf of the government are still very slow in opening doors to those interested in learning more about implementation of the ML. Decisions of the Russian courts usually appear in the Yearbook Commercial Arbitration. Those presented below illustrate the courts’ apparent lack of knowledge and experience and their inconsistent approaches to dealing with international trade disputes. They also show the extremely biased and parochial behaviour of Russian business people who often appear willing to exploit deficiencies in the Russian judicial system in order to avoid compliance with arbitration awards.

(i) *Denial of the Arbitral Tribunal’s Jurisdiction*

In a 1994 case before the Moscow City Court the plaintiff appealed to set aside an award, arguing that the tribunal was not competent to deal with the case because no
arbitration agreement between the parties existed. However, the Court upheld the arbitral decision, relying on the provisions of articles 7(2) and 16(1)(3) of the ML. Specifically, the Court held that article 16(1) of the ML established the principle of Kompetenz-Kompetenz and that in the said case the arbitrators, in the course of examining their jurisdiction, had ruled that the contract had been signed by a party who did not have the capacity to do so. It is interesting that the Court found that the contract was non-existent rather than invalid. It is important to note that the Moscow City Court did not have a problem in indentifying the primacy of the Kompetenz-Kompetenz principle, which had been recognised in the Soviet Era as well, but failed to address the problem of the validity of a contract in a conventional way. This suggests inexperience of the civil court judges in dealing with commercial matters.

In another case decided by the Moscow City Court on an application to set aside an award, one of the arguments was that the arbitral tribunal which rendered the award (the Tribunal of International Commercial Arbitration [TICA]) had no jurisdiction to deal with the dispute. The plaintiff’s application made two objections. First, that he was not a successor to the signatory who had gone into liquidation and, therefore, could not be said to have signed the contract containing the arbitration clause; and second, that the arbitration clause designated another tribunal to decide the issue (the Tribunal of Arbitration at the USSR Chamber of Commerce and Industry). The second argument was dismissed by the Court on the basis of the Statutes of the TICA which confirmed that the

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1001 Unpublished case reported as case no. 147 of 13 December 1994 decided by the Moscow City Court in (1997) XXII Y.B. Comm. Arb. 294.
1002 Unpublished but reported as case no. 148 of the Moscow City Court, 10 February
tribunal which rendered the award was the successor to the initially-designated tribunal. However, the first argument, that the tribunal lacked jurisdiction to render the award because the party who had signed the contract containing an arbitration clause had gone into liquidation, was a real controversy. Here the Court considered the plaintiff’s argument as an objection to the jurisdiction of the arbitral tribunal which should be invoked before the tribunal itself. The Court went on to examine article 16(2)(3) of the ML, repeated by article 16 of the LICA, which clearly determined that such a plea for the lack of jurisdiction of an arbitral tribunal should be raised not later than at the time of the submission of the statement of defence. The Court then noted that in the statement of defence before the tribunal the plaintiff had not made any reference to the lack of jurisdiction of the tribunal, even though he had argued that he was not a successor to the party to the contract. Acting as proposed by the UNICTRAL Working Group in its Fifth Report, the Court dismissed the plaintiff’s application to set aside the award. To reiterate, the Working Group suggested that a party who fails to make a timely plea on the grounds of the arbitrators’ lack of jurisdiction (as provided for in article 16(3)) should be precluded from the recourse against the award provided for in article 34 of the ML.

The above cases show Russian courts supporting the ML position that the arbitral tribunal may rule on its own jurisdiction (Kompetenz-Kompetenz), including any objection respecting to the existence or validity of the arbitration agreement. Moreover, Russian courts have shown considerable understanding of the time limit for a plea that


1004 Fifth Working Group Report, ibid., para 51.
the tribunal lacks jurisdiction. After considering the courts’ application and interpretation of Kompetenz-Kompetenz in the Soviet era, their understanding of article 16 of the ML, that the tribunal has complete freedom to rule on its jurisdiction, should not come as a surprise.

(ii) Public Policy Arguments Invoked by Parties

In Chapter Three, section C of this thesis it was explained that the public policy concept had been widely exploited by Soviet parties and courts to avoid enforcement of awards against Soviet companies. In those cases the Soviet courts relied on a vague and broad statutory interpretation of the public policy concept. One of the objectives of the new Russian legislature—to bring more predictability to the legal system—includes a narrowing of the concept of public policy. The following two cases illustrate divergence in interpretation of public policy by Russian courts and business persons.

One of the reasons for setting aside an award may be the lack of procedural fairness. This was claimed before the Moscow City Court in 1994, where the plaintiff argued that the arbitral tribunal had violated the principle of procedural fairness by refusing to treat the parties equally. Moreover, the plaintiff insisted that such treatment of the parties constituted a violation of public policy. However, the court dismissed the application to set aside the award and held that such a procedural infringement had no

relevance to the notion of “public policy.”

Violation of public policy was also advanced as an argument for setting aside an award in a 1995 case decided by the Moscow City Court. The plaintiff applied to set aside the award ordering him to make a payment in foreign currency. Courts in developing countries (including former socialist countries) often use payment in foreign currency as the means of avoiding the effects of high domestic inflation. In practice, courts enforcing such awards would modify them by ordering the payment amount to be converted into domestic currency at the rate of exchange applicable on a stated date. Not surprisingly, the Moscow City Court held that an award to make a payment in foreign currency was not a violation of public policy and, accordingly, dismissed the application.

2. Rule of Law and Problems with Infrastructure in Russia

The real problem with interpretation and application of the ML in Russia today is related to a misunderstanding on the part of many business people of the rule of law. An additional problem is that there is inadequate infrastructure to support efficient operation of an international commercial arbitration system and, in particular, to enforce arbitration awards against Russian parties.

As previously suggested, in former CMEA countries there was hardly any need for judicial enforcement of an arbitral award and there were no reported cases of refusal

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by a Soviet party to fulfil voluntarily an award in favour of a foreign party when that
award has been rendered (by the FTAC) in the USSR.\footnote{K. Hober, “Arbitration in Moscow,” supra note 555.} According to the \textit{Moscow Convention} it was inconceivable that government foreign trade corporations would refuse to follow the decision of a Socialist arbitration tribunal.\footnote{F. A. Orban III, supra note 722.} However, article 58 of the \textit{Fundamental Principles of Civil Procedure Legislation} of the USSR does state that awards of an arbitration tribunal will be enforced in the same way as those resulting from a court judgment.\footnote{\S 40 (2). \textit{Execution of Award of the Reglement} of the Arbitration Court, says:

Awards not executed voluntarily within the specified period shall be executed in accordance with law and international agreements.}

(i) Enforcement of Foreign Awards in Practice

Problems with the enforcement of foreign arbitral awards in the Russian Federation arose after adoption of the ML. Several aspects of the enforcement of arbitral awards in the former USSR are worthy of note. In some recent cases decided by the MICAC, previously briefly discussed in Chapter Four of the thesis, the Russian entity refused to fulfil the award voluntarily. In the so-called \textit{Alfa} case, the MICAC rendered an award against the Russian party, who then refused to pay $193,850 to the California based Vandy Corporation. It has already been described how the import director of the
Alfa Group argued that the MICAC decisions did not oblige him to pay the debt because the MICAC "has no power, and besides there is no mechanism for execution." This is a clear example of the disconnection between the law as written and the law as applied. It suggests that there are business people in Russia who simply do not understand the changes which occurred in the legal system of the country. Their behaviour is based on the assumptions that the country still lacks institutions of enforcement and that they do not need to obey the rule of law.

As pointed out earlier in Chapter Four, there have been no reported cases of enforcement of a foreign arbitral award in the USSR. In summary, awards rendered by tribunals of other CMEA countries were invariably performed voluntarily by Russian entities. As already explained in Chapter Four, difficulties in the enforcement have appeared with respect to awards made in Western arbitration centres. Two awards decided by an arbitral tribunal in Stockholm in the Subway Sandwich Shop case have given rise to concern on the part of Western investors. The first award was rendered against the Russian party in January 1997 and upheld by the City Court in St. Petersburg. Then in 1998 the Supreme Court of Russia upheld an unrelated arbitration award against the Russian party. None of the awards have been enforced. The problem in the Subway

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1010 See the reports of E. Arvedlund, "Court Decision No Help to Tea Trader", The Moscow Times (24 July 1997) and "Court Speaks, but Who Obeys?," The Moscow Times (16 September 1997); online: LEXIS, News Library, Mostms file.
1011 See Chapter Four and the heading "Recognition and Enforcement of Arbitral Awards, at 244-246 of this thesis.
1012 Subway Ltd. Company v. Minutka reported as "Subway Sandwich Franchisee Has Had His Day in Court, Now What?" Russia & Commonwealth Bus. L.Rep. (7 May 1997) also in The Moscow Times (15 May, 1998) was discussed in detail in Chapter Four at 244-245.
Sandwich Shop case does not appear to be because of the new Russian laws, “On Bailiffs” no. 118-FZ, and “On Enforcement Proceedings” no. 119-FZ, which were enacted in December 1997, but is due to the fact that Russia has no money to implement a system of bailiffs and, consequently, has not even started to organise one. This case shows that unless there is a complete realization of the legal texts, it will be difficult to change legal culture of Russian business people.

(ii) Aerostar and the New York Convention Enforcement Scheme

In the second case, that of Aerostar, a series of complex proceedings before the Stockholm arbitration court resulted in three awards being rendered in favour of a Canadian company, IMP Group Ltd. The difficulty of obtaining enforcement in Russia of these three Stockholm international arbitration awards frustrated the Canadian company so that it applied for enforcement in Canada. The Canadians never collected the first two awards, valued at 3.5 million and 4.5 million US dollars, respectively. The third award rendered in November 1997, was for 22 million US dollars in damages. As in the Alfa case, one Russian manager, Konstantin Gerchin, relied on the weakness of the Russian

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1015 S. Rao, supra note 782.
enforcement mechanism: “We did not pay the sums awarded by the Swedish court before, and we do not plan to pay this time either.”

Then on 23 March 1998 IMP obtained a decision from a Quebec court to allow the seizure of a Russian Airbus jet with 50 passengers at Montreal’s Dorval airport. In order to effect release of the Airbus, the Russian party, Aeroflot, immediately paid 1.4 million US dollars and promised to pay the rest by 3 April 1998 to IMP Group Ltd. of Halifax, Nova Scotia. Indeed, the balance of twenty million dollars was paid in April 1997, but commercial relations between Canada and Russia have been cool since the seizure of the plane in Montreal.

3. Conclusion

Since 1989 Russia is living through an extraordinary period of political, economic, social and cultural change. The rejection of the Soviet policy and Soviet law

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1016 S. Rao, *ibid.*, section 1337.


1019 See M Fisher, “Mother Russia is Closed for Business,” *The Ottawa Sun*, (28 August 1998) at 13: “When the two leaders [Chretien and Yeltsin- added] have met again here last autumn, Chretien attempted to bring up the sordid story of a Nova Scotia company involved in Moscow’s Aerostar Hotel ... Yeltsin publicly humiliated his guest by stating the dispute was of no consequence and that Canadians should stop whining and either invest lots of money in Russian like other western nations or get lost.”
and the search for democracy, rule of law and pluralism include many problems along the road which affect all aspects of social life. In this regard, the transformation of rules on arbitration and the reception of the ML provide the opportunity for investigating the suitability of the received law to the local infrastructure—primarily, to the structure of the court system, operation of the FTAC and education and experience of judges and lawyers involved.

The practice by Russian parties of ignoring foreign arbitral awards and the inability of the Russian court system to enforce international (and domestic) awards could easily diminish the importance of article 35 of the ML as reproduced in *LICA* and could further discourage foreign companies from international trade with Russia. It also emphasises the fact that adoption of uniform laws will not necessarily lead to uniform application of the laws. Application depends not only on the law itself but also on the legal culture and behaviour of those involved in those relations regulated by the law. In the Russian case, the party refusing to fulfil its obligations stipulated in the award relied on the fact that an effective bailiff system had never existed in Russia.

E. Conclusions

The case studies presented in this chapter show that the courts of Hong Kong and Canada have accepted their new role in relation to arbitral proceedings which has been established by the ML. Hong Kong High Court judges, in several cases, expressly
confirmed this. Probably the most explicit in this respect was Kaplan, J. who pointed out in *Guandong Agriculture Company Limited v. Congra International (Far East) Limited*,\(^{1020}\) that some of the powers conferred on the courts by the legislature were excessive. His comments were as follows:

"It is plain that the whole tenor of the Model Law is to restrict to a minimum the part which the courts have to play when parties have agreed to arbitration. It is also plain, as I hope I have demonstrated, that the courts are increasingly reluctant to become involved in disputes between parties to an arbitration agreement. That judicial reluctance, however, has been obstructed by the legislature which has left it open to the courts to examine (often in some detail, I am afraid) the nature and extent of the dispute. That seems to me to be a wholly unsatisfactory state of affairs."\(^{1021}\)

Although there have been some cases in which the courts in Canada appeared uncertain about their new role in connection with international arbitral proceedings, they have, for the most part, accepted the limits placed on their jurisdiction and given determined support to the ML. Henry J., in *Rio Algom Limited v. Sammi Steel Co. Ltd & Sammi Steel Canada Inc.*, concluded:

"What appears to me of significance is that the Model Law reflects an emphasis in favour of arbitration in the first instance in international commercial arbitration to which it applies... The courts in matters of contract interpretation as such are limited in that they do not appear to have a role in determining matters of law or construction; jurisdiction and scope of authority are for the arbitrator to determine in the first instance, subject to later recourse to set aside the ruling or award."\(^{1022}\)

Judges in Canada have understood the purpose and the spirit of the ML and have

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\(^{1021}\) *Ibid.*, at 133.

understood that adoption of the ML was aimed at achieving consistency in the law and practice of other trading countries. This was confirmed in *Quintette*,\(^{1023}\) when the British Columbia Court of Appeal referred to the international trend towards prioritising international arbitration of commercial disputes over litigation. Case reports show that, just as envisioned by UNCITRAL, inconsistency in practice has been diminishing over time. Another UNCITRAL prediction being borne out by time was mentioned in Chapter Two. It is that the ML, even if adopted in its original form with no changes at the legislative level, will in its practical application develop characteristics unique to the adopting country and will do so within a few years of its adoption.

There have been significantly fewer cases in Russia than in Canada or Hong Kong but from what cases there have been it is clear that problems with the application of the ML have mainly arisen mainly because the Russian court system is not equipped to deal with the reform and Russian business people have not been prepared to accept the new model of dispute resolution. Both judges and business people might be finding the new legal culture brought about by the ML to be too radical a change from the one to which they were accustomed.

Finally, it is possible to conclude that adoption of the ML encouraged the development of arbitration in Canada, Hong Kong and Russia, but that the adoption itself could not overcome all of the deficiencies in the legal framework which surrounds international commercial arbitration.

Canada revolutionised its statutes on arbitration when it ratified the *New York..."
Convention and adopted the ML. However, it is the Canadian courts’ interpretation and application of the basic principles and provisions of the ML, in particular the acceptance of limited court jurisdiction, Kompetenz-Kompetenz and the primacy of party autonomy, that have improved Canada’s position as an arbitration-friendly venue.

Recent modifications of the ML in Hong Kong introduced by the 1996 Arbitration Ordinance and the court practice in Hong Kong show how the ML can contribute to the development of international trade. On the other side, the flexibility of the ML proved to be insufficient to overcome significant political changes in Hong Kong, such as the transfer of British sovereignty. Perhaps the greatest problems of arbitration in Hong Kong will be those arising from enforcement of Hong Kong awards in China and vice versa. If the trend to recognise Chinese awards in Hong Kong as domestic awards continues, and, accordingly, if the New York Convention becomes inapplicable in this context, it is possible to conclude that one of the greatest advantages of arbitration in Hong Kong (ease of enforcement) will simply diminish.

Finally, the analysis of interpretation and application of the ML in Russia leads to the conclusion that inadequate infrastructure can sometimes make the ML absolutely unworkable. The LICA is an unsatisfactory arbitration law for many foreign investors because of the inadequate judicial assistance it provides for arbitrators. In other words, the LICA and the ML can not cure problems which exist outside of arbitration. Delay in solving these problems in Russia may block the development of not only international commercial arbitration but also international trade and investment in the country. The introduction of bailiffs is an encouraging change, but more changes such as this need to take place.
Despite some of the previously mentioned threats to the development of arbitration, and after having examined the process of interpretation and application of the ML in the three countries, it is still possible to conclude that courts in all three countries have made significant contributions to the harmonization and unification of the law on international commercial arbitration. In this sense, the ML has met the original expectations of the UNCITRAL.
CHAPTER SIX: Conclusions

This thesis has examined the reception of the UNICTRAL Model Law on International Commercial Arbitration in three adopting countries—Canada, Hong Kong and Russia. It started from the premise that as international trade develops the need for efficient commercial dispute resolution becomes crucial. Many countries and international organizations have made efforts to encourage the use of arbitration. At the national level, states have developed their own systems of arbitration as an alternative to litigation. Accordingly, they have enacted many laws on international and commercial arbitration. At the transnational level, international treaties, principles and rules have been created in order to establish a harmonious, reliable and widely acceptable set of procedural rules for dispute resolution. There is increasing worldwide familiarity with international commercial arbitration. However, such intense development has given rise to much controversy. This thesis has focused on the controversial issues surrounding only one of these international arbitration documents—the ML on international commercial arbitration.

Chapter One re-iterated the main goals of the creators of the ML—to set up a suitable standard for harmonization of arbitration laws at the international level and for the reform of arbitration laws at the national level—as the general hypothesis of the thesis. When the general hypothesis of the flexibility and workability of the ML was initially articulated by UNICTRAL, it was difficult to predict all the practical consequences that would surround the reception of the ML in individual countries.
Specifically, it was difficult to predict the interaction between the ML and the pre-existing legal systems of adopting countries. The ML has now been in existence and applied worldwide for more than a decade. This thesis has looked into the past and present status of the ML and hypothesized on its future, considering its operation within different political, economic, social and legal systems. In order to test these premises, the thesis has attempted to answer, and I believe does answer, the following set of questions on the ML itself and on its operation in adopting countries:

1. What is the nature of the ML? What kind of international document is it? What kind of law does it propose? Is the ML a global law in its form and content?

2. Was arbitration formerly commonly used in Canada, Hong Kong and Russia for resolution of commercial disputes? If so, what was the legal framework of arbitration before adoption of the ML? Were any of the basic principles of the ML (party autonomy, limited court intervention, independence of the arbitral tribunal and procedural fairness) part of the pre-existing legal systems? In particular, how had national courts treated arbitration?

3. What was the relationship between the domestic laws on arbitration and international conventions before adoption of the ML? What were the effects (if any) of the unification of laws at the international level on the legal frameworks of arbitration in Canada, Hong Kong and Russia?

4. What were the main legislative goals surrounding the adoption of the ML in these countries? What were the methods of adoption? More
specifically, did a particular country modify the original text in any way? If so, to what extent did the changes reflect the legal culture of the adopting country? Did any of the modifications change the balance of the basic principles of the ML?

5. Should UNCITRAL consider modifications to the ML as a result of the experiences with its adoption by individual states?

Chapter One of the thesis, dealing with the scholarly context of this study, recognised that interest in arbitration is not limited to lawyers. Indeed, arbitration has been studied by sociologists, anthropologists, political scientist and historians, to name but a few. Most recently, however, arbitration has been studied in the context of the globalization, unification and harmonization of laws, on one hand, and the development of an international legal culture, on the other. The question as to whether the ML is a legal transplant required an overview of its creation, an analysis of its nature and basic principles and a test of its flexibility and workability. Whether adoption of the ML results in changes to the legal culture in the adopting countries required an inquiry into the culture of international commercial arbitration and then a study of the legal cultures of particular countries. All these questions and concepts were discussed in Chapters Two and Three of the thesis.

In Chapter Two, it was explained that the ML arose from an unprecedented process of drafting which involved experts from all legal systems and legal cultures. It was further disclosed that the creation of a new international framework for commercial arbitration was initiated by African and Asian countries (the AALCC), and that the recommendation that countries consider the ML came from the United Nations. After a
descriptive introduction, this chapter moved on to analyze the relationship between courts and international tribunals as established in the ML—that is, in the context of affirmation of party autonomy, limited court jurisdiction, extended powers of arbitrators and strengthened procedural fairness. Here, Chapter Two made an attempt to show that the novelty of the ML was not in inventing new principles but rather in incorporating these principles which had already existed at the national level in various countries into one body of law. The ML made these four principles the legal foundations of international commercial arbitration and its own distinctive culture. In this context, Chapter Two concluded that the ML, by virtue of its universal origin, moved beyond the limits of a particular national legal culture to become the basis for the development of an international arbitration culture.

Chapter Three introduced the case studies, presenting the legal framework for arbitration in Canada, Hong Kong and Russia before the adoption of the ML. Such an in-depth analysis was necessary in order to determine the extent to which the ML modified pre-existing statutes on arbitration and the related dispute resolution culture. This chapter focused on the relationship between arbitral tribunals and courts as provided for in national statutes and as exercised in practice. Accordingly, an overview was given of several court decisions on arbitration. This chapter also indicated that the three countries had developed different legal systems and, accordingly, different systems of commercial dispute resolution. It revealed that even when their statutes derived from the same origin (Canada and Hong Kong both received English common law and emulated the English Arbitration Act 1889) the countries established different solutions and initiated different practices. However, none of the three pre-existing systems incorporated the basic
principles of the ML.

With the exception of Quebec, Canada relied on a traditional English common law attitude towards arbitration as established in the English Arbitration Act 1889. Quebec, which did not adopt the ML, but modernized its statute along the lines of the ML, relied on the French civil law tradition. Before England expressed interest in modernizing its arbitration system, Hong Kong showed a willingness to follow a path of modernization on its own. More significantly, Hong Kong was determined to respect the Asian tradition of conciliation, as opposed to litigation, as much in that it considered adoption of the ML even before it was accepted and proposed for adoption by the United Nations. Analysis of the development of arbitration in Russia and the USSR, on the other hand, reveals that the country had struggled for decades to modernize its complicated tripartite quasi-arbitration system in which, it was explained, forms of arbitration (courts of conciliation, arbitration courts and the FTAC) were a type of judicial system with mandatory procedural and substantive rules including no respect for party autonomy. All these attitudes were explained in Chapter Three.

On the basis of an extensive analysis of these three pre-existing legal systems, Chapter Three established two hypotheses tested in Chapters Four and Five. The first hypothesis was that differences in legal systems largely determined particular methods of implementation of the ML. The second was that differences in implementation and application came about as a consequence of differences both in previous practice and in the method of adoption at the legislative level.

Chapter Four examined the extent to which characteristics of the pre-existing legal systems determined the methods by which the ML was received. The basic
legislative goals underlying adoption were identified; then, the methods by which the ML was introduced were analyzed. This chapter revealed that most of the modifications effected were exactly those envisioned by the UNCITRAL Working Group. For example, in all three countries different authorities were designated and empowered to assist arbitral tribunals. All three added conciliation as a means of resolving disputes which would otherwise have gone to arbitration and they all extended the powers of arbitrators to include provision in their awards for costs and interest.\textsuperscript{1024} Two of the countries provided for the ML to apply to both domestic and international disputes.\textsuperscript{1025} It was argued that the significance of even predictable changes like these should be examined and evaluated in the context of the pre-existing legal framework, because even a seemingly minor modification to the ML could represent a significant departure from the previous statutes and practices.

Chapter Four also argued that certain modifications went beyond those envisioned by the UNCITRAL Working Group. For example, Russia and Hong Kong changed article 1, extending the definition of “international” arbitration in order to make the law applicable to a wider range of disputes. For the same reason, Hong Kong omitted the word “commercial” from the same article. Some Canadian provinces modified the rules regarding the application of the substantive law of arbitration, in order to avoid pitfalls in the application of conflict of laws rules. Hong Kong recently modified its Ordinance to modernize article 7 and to make the written form requirement more flexible.

Based on modifications discussed in Chapter Four, Chapter Five concluded that

\textsuperscript{1024} See provincial statutes in Canada.

\textsuperscript{1025} Federal \textit{Commercial Arbitration Act} in Canada, \textit{supra} note 616, and Hong Kong's \textit{1996 Arbitration Ordinance}, \textit{supra} note 709.
diversities in adoption of the ML might appear at the law-making level. Practice was shown to be another source of diversity.

Chapter Five concluded the case studies with an examination of court decisions on arbitration in Canada, Hong Kong and Russia. These case studies revealed that each country undertook legislative changes after an examination of the problems which the ML created in practice. For example, after problems arose with respect to the interpretation of provisions for the appointment of arbitrators, British Columbia changed its statute to avoid the establishment of a tribunal exclusively of arbitrators having the same nationality. Initially, Hong Kong found interpretation of the written form requirement to be problematic. Complaints from the bench were given serious consideration by the legislature and, in 1996, a solution was proposed. For the Russian courts, the recognition and enforcement of foreign arbitration awards has been a problem that the State Duma has attempted to solve by passing a law on bailiffs. Finally, the case studies included in Chapter Five have revealed that there are now fewer instances of inconsistency in the interpretation of the ML than there were initially. The explanation stems from the analysis presented earlier. That is, in the early days of adoption the influence of practice during the pre-adoption period was intense, and the courts looked to old case law for solutions. However, a new body of case law developed over time and more recent court decisions on arbitration, which were published nationally and worldwide provided judges with new ideas and direction.

For all the above stated reasons, this thesis argues that the ML is a project of harmonization, rather than globalization or unification. The ML aims to achieve similarity, not identity, in the laws in adopting countries. In this context, the thesis argued
that uniformity cannot be achieved through a form of flexible patterns and voluntary adoption, with the option to add, delete or modify any provision of the law. On the contrary, uniformity requires adherence to a strict and rigid form. The case studies undertaken in this thesis have proved that the ML is a suitable standard for legal reforms in diverse contexts because it is flexible and compatible with the pre-existing body of international rules on commercial arbitration and with the national legal systems of adopting countries.

The ML is not a transplantation or duplication of foreign law, but a project of reception. Unlike transplantation, reception signifies changes not only at the law-making level but also at the levels of interpretation and application. By changing the law, it also promotes a change in legal culture and initiates institutional and procedural changes.

The ML is a suitable method of legal reform beyond its own scope because it envisions a dynamic project, allowing modifications whenever necessary to keep up with changes in the internal and external frameworks of international business. Unlike changes to international conventions, changes to the ML are to be directly initiated and enacted at the national level.

Variations in the application and interpretation of the ML do not mean that the ML cannot bring about the harmonization of laws. In other words, the practice of countries which have adopted the ML serves as a guideline to those considering future reform of their laws on arbitration. Modifications of the original text introduced by one adopting country might become a pattern for other countries considering the ML. Thus, the ML will serve as a basis for creativity, rather than representing the imposition of a new, and perhaps inappropriate, legal culture.
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