

JUDICIAL RESPECT FOR INTERNATIONAL COMMERCIAL ARBITRATION
AGREEMENTS IN CANADIAN COURTS UNDER THE NEW YORK
CONVENTION AND UNCITRAL MODEL LAW

by

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ABSTRACT

In Europe of the Middle Ages, there existed an autonomous regime of truly private international business law based upon the customs and usages of merchants, the Law Merchant, administered in lay tribunals. The courts and legislators usurped the jurisdiction of the lay tribunals, and subverted the Law Merchant to municipal law. Arbitration was similarly subverted to municipal courts and strict legal controls. The courts continued to guard their jurisdiction jealously into the 20th century, when nations came to realize the inadequacy of national legal systems for international business problems, and the desire of business to escape parochial legal concerns and municipal courts. Canada adopted the New York Convention and UNCITRAL Model Law in 1986, which maximize party and arbitral autonomy and restrict court interference with arbitration. These new laws would permit the resurrection of an autonomous regime of international commercial dispute settlement largely divorced from national law and court controls, if the courts cooperate. This thesis is the first comprehensive, up-to-date study (of which I am aware) of Canadian case law on arbitration in the context of the history of autonomous commercial dispute resolution from the its zenith in the Middle Ages through its nadir, to its present attempted resurrection. This thesis shows that the courts of Canada continue to guard their jurisdiction jealously, finding the means in old notions and precedents to justify their refusal to cede jurisdiction to arbitrators. The courts have ignored the policies underlying the new laws, have failed to apply international precedents and standards, and have continued to apply notions and precedents from an era hostile to arbitration.

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I. INTRODUCTION

International commercial arbitration has become the dispute-resolution means of choice for international businesspersons¹. International commercial arbitration may be defined as the process by which a dispute or difference, between two or more parties engaged in international commerce, as to their mutual legal rights and liabilities, is referred to and determined judicially and with binding effect by one or more persons (the arbitral tribunal) instead of by a court of law, pursuant to an agreement entered into by the parties.² The tribunal derives its jurisdiction and powers from the agreement of the parties and the law of the place where the arbitration is held.³ The extent to which the parties may choose the laws which govern their legal relationship, and whether the tribunal must apply the laws of any State or State, vary from State to State.⁴

¹ Many authors have expressed this. e.g., The Hon. Justice Kerr, "International Arbitration v. Litigation" (1980) Jo. Bus. L. 164; Redfern & Hunter 19; M. Garavaglia, "In Search of the Proper Law in Transnational Commercial Disputes" [1991] 12 N.Y.S. Sch. J. Int'l & Comp. L. 29, 30 (hereinafter cited as "Garavaglia"); W. Hancock, "Corporate Counsel's Guide to Commercial Arbitration" Alternative Dispute Resolution 2.001 (1989); René David, Arbitration in International Trade 10 (1985); T. Carbonneau, "Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce" (1984) Vol.19 No.3 Texas Int'l L. J. 33, 34 (hereinafter cited as "Carbonneau 1984").

² See, generally, Mustill & Boyd, The Law and Practice of Commercial Arbitration in England, (1982); Redfern & Hunter, Law and Practice of International Commercial Arbitration, (1986); René David, Arbitration in International Trade, 1985.

³ Id.

⁴ Id.

International commercial arbitration holds the prospect of allowing the parties to an international contract to choose their dispute-resolution forum, its structure, their arbitrators, the place of arbitration, the rules of procedure, and the law to be applied to their relations, to the exclusion of courts and domestic systems of law which otherwise would be applied by courts pursuant to their conflict of laws rules⁵. Such unbridled party choice is not universally welcomed. It raises a serious problem of political and legal philosophy: to what extent should a State allow persons, by their private agreement, to constitute a private tribunal to issue legally-binding decisions as to their legal rights, and thus to divest the courts of the State of their jurisdiction over legal relationships of individuals engaged in commercial activities within the State?⁶ With the growth of the welfare state, the increasing regulatory role of the state in ensuring the protection of those with weak bargaining power, and the growth of economic nationalism, states have moved away from laissez-faire notions of freedom of contract⁷ in their domestic laws, and have created a

⁵ Redfern and Hunter, ch.2 (1986); Morris, Conflict of Laws 133 (4th ed., 1993, D. McClean, Ed.); G. Delaume, Transnational Contracts - Applicable Law and Settlement of Disputes ch.1 (1989); O. Lando, "The Law Applicable to the Merits of the Dispute" [1986] 2 Arb. Int'l 104, 105; Carbonneau 1984, 35-6.

⁶ René David, Arbitration in International Trade, p.55 para.59 (1985), (cited herein as "David").

⁷ Laissez-faire is a doctrine that the economic affairs of society are best guided by the decisions of individuals to the virtual exclusion of collective authority. The idea has its basis in the writings of the Physiocrats (an 18th-century French school critical of mercantilism and of indirect taxation of land) and in the works of Adam Smith and the Classical school.- The MIT Dictionary of Modern Economics, 3rd. ed.; Treitel, The Law of

maze of rules governing domestic and international commercial behaviour.⁸ The laws of each nation are unique, so the world stage presents a confusing morass of potential legal entanglements for the unwary or unsophisticated.⁹ International business interests seek a neutral, supranational adjudicative process with a common body of rules to avoid such entanglements, and to provide predictability, certainty, and stability to international business

Contract 3-5, (3rd ed., 1970); In the laissez-faire model of international trade, there would be no governmental control or regulation of trade, the role of nations would be limited to the development of a legal and economic infrastructure for a world market intended to facilitate trade by private parties. Merchants would be able to do business across international borders within an open competitive framework, free of government interference with their contractual arrangements. - Chachioliades, International Economics c.8, (1990); Vagts, Transnational Business Problems 3, (1986).

⁸ Sornarajah, International Commercial Arbitration, 106-116 (1990) (hereinafter cited as "Sornarajah."); Vagts, Transnational Business Problems (1986); Raworth, Legal Guide to International Business Transactions (1991); Lookofsky Transnational Litigation and Commercial Arbitration (1992). It is an essential tribute of sovereignty that States have competence to prescribe the laws that apply to resources, events, and persons within their own territory. Not content to restrict the application of regulatory regimes to the domestic sphere, nations have sought repeatedly to give their laws extra-territorial reach. Other nations, alarmed at such extra-territorial laws, have enacted "blocking statutes" designed to counter-act such extra-territorial laws. See Extra-Territorial Application of Laws and Responses Thereto, C. Olmstead, Ed., (1984).

⁹ T. Carbonneau, "American and Other National Variations on the Theme of International Commercial Arbitration" (1988) 18:2 Ga J. Int'l & Comp. L. 143, 143-151. (cited herein as "Carbonneau 1988"); Lookofsky, Transnational Litigation and Commercial Arbitration (1992); Raworth, Legal Guide to International Business Transactions (1991); Vagts, Transnational Business Problems (1986).

relations.¹⁰ However, international commerce operates in the context of nation-states, and states tend to be wary of the evolution of legal systems over which they have no control.¹¹

The tension between the laissez-faire dreams of businesspersons and the positivist views (one the one hand) and economic views (on the other hand) of national legislatures, has been played out domestically and internationally, and continues today.¹² However, laissez-faire is ascendant at present in the arena of private international commercial relations, where the increasing respect for party autonomy and arbitral autonomy in international commercial arbitration law is allowing such arbitration to assume the status of an autonomous regime of law and procedure, distinct from and largely released from control of national law-makers; a supranational legal system¹³. The present situation is

¹⁰ Carbonneau 1988, 214; Garavaglia, 30-33, 40-42, International Council for Commercial Arbitration, UNCITRAL's Project for a Model Law on International Commercial Arbitration 33, 35 (1984); Fouchard, L'Arbitrage Commercial International 1-48.

¹¹ Sornarajah, 106-116; Redfern & Hunter 42: "An understanding of the inter-change between the arbitral process and national systems of law is fundamental to a proper appreciation of international commercial arbitration." States, when asked to assist the international commercial arbitration process and to recognize and enforce awards, require some control over the arbitration process, to ensure that domestic notions of minimum standards of justice are met.- Id., 42-43.

¹² See Part V, "The Multinational Corporation and World Trade" in International Economics and International Economic Policy: A Reader, 219 (P. King, Ed., 1990); Chachioliades, International Economics, 14, 168-244;

¹³ UNCITRAL Model Law Art.28 enshrines party and arbitral autonomy in choice of law, generally subject only to basic notions of arbitrability and public policy in Arts. 34 & 35. Arguably, its

reminiscent of medieval times in Europe, in which a law merchant or lex mercatoria, a truly international and anational law of commerce based upon the custom and usage of merchants and mariners, was applied by market tribunals in which merchants and mariners rendered the decisions. These market tribunals operated in England under Royal charters, outside of and largely beyond the control of,

use of the term "rules of law" indicates that the choice of law includes lex mercatoria - De Ly, International Business Law and Lex Mercatoria, 253, and Y. Derains, "Possible Conflict of Laws Rules and the Rules Applicable to the Dispute" in UNCITRAL's Project for a Model Law in International Commercial Arbitration, 169, 191-2; Lex Mercatoria and Arbitration 33,34 (T. Carbonneau, Ed., 1990); Rubino-Sammartano, International Arbitration Law Ch.13 (1990); S.3 of the English Arbitration Act, 1979 provides that parties to arbitration agreements may exclude judicial review of arbitration awards in certain instances if neither party is a national or a resident of England; The Swiss Act of Dec.18, 1987 on Conflict of Laws provides that the parties may exclude judicial review if at least one party is neither a resident nor a national; the Belgian Act of March 27, 1985 excludes setting aside of international arbitral awards in Belgian courts if no party is a Belgian resident or national. -De Ly, International Business Law and Lex Mercatoria 26 (1992); Portuguese Law no.31/86 of Aug. 29, 1986 excludes judicial review of international awards, but the parties may agree otherwise. -U. Drobniig, "Assessing Arbitral Autonomy in European Statutory Law," in Lex Mercatoria and Arbitration 164 (T. Carbonneau, Ed., 1990). Case law in France and the United States shows examples of courts exempting international transactions from domestic law imperatives, creating "transnational substantive rules."- Id., 293-297. France: Gosset, French Supreme Court, May 7, 1963, J.C.P., 1963, 13405; Galakis, French Supreme court, May 2, 1966, R.C.D.I.P., 1967, 533. United States: The Bremen v. Zapata Offshore Co., 407 U.S.1 (1972); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 105 S.Ct. 3346 (1985);

"(T)he internationalist tenor of the rulings [of the U.S. Supreme Court] in Scherk and Mitsubishi give [sic] additional judicial support to the concept of an autonomous and "anational" international commercial arbitration process, a process that is distancing itself from any reference to municipal legal authority and operates free of all national legal provisions but those that specifically regulate private international law matters." - Carbonneau 1988, 214.

Royal courts¹⁴.

Phillippe Fouchard and other (mostly Continental) commentators have argued that the complete detachment of international commercial arbitration from any system of municipal law and from all state authorities is now not only theoretically possible but is in fact and in positive law largely accomplished. These authors further argue that "delocalized" arbitrations and awards, divorced from dependence upon any specified place of arbitration and having no "nationality," are taking place and are gaining recognition in domestic courts.¹⁵ This position is in contradistinction to the

¹⁴ These merchant tribunals were generally called "piepowder courts." - 1 Holdsworth, A History of English Law, ch.7 (hereinafter cited as "Holdsworth"), (7th ed., 1956); Kiralfy, Potter's Historical Introduction to English Law and Its Institutions, ch.7 (4th ed. 1958, hereinafter cited as "Potter's"); Tetley, Maritime Liens and Claims (hereinafter cited as "Tetley"); Garavaglia; Selden Soc., 1 Select Pleas in Manorial and Seigniorial Courts i-xxvi (1889, F.W. Maitland, Ed.).

¹⁵ Fouchard, II L'Arbitrage Commercial International Sns. 38-50; B. Goldman, "The Applicable Law: General Principles of Law - the Lex Mercatoria" in Contemporary Problems in International Arbitration 113, 116 (J. Lew, Ed. 1986); B. Goldman, "L'Arbitre, Les Conflits de Lois et la Lex Mercatoria" and A. Kassis, "L'Arbitre, Les Conflits de Lois et la Lex Mercatoria" in Proceedings of the 1st International Commercial Arbitration Conference, 13 and 134, respectively (N. Antaki. and A. Prujiner, Eds., 1985); Redfern & Hunter, 55-64. Professor Goldman relies on three principal sources for the principles of the lex mercatoria: general principles of law, trade usages, and arbitral awards which are based upon such principles and usages. He also relies upon the instances in which national courts have upheld such awards, in particular the case of Norsolor (1982) 109 J.D.I. 231 in which the Austrian Supreme Court upheld an award based upon lex mercatoria. - Sornarajah, 145-6. See also the discussion of the Texaco, Aramco, Sapphire and BP arbitrations in Redfern & Hunter 58-62. These all involved investment disputes between a sovereign and a private investor, typically involving a contract made in the territory of the sovereign under whose law the investor had been divested of its property. Thus these are hardly typical of private international

"seat" theory of arbitration by which the law governing the arbitration (the "curial law"¹⁶), and the nationality of the award, are determined by the place of the arbitration.¹⁷ The concept of nationality of awards is crucial to their recognition and enforcement under the New York Convention.¹⁸ The UNCITRAL

commercial contracts. - Id. The first three of these arbitrations provide examples of awards not based upon any system of national laws, and in particular not based upon the lex loci arbitri, in other words they were decided independent from the law of the place of the arbitration, i.e. they were "delocalized." However, the enforceability of a "delocalized" award is suspect, - the New York Convention applies to awards upon the basis of their locality - the delocalisation of the Texaco and Aramco awards did not matter since they were not awards in the usual sense of binding awards enforceable in courts, but were advisory opinions only - Redfern & Hunter, 58-62. The tribunal in BP refused to apply law other than national law out of concern that an award based upon international law and thus lacking nationality would lack enforceability. - Lagergren, J., in British Petroleum Co. (Libya) Ltd. v. The Government of the Libyan Arab Republic (1980) V Y.C.A. 143, 147; and see, generally, Lex Mercatoria and Arbitration, (T. Carbonneau Ed., 1990.).

¹⁶ The "curial law," or "law governing the arbitration," is to be distinguished from the "proper law of the contract" or "law applicable to the merits of the dispute" (also referred to as the lex causae) and from the "proper law of the arbitration agreement." - per Lord Diplock in Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A. [1971] A.C. 572, 604; James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd. [1970] A.C. 583. 608; Russell on Arbitration 60 (20th ed., 1982).

¹⁷ Redfern & Hunter, 62.

¹⁸ United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards, done at New York June, 10, 1958, 330 U.N.T.S. 38 21 U.S.T. 2517, T.I.A.S. No. 6997. The Convention applies to "foreign" awards, i.e. awards made in a State other than that in which enforcement is sought, or awards which are "not considered as domestic." - Art.1(1). Thus, under the Convention, an award has a nationality, derived from the place of arbitration or from some other element which distinguishes it from domestic awards. - Redfern & Hunter 64. The entitlement of an award to enforcement is tested on the basis of: (i) the law chosen by the parties as the law applicable to the arbitration agreement;

Model Law adopted a "strict territorial doctrine" reflecting the "seat" theory.¹⁹

Notwithstanding the "delocalization theory, arbitration cannot operate without the tolerance of national legal systems, nor without their support - the coercive force of domestic law and domestic courts is necessary to enforce arbitration agreements and arbitral awards²⁰. The elevation of international commercial

and (ii) the composition of the tribunal being in accord with the agreement of the parties, but in the absence of party choice of these, the law of the place of arbitration is controlling. - Art.V(1)(a) & (d). The Convention recognizes that an award may be set aside by "a competent authority of the country in which, or under the law of which, that award was made." - Art.V(i)(e).

¹⁹ Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, 3-21 June, 1985, General Assembly Official Records: Fortieth Session, Supp. No.17 (A/40/17) (cited herein as "Commission Report"), paras.70-81.

²⁰ Redfern & Hunter 52-64;

"Like a contract, an arbitration does not exist in a legal vacuum. It is itself regulated not only by the wishes of the parties (l'autonomie de la volonté) but by a governing law, often referred to as the lex arbitri." - Id., 53;

"(S)ome link with the local law is necessary to give efficacy to the arbitral proceedings and to the award." - Id., 63;

"The use of arbitration to settle international commercial disputes resulted largely from the dynamic interplay between twentieth century commercial practice and national legal systems. Faced with complex and international commercial disputes, national legal systems enacted legislation and their courts handed down supporting decisional law, confirming what had already become a commercial reality. Furthermore, they provided indispensable support for the emerging process, which could have easily become frustrated by parochial domestic attitudes. The fundamental practicality of arbitration, which gave it a favoured status among international merchants, would have been ineffective without this equally pragmatic attitude on the part of national legislatures and courts." - Carbonneau 1984, 37;

"State law will never be totally absent when arbitration is concerned." - René David, Arbitration in International Trade 63

arbitration to supranational status would not be possible without the cooperation of national legislatures and national courts.²¹ In particular, it is noteworthy that domestic "conflict of laws" or "private international law" rules provide a decisional regime by which a domestic court can decide which laws apply to a contract, but these rules almost invariably point to a national legal system²². The notion that parties can choose the system of domestic law applicable to their contractual relations is generally

(1985).

²¹ "There is a lively academic debate regarding whether the international arbitration process is truly separable from national legal processes. The controversy is anchored in a positive law thesis that argues for the need to ground legal regulation and processes in an authorizing national sovereign source. Mirroring the English attitude on international commercial arbitration, proponents of this view hold that the effort of international merchants to create their own adjudicatory system cannot be effective without the initial and continuing approval of national legal systems. The responsibility and authority for creating legitimate legal norms lie exclusively within the province of municipal authority.

The experience with the twin American federalization of arbitration law belies this interpretation of the development of international commercial arbitration. The municipal endorsement of arbitration - domestic or international - manifests a systemic willingness to accept arbitration as a parallel adjudicatory process. It further evidences a similar willingness to allow the mechanism to develop as a process and to formulate its own rules and modus vivendi." - Carbonneau 1988, 218; See also: Redfern & Hunter, 42; Sornarajah, 120 (1990).

²² Sornarajah, 115 (1990); De Ly, International Business Law and Lex Mercatoria, 22 (1992); Lord Justice Mustill, "The New Lex Mercatoria: The First Twenty-five Years" in M. Bos and I. Brownlie (Eds.) Liber Amicorum for Lord Wilberforce 149 at 154; Mann, Cases and Comments on Cases in International Law, Commercial Law, and Arbitration 21-26 (1992) (hereinafter cited as "Mann"); Amin Rasheed Shipping Corp. v. Kuwait Insurance Co. [1983] 3 WLR 241.

respected among domestic legal systems²³, but the notion that the parties should be free to choose to apply an "anational" system such as the modern lex mercatoria or to apply general principles of equity and fairness without strict adherence to any rules of law except those representing fundamental rules of public policy, such as in arbitration ex aequo et bono or as amiable compositeurs²⁴, challenges traditional concepts of conflict of laws²⁵. This latter notion is rooted in the concept of unlimited party autonomy²⁶.

²³ "So far as the law of contract is concerned, there is a principle of law which is generally accepted, and which directs international commercial arbitrators to the correct choice of the law applicable to an international commercial contract. This is the principle of the autonomy of the parties. By this is meant the freedom of the parties to choose for themselves the law applicable to their contract." - Redfern & Hunter, 72 (emphasis added). This principle is accepted in common law, civil law, and socialist countries. - Id.; Lew, Applicable Law in International Commercial Arbitration 75 (1978). See the discussion of party autonomy in fn.36, infra, and the discussion of the interplay between party autonomy and national choice of law regimes in fns.37, 43 & 44, infra.

²⁴ Grigera Naón, Choice-of-Law Problems in International Commercial Arbitration, 9,10 (1992); Mann, Notes and Comments on Cases in International Law, Commercial Law, and Arbitration 16, 21, 26,27; Amin Rasheed Shipping Corp. v. Kuwait Insurance Co. [1983] 3 WLR 241 (H.L.).

²⁵ Id.; "Party autonomy is a logical outgrowth of a period in which contractual freedom was the arbiter of economic relationships in western societies. With the growth of the welfare state and the increasing regulatory role of the state in ensuring the protection of those with weak bargaining power, the notion of party autonomy has undergone significant decline.

Even at its height, it was doubtful whether the doctrine permitted an unlimited choice. It is clear, in all conflicts systems, that mandatory provisions of the law cannot be evaded by an express choice of a proper law." Sornarajah, 106.

²⁶ Sornarajah, 115.

The post-World War II proliferation of international trade and the shift from national economies to a global economy that it represents²⁷, has led to public and private international efforts²⁸ to promote the evolution of universally applicable norms of conflicts of laws, procedural rules and substantive principles, which can be applied to the arbitration of international commercial

²⁷ "The fractured nature of the contemporary world's political and legal organization sharply contrasts with the increasingly transnational character of its economy." - Garavaglia, supra, 32 fn.8.

²⁸ "The establishment of the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Commission on International Trade Law (UNCITRAL) were early manifestations of the international resolve for enacting uniform laws of commerce." - Garavaglia, 40. The United Nations General Assembly passed a resolution in 1965 (G.A. Res. 2102) in support of "the efforts made by the U.N. and its specialized agencies, and by inter-governmental and non-governmental agencies, toward the progressive unification and harmonization of the law of international trade by promoting the adoption of international conventions, uniform or model legislation, standard contract provisions, general conditions of sale, and other measures." UNCITRAL and various organizations involved in the promotion of international commercial arbitration have also been active in the promotion of uniform laws of arbitration. For example, see the report of the International Council for Commercial Arbitration: UNCITRAL's Project for a Model Law on International Commercial Arbitration (1984). The work of international unification and harmonization is done primarily by the Hague Conference on Private International Law, UNIDROIT, UNCITRAL, and the Organization of American States. Common features among these include: (i) exclusive concern with unification and harmonization of private law, and (ii) a primary focus on development of international trade or other transactions made difficult by different national laws and procedures. - P. Pfund, "United States Participation in Transnational Lawmaking," Lex Mercatoria and Arbitration 169-70, (T. Carbonneau Ed., 1990). Much useful work in the standardization of trade terms has been done by private organizations such as trade associations who produce standard form contracts which are in wide international use, and by the International Chamber of Commerce ("ICC"). - Day & Griffin, The Law of International Trade 5,6 (2nd ed., 1993). The ICC publishes "INCOTERMS", a widely-used set of international rules for the interpretation of the most commonly used trade terms in foreign trade, such as "FOB," "CIF," etc.

disputes.²⁹ Faced with the new economic reality of fierce international competition, hoping to portray their countries as friendly to international trade, and hoping to obtain the economic benefits of arbitration activity within their borders, nations are showing themselves willing to abrogate much of their sovereign control over domestic aspects of international economic activities, and related dispute-resolution activities.³⁰ The almost

²⁹ Id.

³⁰ This may take the form of respect for choice-of-forum clauses, whether in favour of arbitration or in favour of litigation in a foreign court (an example of the latter is the decision of the U.S. Supreme Court in The Bremen v. Zapata Offshore 407 U.S.1 (1972)). It may also take the form of respect for a choice of applicable law clause which excludes the laws of the forum state which would otherwise be applicable, i.e. respect for the principle of party autonomy. Further, it may take the form of a doctrine that subject matter which is not arbitrable in a domestic context is nonetheless arbitrable in the international commercial arbitration context (U.S. Supreme Ct. in Mitsubishi v. Soler Chrysler-Plymouth 105 S.C. 3346 (1985), or that an arbitration agreement void in domestic law is nonetheless valid for international commercial arbitration (e.g. The Swiss Federal Law on Private International Law of Dec. 18, 1987, Art. 177(2) and the French Nou. Code Civ. Proc. Art. 1484(2)). The UNCITRAL Model Law bucks this trend by retaining inarbitrability as a ground for judicial review. - U. Drobnig, "Assessing Arbitral Autonomy in European Statutory Law, Lex Mercatoria and Arbitration 165,166.). It may take the form of a limitation on court review of awards granted in the country (Belgian Act of March 27, 1985; Swiss Law of Dec. 18, 1987; English Arbitration Act, 1979) - See De Ly, International Business Law and Lex Mercatoria (1992) 26, and Sornarajah, 120-21. The United States and certain European nations are at the forefront of this movement, but others, notably England, are less enthusiastic about the release of international commercial arbitration taking place within their borders, and the international commercial arbitration awards made there, from review by their courts. Section 3 the English Arbitration Act, 1979 permits parties to a "non-domestic" pre-dispute arbitration agreement to exclude court review of an arbitral award for errors of law but not if the subject matter is a question or claim within the Admiralty jurisdiction of the court, a dispute arising out of a contract of insurance, or a commodity contract (Section 4(1)(a)). See also fn.13 supra.

universally-accepted New York Convention³¹ provides the framework for international commercial arbitration, providing for the enforcement of international arbitration agreements, and of foreign awards, by the courts of States party to the Convention³². However, the New York Convention does not provide a complete code of arbitration law, and much of the procedural and substantive law of international commercial arbitration is left to the varied

³¹ United Nations Convention on the Recognition and Enforcement of Arbitral Awards, done at New York June 10, 1958, 21 U.S.T. 2517 (cited herein as the "New York Convention").

³² van den Berg, The New York Convention of 1958 1 (1981). The Convention has been described as: "to date, the most important international treaty relating to international commercial arbitration. Indeed, its general level of success may be regarded as one of the factors responsible for the development of arbitration as a means of resolving international trade disputes in recent decades." -Redfern & Hunter, 46. The League of Nations produced two treaties on international commercial arbitration: the Geneva Protocol on Arbitration Clauses, 1923, (27 L.N.T.S. 158 (1924)), which established the international recognition and enforceability of arbitration agreements, and the Geneva Convention on the Execution of Foreign Awards, 1927 (92 L.N.T.S. 302 (1929-30)), which regulated the international enforcement of awards. The restricted scope of these treaties (applying only to awards made in the country of a Contracting Party, and requiring court homologation in the place of making and the place of enforcement ("double exequatur"), and failing to gain accession of the United States) led to the development of the New York Convention, which eschews "double exequatur".- van den Berg, 6. The New York Convention attracted 131 States Parties by May 31, 1995.- (1995) 20 Y.C.A. 603. It provides simplified means of enforcing awards, and applies primarily to the enforcement of awards, Art.V exhaustively lists the grounds upon which an award may be refused enforcement. Art.II(3) provides that a court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, shall, at the request of one of the parties, refer the parties to arbitration. The Convention provides an almost universal framework for the enforcement of arbitral awards among the trading nations of the world; there is no such universal framework for the enforcement of judgments. -Raworth, Legal Guide to International Business Transactions, 40 (1991).

municipal laws of state parties³³. The resulting variability of interpretation and application of the Convention in different countries led to the development of the UNCITRAL Model Law on International Commercial Arbitration, concluded in 1985³⁴. The Model Law is not a treaty, but was intended as a vehicle for the creation of uniformity by its use as a model for laws on international commercial arbitration adopted by national legislatures³⁵. The Model Law represents a blend of laissez-faire principles of party autonomy³⁶ and arbitral autonomy³⁷ with

³³ Id.

³⁴ I. Szasz, "Introduction to the Model Law of UNCITRAL on International Commercial Arbitration," UNCITRAL's Project for a Model Law on International Commercial Arbitration, 31, 33, 35 (P. Sanders, Ed., 1984); Redfern & Hunter, 387. For comments on the desirability of uniform interpretation of international Conventions, see Lex Mercatoria and Arbitration 154, 175.

³⁵ Introductory Address of Professor Kazuaki Sono, Secretary of the United Nations Commission on International Trade Law, UNCITRAL's Project for a Model Law on International Commercial Arbitration, 28 (1984).

³⁶ "Party autonomy" is used here, in its widest sense, as the rights of parties to contracts: (1) to designate an arbitral tribunal as the only tribunal with jurisdiction to issue binding settlements of disputes arising from the relations between the parties; (2) to choose the structure of the arbitral tribunal; (3) to specify what disputes are within the jurisdiction of the arbitral tribunal and the remedies which the arbitrators may or must provide; and (4) to choose (or to empower the arbitral tribunal to choose): (a) the arbitrators; (b) the place of arbitration; (c) the rules of procedure by which the tribunal will act; (d) the rules of law (usually, but not necessarily, the laws of a nation or state): (i) applicable to the arbitration agreement (the "proper law of the arbitration agreement"); (ii) to be applied by relevant courts as the "curial law" or the system of law which governs the procedure by which disputes are to be resolved (also referred to as the "lex arbitri"); and (iii) the rules of law applicable to the merits of the dispute (the "proper law of the merits," "proper law of the (underlying) contract," or "lex causae"). See Redfern & Hunter; Mustill & Boyd, The Law and

positivist principles of mandatory curial law rules, domestic public policy restrictions, domestic restrictions on arbitrability, and concurrent court supervision and control over the arbitral process. It seeks to minimize interference by courts while maximizing court assistance for arbitration proceedings. It is left to the courts, however, to interpret and apply the Model Law

Practice of Commercial Arbitration in England (1982); and Morris, The Conflict of Laws 132,133 (4th ed. 1993). "Party autonomy" in its more restrictive sense refers to the right of the parties to choose the law applicable to the merits of the dispute. Even in this restrictive sense, party autonomy is not without limitations. - See Sornarajah, 102-122. As to the interplay between party autonomy and national choice of law regimes, see the discussion in fn.43, infra.

³⁷ Arbitral autonomy includes the exclusive right of the arbitral tribunal, in the absence of party choice: (i) to choose rules of procedure and applicable choice of law rules (if necessary); (ii) to choose the law applicable to the merits of the dispute; (iii) to construe the arbitral agreement to determine the limits of its jurisdiction; and (iv) to construe the contract of the parties. This power of the tribunal to rule on its own jurisdiction is generally accepted by national laws and is referred to as "competence-competence" ("Kompetenz-Kompetenz" in German and "Competence de la Competence" in French). This principle is generally accepted in continental Europe, but is sternly resisted in England. - Dr. habil. Tadeusz Szurski, "Arbitration Agreement and Competence of the Arbitral Tribunal" in UNCITRAL's Project for a Model Law on International Commercial Arbitration 53, 74 (P. Sanders, ed., 1984); V. Drobnig, "Assessing Arbitral Autonomy in European Statutory Law" in Lex Mercatoria and Arbitration 161 (T. Carbonneau, Ed., 1990); Moonchul Chang The Autonomy of International Commercial and Maritime Arbitration: International, Canadian, and Far Eastern Perspective (1989); Russell on Arbitration 91-92, fn.71. (20th ed., 1982). Art. 16 of the Model Law provides for Kompetenz-Kompetenz. Kompetenz-Kompetenz is not dealt with specifically in the New York Convention or the Inter-American Convention, but is in Art. V(3) of the 1961 European Convention and Art. 4(1) of the ICSID Convention - J. Siqueiros, "Arbitral Autonomy and National Sovereign Authority in Latin America" Lex Mercatoria and Arbitration 189.

as adopted by their legislatures.³⁸

The UNCITRAL Model Law, if allowed to develop to its full potential, can be seen to represent the adoption of a legal regime intended to allow, if not to foster, the creation of a private, autonomous, and supranational dispute settlement regime in which international business can resolve disputes and enforce contractual terms on a basis entirely free of all but mandatory provisions of the UNCITRAL Model Law and the New York Convention, i.e. subject only to basic notions of arbitrability of subject matter, of procedural fairness, and of public policy. Thus the Model Law can be seen as the modern version of the Royal Charter of a market or "piepowder" court: the endorsement by a sovereign of a modern dispute-settlement forum akin to the merchant tribunals of medieval times, in which international businesspersons are free to apply their own chosen law or contract rules, customs, and usages, and to choose their own rules of procedure, in the adjudication of disputes arising in international trade, under the auspices of a regime of tribunals promulgated and enabled by uniform municipal laws. Adoption of the UNCITRAL Model Law thus represents a retreat from the exertion of sovereignty and positive powers, a movement back toward a time when there was relatively little interference in the international commercial dispute resolution process by state courts, and little insistence that the lex loci be applied to such disputes or the adjudicative process. The UNCITRAL Model Law is

³⁸ P.J. Davidson, "International Commercial Arbitration in Canada", (1991) 12:86 Int'l Law & Bus. 97, 105-107.

a step toward the reversal of 5 centuries of increasing subordination of arbitration to strict legal control in common law regimes.

All the jurisdictions in Canada adopted the New York Convention and the UNCITRAL Model Law in 1986, with some variations on the latter. The intent of the legislators was to bring Canada into the vanguard of nations presenting a hospitable legal regime for international commercial arbitration³⁹. However, the courts of Canada have a history of hostility to arbitration⁴⁰. England, from which most of the jurisdictions in Canada derive their legal culture, has a tradition of extreme judicial jealousy over ceding jurisdiction over disputes to arbitral tribunals, and a very strong tradition of insisting that arbitration be subjected firmly to the rule of law and the control of the courts. England, to this day, will not

³⁹ P.J. Davidson, "International Commercial Arbitration in Canada," (1991) 12:86 Int'l Law & Bus. 97, 106; R.K. Paterson, "Canadian Developments in International Arbitration Law: A Step Beyond Mauro Rubino-Sammartano's International Arbitration Law," (1991) 27:3 Will. L. Rev. 573.

⁴⁰ Nine of the ten provinces of Canada inherited their arbitration law from England. The common law judges of England were hostile to arbitration and developed strong restrictions on it. Agreements to arbitrate future disputes were ruled illegal as attempts to oust courts of their jurisdiction and of their role as safeguards of the public interest and of the rule of law. It appears that the judges were motivated largely by their purses, since their earnings were based upon the number of cases filed in their courts, and some of those also acted as arbitrators; Chief Justice Dyer is a particularly apt example. See the discussion infra on the history of arbitration in English law. The courts of Quebec, with their civil law heritage, were similarly restrictive in their refusal to enforce arbitration agreements providing for the arbitration of future disputes. See the discussion of the Quebec experience infra.

tolerate "delocalized" arbitrations, arbitration ex aequo et bono, or arbitration by amiable compositeurs.⁴¹ Given this tradition, how willing will the judges of Canada be to relinquish their traditions and prejudices against arbitration and embrace an entirely new and different legal philosophy which supports the freeing of arbitration from control by the courts?

This thesis investigates the Canadian experience with the UNCITRAL Model Law for International Commercial Arbitration, to see to what extent the Canadian courts have fulfilled the promise of the UNCITRAL Model Law as a means of enforcing arbitration agreements and upholding party autonomy and arbitral autonomy. The chosen test is that of the willingness of courts to stay Actions commenced in defiance of arbitration agreements and to refer the parties and issues in dispute to arbitration according to the terms of the parties' arbitration agreements. The author posits that the Canadian courts have failed to eschew their traditional attitudes which require that arbitration and international commercial relations be subjugated to court control and to strict rules of municipal law - that Canadian courts have failed to meet liberal international standards, and hence have tended to be overly

⁴¹ Czarnikow v. Roth Schmidt & Co., [1922] 2 K.B. 478 (C.A.); B.T.P. Tioxide Ltd. v. Pioneer Shipping, The Nema, [1981] 2 Lloyd's Rep. 239 (H.L.); Deuterium of Canada Ltd. v. Burns & Roe, Inc., (1974) D.L.R. (3d) 693, per Laskin J. at 710: "In the face of arbitration statutes which, like that in Nova Scotia and others elsewhere in Canada, are designed to place private arbitration on a regulated footing, I am not prepared at this date to revert to a common law policy of jealous reaction to the attempted supersession of the original jurisdiction of the ordinary Courts."

restrictive of arbitration agreements and of the freedoms built into the Model Law.

The means of investigation includes: (i) analysis of the decisions of Canadian courts as they have applied the UNCITRAL Model Law, in the context of their traditional hostility to arbitration; (ii) analysis of the success of Canadian courts in fulfilling the intentions of UNCITRAL as disclosed by the published travaux preparatoires of UNCITRAL; and (iii) comparison of the rationales of Canadian courts with those of the courts of selected foreign jurisdictions.

The above analyses are approached from the viewpoint of a proponent of the "mixed" or "hybrid" theory⁴² of the basis of arbitral

⁴² There are four main theories of the nature of the basis of arbitral authority to adjudicate, each of which seeks to explain the interrelation of arbitration and national legal systems. The first is the "jurisdictional" theory, essentially socialist in orientation, in which the arbitral process is seen as inextricably linked to and an extension of the State's authority. - Lew, Applicable Law in International Commercial Arbitration 52-62 (1978). The second is the "contractualist" theory in which party autonomy is paramount, and in which any State interference is seen as unnecessary and anomalous - Fouchard, L'Arbitrage International Commercial Sn.44 (1965). The third is the "mixed" or "hybrid" theory which attempts to reconcile the jurisdictional and contractual theories by recognizing the crucial role played by State authority in upholding the arbitral process, but also recognizes that once the arbitration is commenced, the control of the State over the process is diminished by the party autonomy principle. - Lew, supra, 57-58. The fourth theory is that seeing international arbitration as "supranational," or "anational," an autonomous process divorced from national legal systems. - Fouchard, supra, S.29; Carbonneau, Lex Mercatoria and Arbitration (1990); Carbonneau, 1984, 1; Carbonneau 1988 214; contra: Lord Justice Mustill, "The New Lex Mercatoria: The First Twenty-five Years" in Liber Amicorum For Lord Wilberforce (M. Bos and I. Brownlee Eds. 1987)

authority with a "universalist" or "internationalist"⁴³

⁴³ Courts faced with disputes involving international contracts have to decide: (i) whether to assume jurisdiction over the contract dispute, and on what basis; and (ii) which system of laws to apply in construing the contract. If the parties in their contract have specified a choice of applicable law, that choice will receive differing interpretations in various municipal systems. Although choice-of law clauses are generally respected, in some cases a court will refuse to apply a law seen as contrary to its notions of public policy or "ordre public". - See Cheshire an North's Private International Law 113, (P. North and J. Fawcett, Eds., 12th ed. 1992.) Some jurisdictions maintain that even where there is a choice of law clause, they must still apply their choice of law rules to test the validity of the clause. These jurisdictions consider unlimited party autonomy in choice of law to be the usurpation of a legislative function by private individuals - See Cheshire, Private International Law 216 (5th ed., 1957). As a general rule, in the absence of a choice of law, the proper law of the contract is the law of the country with which the contract has the "closest connection." This approach presumes that a contract involving several nations must be most closely connected with one of them. Courts generally proceed from a territorial doctrine, using an approach in which they attempt to establish the "locality" of the contract. This "localization" is performed pursuant to the "private international law" or "conflicts of laws" rules of the forum court, which rules are peculiar to that forum, with many variations found among nations -See Cheshire and North, supra; Cheshire, Private International Law 38 (5th ed., 1957). The classical perspective holds that: (i) private international law or conflicts of laws rules are part of municipal law, derived from and deriving authority from a national legal system; and (ii) the primary function of these rules is to designate the appropriate municipal law governing the contract. The opposing universalist school argues that neither national law nor international law provides a sufficient juridical basis for transnational commercial relationships, and that the traditional conflicts of laws approach, in which complex contracts involving parties from many nations and numerous locales of negotiation and performance are subjected to the territorial authority and peculiar legal requirements of only one nation, is neither appropriate nor desirable. The universalists argue for the fashioning of a new legal order which recognizes the complexity of international commercial relations and which abandons the facile dichotomization of law between national and private international law. This new legal order, they argue, is already evolved to some extent and is essentially founded on a parallelism of action in the various legal systems, in an area in which the sovereign legal state is not essentially interested. Some propound a truly transnational law of international commercial relations, or lex mercatoria, free of the restrictions and control of any national system of law, and some go so far as to maintain

perspective on the law of transnational commercial transactions, whose views are tempered by a pragmatic realization that arbitration would be ineffectual without the enforcement powers of national legal systems⁴⁴ and that the best that can be achieved in

that a true lex mercatoria now exists as a system of universally-recognized legal principles suited to international commercial contracts.- See Redfern & Hunter, 52-97; De Ly, International Business Law and Lex Mercatoria (1992); Mann, Notes and Comments on Cases in International Law, Commercial Law, and Arbitration ch.6 (1992); O. Lando, "The Law Applicable to the Merits of the Dispute" (1986) 2 Arb. Int'l 104; Goldman, "Lex Mercatoria" (1983) No.3 Forum Internationale 1; Lord Justice Mustill, "The New Lex Mercatoria: The First Twenty-five Years" in M. Bos and I. Brownlie (Eds.) Liber Amicorum For Lord Wilberforce (1987), 149; Goldman, Berthold, "Lex Mercatoria," 3 Forum Internationale 1, (November, 1983); Garavaglia, 33-55. A truly internationalist law of arbitration would provide an autonomous and "anational" international commercial arbitration process, independent of all municipal legal authority and provisions except those specifically regulating private international law matters. -See Carbonneau 1988, 214; and Fouchard, II L'Arbitrage Commercial International Sns. 537, 538 (1965). Critics maintain that the lex mercatoria is illusionary, that such a system of universally-recognized principles of commercial law does not exist, or at least is too fragmentary to be considered a true system of law. -See Lord Mustill, supra, Sornarajah, 115-122 (1990); Redfern & Hunter, 89. English law does not recognize lex mercatoria as a legitimate choice of law. - Mann, supra, 25; Amin Rasheed Shipping Corp. v. Kuwait Insurance Co. [1983] 3 WLR 241 (H.L.).

⁴⁴ Some maintain that arbitration is so closely tied to and dependent upon national legal systems that even the term "international commercial arbitration" is a misnomer. Mann writes: "In the legal sense, no international commercial arbitration exists....every arbitration is a national arbitration, that is to say, subject to a specific system of national law....Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law." - Mann, "Lex Facit Arbitrum," in International Arbitration Liber Amicorum for Martin Domke 159-60 (P. Sanders ed., 1967). In the traditional English view, a system of procedural or substantive law can exist only by virtue of sovereign authority. - Carbonneau and Firestone, "Transnational Law-Making: Assessing the Impact of the Vienna Convention and the Viability of Arbitral Adjudication" 1 Emory J. Int'l Dis. Res. 51, 53. Generally speaking, arbitral tribunals have no authority of their own to compel parties and witnesses to participate in the arbitral process, to compel compliance with

the present world system of sovereign states is a parallelism of action in support of arbitration⁴⁵.

Legislators are not bound to ascribe to any particular theory of the nature of arbitration, they may subject arbitration to whatever regulation they see fit, subject to their legislative competence (in a federal State, for example), and subject to treaty obligations. However, the characterization of arbitration may have significant effects when it comes to the enforcement of foreign awards - are they to be treated as judgments of foreign tribunals, or as private contracts?⁴⁶

Rene David states that the present trend is to regard arbitration as an institution of the law of contract. This view is not seen as having a sounder theoretical foundation than others, but is

rules of procedure, or to compel compliance with awards. The laws of the forum state (perhaps pursuant to an international convention adopted by that state) may supply rules of procedure, the substantive law of the forum or that of some other state will probably govern the arbitration agreement and the merits of the dispute, the validity of an award will be governed by municipal law, and enforcement of an award will depend upon municipal law. - Redfern & Hunter.

⁴⁵ "Parallelism of action" is used here in the sense of the adoption of uniform laws on international commercial arbitration, firstly by international conventions such as the United Nations Convention on Recognition and Enforcement of Arbitral Awards, done at New York, 1958 (cited herein as the "New York Convention"), secondly by the adoption of uniform model laws such as the UNCITRAL Model Law of International Commercial Arbitration, 1985 (the "Model Law"), and thirdly by uniform judicial respect for international commercial arbitration as an autonomous regime for the adjudication of disputes.

⁴⁶ David, 77.

based upon a pragmatic consideration that party autonomy is more likely to be maximized by classifying arbitration as a creature of contract.⁴⁷

The distinction between the contractual and jurisdictional theories of arbitration, is becoming increasingly artificial, in the municipal context at least. It cannot be said that when an arbitral tribunal is called upon to intervene in the life of a contract, either to settle a dispute or to frame a new contractual relation, it is exercising a function different in nature from that of a court. A distinction may be drawn between arbitrium merum in which the arbitrator is not bound to observe any recognized rule of law, and arbitrium boni viri in which the arbitrator must observe specified rules of procedure and apply specified rules of law, but in the latter case there is no doubt that there is little difference between arbitration and judicial adjudication.⁴⁸ Rene David argues that distinctions drawn on the contractual and jurisdictional theories⁴⁹ of arbitration no longer serve a useful purpose, they are now no more than an obstacle to a comprehensive view of the phenomenon of arbitration, merely the product of historical accidents.⁵⁰

⁴⁷ David, 77.

⁴⁸ David, 80.

⁴⁹ See fn.42.

⁵⁰ David, 81.

The adjudication of disputes arising in international contracts is less closely linked to the administration of justice in a State than in the case of disputes arising in and adjudicated in the municipal context. The place of arbitration may be chosen because it is neutral territory, having no connection with or interest in the dispute. Thus in international commercial arbitration, there is a trend to the freeing of the parties from national laws, stressing the paramount importance of the arbitration agreement and the view of the award in an international dispute as the product of the free will of the parties.⁵¹

II. SOURCES OF UNIFORMITY IN INTERNATIONAL COMMERCIAL ARBITRATION LAW

While international conventions, uniform laws, the practices of trade organizations in imposing codes of conduct on their members, in promulgating standard form contracts, and in preparing standardized terms of contracting and affreightment, such as the INCOTERMS, all have some standardizing effect on international trade terms⁵², this thesis will concentrate on only the New York Convention and the UNCITRAL Model Law.

1. THE NEW YORK CONVENTION

The Convention applies to "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" and to awards "not

⁵¹ See fns. 13, 20, 30, 36, and 37; David 81.

⁵² See fn.28, supra.

considered as domestic" in the enforcing forum (Article I). The two criteria are cumulative. Thus an award may qualify for application of the Convention upon the basis of the place the award is rendered, or upon the basis of the international character of the arbitration. The definition of "awards not considered as domestic," is left to the laws of each Contracting State⁵³.

Each Contracting State is obligated to recognize and enforce arbitral awards made in any other country, including countries which are not Contracting States, unless the first State has made the reservation, under Article 1(3), that it will apply the

⁵³ See van den Berg, supra, p.22; Bergeson V. Muller 710 Federal Reporter 2d., 928; and 9 U.S.C. Section 202. Pointing, inter alia, to: (a) civil code definitions of "domestic" as including all awards made under the laws of a state, even those rendered outside its territory; and (b) the reservation in Article I(3) made by 2/3 of all Contracting States that they will "apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State," van den Berg argued in 1981 that the second ground for qualification of an award for application of the Convention, the "not considered as domestic" ground, should be considered as a "dead letter", unworthy of use (p.28), and pointing with approval to the United States Court of Appeals (2nd. Cir.) decision of May 24, 1974 in National Metal Containers Inc. v. I/S Strasborg (U.S. No.2) with the words "A United States Court of Appeals correctly did not apply the New York Convention to an award made in New York between a United States corporation and a Norwegian shipowner involving an international transaction." However, the U.S. Court of Appeals, in Bergeson, in considering the Strasborg decision, stated "Whether the Convention applies to a commercial arbitration award rendered in the United States is a question previously posed but left unresolved in this Court." In Bergeson, the Court went on to hold "We adopt the view that awards 'not considered as domestic' denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction." This decision is in accord with the present trend toward generous application of the treaty by national courts.

Convention to awards made only in the territory of another Contracting State. This reservation is common. Of the 131 states which had adhered to the Convention by 1995, 83 had made this reservation⁵⁴. Another reservation, also in Article I.3, permits the restriction of the Convention to differences arising from legal relationships considered as "commercial" under the laws of the reserving state. 47 States have made the "commercial" reservation. None of the Canadian jurisdictions made the "reciprocity" reservation, but all but Quebec made the "commercial" reservation. The United States made both reservations, while the United Kingdom made the "reciprocity" reservation.⁵⁵ Unfortunately, the term "commercial" has varying definitions in the national laws of the Contracting States⁵⁶.

2. ENFORCEABILITY OF AN ARBITRATION AGREEMENT UNDER THE NEW YORK CONVENTION

The New York Convention obligates the Contracting Parties to enforce arbitral agreements, evidenced in writing, whether they relate to existing or future disputes. Article II(3) requires any court of a Contracting Party seized of an action to refer to arbitration a "matter capable of settlement by arbitration" if it is the subject of an arbitration agreement, "unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

⁵⁴ (1995) 20 Yearbook Commercial Arbitration, 603.

⁵⁵ van den Berg, 416.

⁵⁶ Id.

3. THE LAW APPLICABLE TO "NULL AND VOID, INOPERATIVE, OR INCAPABLE OF BEING PERFORMED"

The Convention does not specify which law the court is to apply in determining whether the matter is capable of settlement by arbitration, or in determining whether the agreement is null and void, inoperative, or incapable of being performed, and the courts are divided on this point.⁵⁷ Albert Jan van den Berg reported in 1981⁵⁸ that all the reported cases to that time which had dealt with Article II involved arbitration taking place or to take place abroad, and all the courts decided the question of arbitrability exclusively under their own law. None took into account the law of the place in which the arbitration was taking place or was to take place. Since the Convention states in its provisions relating to defences to the recognition and enforcement of awards⁵⁹ that the law applicable to the arbitration is to be that chosen by the parties, or in the absence of such choice is to be the law of the place of the arbitration, it would seem inconsistent to apply the law of a different place to the question of the validity of the arbitration agreement. Van den Berg argued in favour of a uniform interpretation of Article II with Articles I (which bases recognition of awards mainly upon the place of their making) and

⁵⁷ A. van den Berg, "New York Convention of 1958 Consolidated Commentary Cases Reported in Volumes XVII(1992) - XIX(1994)", (1994) XX Yearbook Commercial Arbitration, 475, 535.

⁵⁸ van den Berg, The New York Arbitration Convention of 1958, 153.

⁵⁹ Arts.V(1)(a) and (d).

V(1)(a).⁶⁰ By analogy, he would apply the uniform conflict rule of Article V(1)(a) to the enforcement of an arbitral agreement under Article II. However, this would require Article V(1)(a) to be read as "the law of the country where the award will be made" rather than its actual wording of "was made."⁶¹ Further, the analogy breaks down completely if the parties have not designated a place for the arbitration, so the court called upon to enforce the arbitration agreement under Article II will not necessarily know where the award will be made.

The German courts now consistently apply the conflict rule in Art.V(1)(a) to arbitration agreements under Art.II, reading the conflict rule, by analogy, as "the law of the place where the award will be made", in applying it to arbitration agreements under Art.II,⁶² in one case splitting the questions of formal validity of the arbitration agreement (found to be governed by German law) and the scope of the arbitration agreement (found to be governed by Swiss law) where the contract specified that Swiss law was the law governing the contract.⁶³ The Court of Appeal of Genoa, Italy,

⁶⁰ van den Berg, pp.57, 126-7.

⁶¹ van den Berg notes two cases, one in Austria in 1971, and one in Heidelberg in 1972, in which courts applied the conflict rules of Article V(1)(a) to Article II, by analogy, the Heidelberg court expressly reading Article V(1)(a) as importing "the law of the country in which the award will be made."-van den Berg, pp.127-128.

⁶² Consolidated Commentary (1994) 19 Y.C.A. 535.

⁶³ Id., citing FR Germany No.37, 17 Y.C.A.

has also used the "analogy" principle.⁶⁴ The United States eschews this approach, applying U.S. federal law, as it appears in the Federal Arbitration Act, to the determination of the binding effect of arbitration agreements.⁶⁵

4. STAYING LITIGATION UNDER THE NEW YORK CONVENTION

If a valid arbitration clause is found, and a party applies for a stay of the court proceedings relating to a dispute which is subject to the arbitration agreement, the words of Article II leave the court with no discretion. As stated by Rene David:

"The Courts, in England and the U.S.A., have considered that the words at the end of Art. II, para. 3 were to be interpreted very strictly and that, when the New York Convention was applicable, they lost all discretionary power and were bound to stay the proceedings brought before them."⁶⁶

5. PARTY AUTONOMY UNDER THE NEW YORK CONVENTION

Under Article V(1)(a), the parties are free to designate the law applicable to the arbitration agreement, to the exclusion of the law of the place of arbitration. It is only in cases in which the parties have failed to provide "any indication thereon," that the law of the country where the award is made is applied to the question of the validity of the arbitration agreement. Van den Berg notes that this provision "has been hailed by other authors

⁶⁴ Id.

⁶⁵ Consolidated Commentary, 535; Rhône Méditerranée v. Lauro, (1982) 555 F.Supp. 482.

⁶⁶ René David, Arbitration in International Trade, 216 (1985).

as the supremacy of the principle of party autonomy over the territorial concept of arbitration."⁶⁷

The public policy ground for refusal of enforcement in Article V(2)(b) is perhaps the least-defined; and the most fertile ground for a defence against recognition and enforcement of an arbitral award. As noted in Redfern and Hunter: "The court of the forum state is likely to have its own concept of what constitutes a fair hearing. As it was put by the District Court of New York⁶⁸, the New York Convention 'essentially sanctions the application of the forum state's standards of due process.'" The Court went on to refer to the Convention's "pro-enforcement bias", and held that the public policy defence should be construed narrowly, and enforcement of an award denied on this basis only "where enforcement would violate the forum states' most basic notions of morality and

⁶⁷ van den Berg, *supra*, p.282. The Model Law does not contain any express choice-of-law provision instructing the arbitral panel which law to apply in determining the validity of the arbitration agreement. However, Articles 34(2)(a)(i) and (iv) provide that in setting-aside actions, in the absence of a choice of law by the parties the law of the State in which the arbitration is taking place applies. The latter Article provides that mandatory rules of law of the place of arbitration over-ride the parties' agreement on composition of the tribunal and procedure. -Holtzmann and Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary 480 (1989). These provisions help to solve the problem, but are of little use if it is not clear where the arbitration will take place.

⁶⁸ Quoting from Parsons Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F. 2d. 969 (Second Circuit Court of Appeals), 1974.

justice."⁶⁹ There is a consistent pattern reported to be found in the enforcement decisions of the Contracting Parties, that they accept an international order of due process different from the stricter domestic order. The international order "requires only the basic elements of fair play and is not disturbed by the absence of the special embellishments which the enforcing State applies when reviewing its domestic decisions."⁷⁰

The principle of party autonomy is reflected in Articles V(1)(c) and (d), which provide that recognition and enforcement of an award may be refused if the award exceeds the jurisdiction granted by the parties in the submission to arbitration, or if the composition of the tribunal or the arbitral procedure are not in accordance with the agreement of the parties.⁷¹

6. REVIEW OF AWARDS

The only provision in the New York Convention relating to review of awards is in Art.V(1)(e)⁷². Such review is strictly within the jurisdiction of national courts, based upon their jurisdiction over

⁶⁹ Id. , 974; Redfern and Hunter, 348; and see E. Kurth, "Adjudicative Resolution of Commercial Disputes Between Nationals of the United States and Mexico", (1983) 14 St. Mary's L. Jo., 597, 620 (cited herein as "Kurth"); and Garavaglia, 100.

⁷⁰ Kurth, 620.

⁷¹ Redfern and Hunter, 327.

⁷² Art.V(1)(e) provides that recognition and enforcement of an award may be refused if: "The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

the arbitral proceedings, either upon the basis that the arbitration is occurring within their territory, or upon the basis that the arbitration is being or was conducted under the laws of that country⁷³.

7. THE UNCITRAL MODEL LAW

The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law on June 21, 1985. It was intended as a model for the modernization and harmonization of domestic laws on international commercial arbitration among all nations, and also to harmonize domestic arbitration laws with the New York Convention and the UNCITRAL Arbitration Rules of 1975.⁷⁴ It also sought to employ the same mechanism and substantive grounds for the recognition and enforcement of foreign and domestic awards⁷⁵. The Law exhibits a conscious attempt to maximize the independence and discretion of the arbitral tribunal and to insulate it from interference by the courts. The Model Law maximizes party autonomy and the authority of arbitrators, while maintaining access to the courts for aid in enforcing the arbitration agreement, constituting the panel, carrying out the process, and enforcing the award⁷⁶. Key

⁷³ van den Berg, 349, 350.

⁷⁴ Holtzmann and Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration' Legislative History and Commentary (1989).

⁷⁵ Id., 1060.

⁷⁶ Paul J. Davidson, "International Commercial Arbitration Law in Canada", (1991) 12 Int'l L.&B., 97, at 105.

provisions are as follows. Article 5 of the Model Law limits court intervention with imperative language, stating: "In matters governed by this law, no court shall intervene except where so provided in this Law". Article 8(1) provides for a mandatory referral to arbitration of the parties to any action brought in a matter which the subject of an arbitration agreement; Article 16 goes so far as to enshrine the principle of Kompetenz-Kompetenz as a mandatory provision, in Article 16(1). That is, the parties cannot agree to limit the power of the arbitral tribunal to rule on its own jurisdiction, including any objections as to the existence or validity of the arbitration agreement⁷⁷. Art.16(1) also imports the doctrine of "separability" by which the arbitration agreement and the contract containing it are seen as independent so that "A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause." Articles 13 and 16(3) provide that if the panel makes a preliminary finding of jurisdiction in response to a challenge by a party, the court may review the finding. Otherwise, the only control the court has over the process is the limited grounds for setting aside an award, once it is made, in Article 34, and the right to refuse recognition and enforcement of an award the enforcement of which is sought through that court (Article 36). The grounds for setting aside an award and for refusing recognition and enforcement of an award in Articles 34 and 36 are virtually the same and are almost identical to the grounds for refusal of recognition and enforcement in the New York

⁷⁷ Id., 480.

Convention, from which they were taken. There is no provision for a stated case procedure, for setting aside on the basis of error of law or finding of fact, nor for appeals on questions of law.

Article 19 enshrines the autonomy of the parties in governing the procedural conduct of the arbitration, subject to Article 18 which states simply: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." The Model Law maximizes the power and discretion of the arbitral tribunal to decide procedural matters, order interim measures of protection, choose the situs of the arbitration, decide evidentiary matters, and to choose the conflict of laws rules which are then applied to determine the applicable law, if the parties have not decided these matters.⁷⁸

Court assistance is available under the Model Law in the appointment of arbitrators;⁷⁹ the staying of court actions on matters which are subject to an arbitration agreement⁸⁰; the granting of orders of interim protection;⁸¹ assistance in the taking of evidence;⁸² and rulings on challenges to the appointment

⁷⁸ Arts.17, 19-28.

⁷⁹ Arts.11(3) and (4).

⁸⁰ Art.8.

⁸¹ Art.9.

⁸² Art.27.

of an arbitrator, the arbitrator's ability, or delay by the arbitrator.⁸³

8. CHOICE OF LAW UNDER THE MODEL LAW

Article 28 is central to party autonomy⁸⁴ under the Model Law.⁸⁵ Article 28 (1) allows direct party choice of "rules of law," without renvoi⁸⁶. The use of "rules of law" instead of "law" was

⁸³ Arts.13 and 14.

⁸⁴ See fns.25 & 36.

⁸⁵ Article 28 provides:

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of trade applicable to the transaction.

There was wide support among the Commission for inclusion of a choice-of-law provision, since it was felt that "the model law would be incomplete without a provision on rules applicable to the substance of disputes, particularly in view of the fact that the model law dealt with international commercial arbitration where a lack of rules on that issue would give rise to uncertainty." - Commission Report A/40/17 para. 238 (Aug.21, 1985).

There was little dissent on the principle that the parties should have complete autonomy to choose the rules to govern the substance of any disputes. - Holtzmann & Neuhaus, 765.

⁸⁶ J. Blom, "Conflict of Laws Aspects of The International Commercial Arbitration Act," in UNCITRAL Arbitration Model in Canada, R. Paterson & B. Thompson, Eds., 130. Art.28(1) provides, in part, that: "Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as

controversial, with the drafters going back and forth between the two in various drafts, until finally settling on "rules of law."⁸⁷ The use of the latter term is intended to free the parties from having to choose the law of only one State: the parties are intended to have the freedom to choose all or part of the laws of one or more States, including States having no connection with the matter, to choose different laws to govern different parts of the parties' relationship ("dépeçage"⁸⁸), or the rules of an international convention or model law, even if the latter are not in force.⁸⁹ The concern that the arbitral tribunal be able to ascertain the applicable law readily led the drafters away from intending to allow the use of general principles of law or principles revealed by arbitration awards as the law applicable to the dispute.⁹⁰

If the parties do not choose the applicable law, then the tribunal is to choose an appropriate system of conflict of laws by which the

directly referring to the substantive laws of that State and not to its conflict of laws rules." The interpretation of an express choice of legal system as a reference to the conflict of laws rules of that legal system is the "merry-go-round" known as renvoi. Art.28(2) of the Model Law eliminates renvoi "for all practical purposes" - Blom, *supra*, 130.

⁸⁷ Holtzmann & Neuhaus, 764-807. The concerns over the use of "rules of law" included: that it was "novel and ambiguous", that it would lead to difficulties in practice or to "extravagant choices," and that it was unnecessary in most legal systems. -Id., 767.

⁸⁸ Id., 767.

⁸⁹ Id., 766-7, 805.

⁹⁰ Id., 766, 768.

applicable law will be determined. The drafters decided not to allow the tribunal to make a direct choice of applicable law, intending to avoid surprises to the parties which might arise if the tribunal were given the right to choose the applicable law directly. Also, it is intended that the tribunal give reasons for its choice of conflict of laws system, and hence for its choice of law.⁹¹

Art. 28(3) allows the arbitral tribunal to decide ex aequo et bono or as amiable compositeur, but only if the parties expressly so authorize. These two terms are roughly equivalent, but their use is not consistent in all legal systems.⁹² Hence the drafters used both, to ensure equivalent treatment in all legal systems. Concerns were expressed that this paragraph should include provisions requiring tribunals to seek to ensure enforceability of awards, and to observe mandatory rules of law, but drafting an article giving a comprehensive definition of the mandate of arbitrators acting ex aequo et bono or as amiable compositeurs proved unmanageable.⁹³ The inclusion of Art.28(3) is intended to de-emphasize the importance of the place of arbitration, insofar as 28(3) recognizes the use of arbitration practices not always recognized in domestic arbitration at that same place.⁹⁴

⁹¹ Id., 770.

⁹² Id., 771.

⁹³ Id.

⁹⁴ Id., 770.

Of particular note for the purposes of this paper, Article 28(4) requires that, in all cases, the tribunal is to decide "in accordance with the terms of the contract" and take into account "the usages of trade applicable to the transaction." This rule applies whether the parties have chosen the applicable law or not, or have chosen arbitration ex aequo et bono or as amiable compositeur.⁹⁵ This is of particular interest to this author since the lex mercatoria of old, the Law Merchant, was born of the usages of trade of merchants and mariners, and developed into a truly international law of private commercial relations. Articles 28(1) allowing choice of "rules of law," and 28(4) requiring consideration of the terms of the contract and trade usages, should allow the adoption of market custom and the rules of business associations, whether presently identified or developed in future,

⁹⁵ Id., 772. This provision was included in the first draft of Article 28, and was dropped after the Working Group expressed concerns that the reference to contract terms had the potential to conflict with mandatory provisions of law, and that reference to trade usages was redundant in some systems and dangerous in others since the effect to be given to trade usages varied in different systems. The provision was restored by the Commission at the behest of the United States, it being noted that this provision was consistent with Art.33(3) of the UNCITRAL Arbitration Rules, which had been adopted by the United Nations General Assembly as suitable for countries with different legal, social, and economic systems, and was consistent with the European Convention on International Commercial Arbitration, 484 U.N.T.S. 349 (1961 Geneva Convention). It was also noted that the inclusion of such a provision "may even be a stimulant for insertion of an arbitration clause into the contract as the parties, not without good reasons, expect from the arbitrators that they will above all base their decisions on the wording and history of the contract and the usages of trade." - Sixth Secretariat Note (Analytical Compilation of Government Comments) A/CN.9/263, para.12.

as the rules governing the parties' contractual relations.⁹⁶ Thus the Model Law has the potential to permit the development and use of autonomous systems of rules of private international relations.

Articles 34 and 36 further limit court interference by providing, exhaustively, the means of, and the grounds for, setting aside an award and for refusing recognition and enforcement of an award.

Setting aside is unlike an appeal. In a setting aside, the court may set aside the award, or part thereof, but may not substitute its own award for that of the arbitral panel. The drafters of the Model Law took great pains to ensure that there should be no court review of the award on the merits. Rather, the drafters' intention was that the grounds for review of an award should be limited to matters of procedural injustice.⁹⁷

Article 34(2) provides: "An arbitral award may be set aside by the court...only if⁹⁸" certain grounds are proved. In other words, these grounds are exhaustive. The applicant bears the onus of proving the first four grounds, which are the same as those for refusal of recognition and enforcement of an award set out in

⁹⁶ Several governments noted their understanding that "rules of law" included trade usages and "the rules of businessmen and business associations." - Sixth Secretariat Note A/CN.9/263, Art.28, para.4; and Summary Record, A/CN.9/SR.326, para.20.; and see the discussion of the Law Merchant, *infra*. The term "rules of law" is considered by some authors to include lex mercatoria. - See Redfern & Hunter 90,91; Rubino Sammartano ch.13; and Lex Mercatoria and Arbitration, 33-35.

⁹⁷ Holtzmann & Neuhaus, 933, 998.

⁹⁸ Emphasis added.

Articles V(1) (a) to (d) of the New York Convention, with only minor modifications⁹⁹. The court, of its own motion, may apply the last two grounds for setting aside, which are basically the same arbitrability and public policy grounds found in Article V(2) of the New York Convention.¹⁰⁰ Errors of law by the arbitrator are irrelevant. These same grounds are mirrored in Article 36, with respect to refusal of recognition and enforcement.¹⁰¹ The alignment of the Model Law with the New York Convention grounds for refusing recognition and enforcement of awards was intended to promote unification of this area of law, and "to insulate international awards from local legal particularities, because the Convention embodies internationally accepted bases for overturning arbitral awards in transnational cases."¹⁰² The drafters intended that a single system of recognition and enforcement would apply to international awards whether made in the country where recognition and enforcement were sought, or elsewhere.¹⁰³

III. INTERNATIONAL LAW TO DOMESTIC LAW, FROM LAY TRIBUNAL TO LITIGATION, THE TRIUMPH OF THE COMMON LAW OVER ARBITRATION AND THE LAW MERCHANT

1. INTRODUCTION

⁹⁹ Holtzmann & Neuhaus, 911.

¹⁰⁰ Id.

¹⁰¹ Holtzmann & Neuhaus, 1057.

¹⁰² Holtzmann & Neuhaus, 1056.

¹⁰³ Id.

This paper now turns to a consideration of the legal culture inherited by Canada from England and France, first tracing the origins of the law merchant and arbitration and their fate at the hands of the common law courts of England.

2. THE ORIGINS OF ENGLISH MARITIME AND MERCHANT LAW

Holdsworth wrote that the Law Merchant of primitive times comprised both the maritime and commercial law of modern codes. From the earliest time, an intimate relationship existed between maritime and commercial law. Both applied peculiarly to the merchant class (domestic and international), a class quite distinct from the rest of society. Both laws grew from the customary observances of this class, and were administered in tribunals dominated by merchants and their customs, distinct from ordinary courts. In England, both differed from the common law, and both had in the Middle Ages (approximately 500 to 1450 A.D.) an international character which they continued to possess right down to modern times.¹⁰⁴ This *lex maritima* which was codified in the Roles of Oleron, along with terms related to the wine trade.¹⁰⁵

3. THE LAWS OF OLERON

¹⁰⁴ Holdsworth, A History of English Law Vol.1, 526, (7th ed. revised, 1956, originally published 1903), [cited herein as "1 Holdsworth"].

¹⁰⁵ Tetley, 6; Potter's Historical Introduction to English Law and Its Institutions 4th Ed. (1958), 185-186 [cited herein as "Potter's"].

From the 9th to the 12th centuries, there was a custom of the sea, an oral *lex maritima*, distinct from but forming part of the *lex mercatoria*, practised on the Atlantic coast of Europe from Spain to Flanders and in England and Scotland. References have been found to local courts applying the *lex maritima* in cases between merchants and seamen in England and Scotland "in haste, before the third tide" and "from tide to tide" in the reign of Henry I (1100-1135) and in the second year of the reign of King John (1201). It is this *lex maritima* which was codified in the *Roles of Oleron*, along with terms related to the wine trade.¹⁰⁶ Besides the *Roles*, there is the Customary of Oleron, a collection of judgments of the mayor's court of the island of Oleron. While the *Roles* deal primarily with arrangements at sea of ships, masters, seamen and merchants, the *Customary* deals primarily with the problems of the ship, the owners, and merchants in port before and after the voyage¹⁰⁷. The laws of Oleron are our first recorded source of modern maritime law in both common law and civil law jurisdictions.¹⁰⁸ The Laws of Oleron have the distinction of being the foundation of all European maritime codes, and were included in the *Blacke Book of the Admiralty* of England, probably first

¹⁰⁶ Tetley, 6; Potter's Historical Introduction to English Law and Its Institutions 4th Ed. (1958), 185-186 [cited herein as "Potter's"].

¹⁰⁷ Tetley, 9.

¹⁰⁸ Tetley, 6.

assembled in the period of 1332-1357 as a compilation of the maritime law of England for use by the court of Admiralty¹⁰⁹.

Holdsworth wrote:

"The laws of Oleron thus provided a set of rules which were no doubt generally sufficient to enable juries of merchants and mariners to settle most of the problems of maritime law which arose in the sea-port towns in the early medieval period."¹¹⁰

4. THE ORIGIN AND A BRIEF HISTORY OF THE COURTS OF ADMIRALTY.

The first references to the English Court of Admiralty come from the period 1340 to 1357, during the reign of Edward III.¹¹¹ The Admiral and his deputies, and the later Admiralty judges, were "civilians," i.e. they were trained in Roman or "civil" law, not in the common law of England¹¹². The Black Book of the Admiralty indicates the new court of Admiralty first looked for its procedural models in the civil, not the common law, but adopted the common-law features of the jury in civil matters¹¹³ and presentment and request in criminal matters¹¹⁴.

¹⁰⁹ 1 Holdsworth, 545; 5 Holdsworth, 125-127; Tetley, 21; Q.N.S. Paper v. Chartwell Shipping [1989] 2 S.C.R. at 717.

¹¹⁰ 5 Holdsworth, 123.

¹¹¹ Tetley, Maritime Liens and Claims, 20 (1985).

¹¹² Potter's, 35.

¹¹³ In those times, a jury was not a group of disinterested persons assembled to judge the case on the basis of evidence presented by witnesses. Rather, the theory of the jury was that they were to be assembled from the place in which the cause of action arose and were to supply knowledge of the matters in issue. In other words, they were, in theory at least, the witnesses as well as the finders of fact and appliers of law.- Potter's, 205.

¹¹⁴ 5 Holdsworth, 126.

Holdsworth wrote that in the 14th century there were several Admirals and several Admiralty courts. Their jurisdiction was wide and vague, including jurisdiction over matters civil and criminal, prize, wreck, and droits of the crown.¹¹⁵

Cases from the regnal years of Richard II (1377-1399) show that the Admirals were by then hearing disputes in civil matters related to seafaring and maritime commerce. It appears that Admiralty acquired jurisdiction in much the same way as had the court of Chancery, namely, that petitions to the King's Privy Council for justice were delegated to the Admiral or his deputy for trial. On this basis, the Admirals assumed a wide-ranging civil jurisdiction, thus encroaching upon the franchises of the port towns which had for some centuries administered justice in maritime matters as part of the law merchant and pursuant to their Royal franchises¹¹⁶. In England, as on the continent, the need to provide special protection for traders in the lawless times of the 9th and 10th centuries had led the legislators to establish centres of trade. Within these, and coming to and fro, the participants enjoyed the king's protection or "special peace." Buying at any place other than a "burh" (later "borough") or "port" entailed risks to personal safety and the risk that the goods might have been stolen, and often was prohibited by laws against theft. By these strictures, market towns were established and flourished. However,

¹¹⁵ 1 Holdsworth, 548. The Franchise courts will be discussed infra.

¹¹⁶ Potter's, 193.

the king expected to be compensated for the protections given, so the merchants were required to pay tolls. The right to hold markets and to collect tolls was granted by Royal Franchise to such port towns and to market fairs. These port towns had their own courts, with commercial and maritime jurisdiction, the right to hold such courts being part of the grant of franchise¹¹⁷.

After repeated complaints by the Franchise ports, a series of Acts were passed in attempts to limit the Admiralty's encroachments: the Act of 1389¹¹⁸, followed in 1391 by an Act on the Jurisdiction of the Admiral¹¹⁹, further Act in 1400¹²⁰ which provided that those sued wrongfully in the Admiralty courts should have a right of action for double damages¹²¹. These Acts effected some settlement of the jurisdiction of the courts of the Admiralty, and the courts of common law maintained the observance of their jurisdiction by Writs of Supersedeas, Certiorari, and Prohibition.¹²²

The extent of the jurisdiction exercised by the court in the Tudor period is revealed by the cases heard by the court; they were

¹¹⁷ 5 Holdsworth, 103; Potter's, 187.

¹¹⁸ 13 Edw.I, ch.5.

¹¹⁹ An Act on the Jurisdiction of the Admiral, 1391, 15 Richard II, ch. 3. This Act expressly preserved the Franchise rights and liberties of the Lords, boroughs, and towns.

¹²⁰ Act on the Jurisdiction of the Admiral, 1400, 2 Henry IV. c.II.

¹²¹ 1 Holdsworth, 548-9.

¹²² 1 Holdsworth 553.

almost exclusively mercantile and shipping cases. The Admiralty court was also regarded as a recognized tribunal of the Law Merchant.¹²³

5. MERCHANT FAIRS, PIEPOWDER COURTS, AND THE LAW MERCHANT

Potter notes that medieval merchants often carried on business by travelling from country to country, taking their merchandise for sale in the great fairs and markets of the civilized world.¹²⁴ This method of transacting business lent an international character at least to the more important fairs and a universality to the principles of law governing their transactions.¹²⁵ It was desirable that this law be generally the same in all countries for the convenience of the parties, and local authorities recognized, and for economic and tax reasons encouraged, self-regulation by international merchants.¹²⁶ The legal requirements of the merchants also were peculiar in that such transient parties, particularly in a period of poor communications and slow transport, could not wait upon ordinary law courts to settle their disputes¹²⁷. Their need for speedy adjudications was met by the

¹²³ 1 Holdsworth, 552.

¹²⁴ Potter's, 183.

¹²⁵ Id.; De Ly, International Business Law and Lex Mercatoria 15.

¹²⁶ De Ly, 16.

¹²⁷ Id; 1 Holdsworth, 535.

courts of the Fairs and Boroughs, or the courts of the Staple.¹²⁸ A franchise of a Fair carried with it the right to hold a court, and such courts became known as "piepowder courts."¹²⁹ These courts sat continuously during the fairs, applying a summary procedure, and although the local mayor, bailiffs, or steward held the courts, in the 13th and 14th centuries the judges of the court were the merchants who attended the fairs¹³⁰. The records of the English fair courts show that they were of the same type as the courts of similar merchant fairs held all over Europe.¹³¹ The law of England took account of the fact that, whether it had a franchise or not, a borough which was a centre of trade might have the right to hold a court of piepowder.¹³² The law to be applied was the Law Merchant, not the common law of England. This is

¹²⁸ The Staple towns were towns granted exclusive rights to trade in the more important article of commerce, or "staple commodities", such as wool, woolfells, leather, tin, lead, etc. The Staple system dates from Edward I.'s reign. "To be a Staple town was a privilege highly prized; for as Coke says 'riches follow the Staple.'" - 1 Holdsworth 543, fn.3; Potter's 190. The English Carta Mercatoria of 1303 assured foreign merchants of speedy dispute settlements and the application of Law Merchant to their disputes, and the Statute of the Staple similarly provided for the application of the Law Merchant instead of English common law. - De Ly, 16.

¹²⁹ "The term 'piepowder' (piepoudres, pede pulverosi),' says Gross, 'was not applied to this tribunal, as Sir Edward Coke and various other writers believed, because justice was administered as speedily as the dust could fall or be removed from the feet of the litigants, but because the court was frequented by chapmen with dusty feet, who wandered from mart to mart.' The name was perhaps originally a nickname but was adopted in the official style of the court." - 1 Holdsworth, 536; Potter's 185.

¹³⁰ 1 Holdsworth 536-7; Potter's 185.

¹³¹ 1 Holdsworth, 536; 5 Holdsworth, 91-93, 106-112.

¹³² 1 Holdsworth, 538.

illustrated by a Charter of Henry III, granted in 1268, which stated that "pleas of merchandise are wont to be decided by law merchant in the boroughs and fairs." This law was admitted to be different from the common law in early cases in the Year Books.¹³³ Edward I recognized the Law Merchant as part of the national law in the Carta Mercatoria of 1303 and this view was taken by Edward III's Parliament in the Statute of the Staple¹³⁴ of 1353.¹³⁵

The Statute of the Staple provided that all merchants coming to the Staple town "shall be ruled by the law merchant as to all things touching the Staple and not by the common law of the land," especially in actions of debt, covenant, and trespass. Thus the national law had accorded a special place in its system to the Law Merchant.¹³⁶

Trakman writes that, under the commercial regime of international trade in medieval times, the value of mandatory law was rendered subservient to business demands dictated by the trade environment.¹³⁷ The regulation of merchants depended upon the trade dynamics of the period, not upon static legal commands.¹³⁸

¹³³ Potter's 184.

¹³⁴ Statute of the Staple, 27 Edw. 3, st. 2 (1353).

¹³⁵ Potter's, 184.

¹³⁶ Id.

¹³⁷ Trakman, The Law Merchant: The Evolution of Commercial Law 16 (1983).

¹³⁸ Id.

The law of the Royal courts, being fixed and static and thus unable easily to adjust to changing commercial practice, contributed little to the development of the medieval Law Merchant.¹³⁹ The medieval Law Merchant was a model for innovation within conventional systems of trade law.¹⁴⁰ It shows the ability of merchants to regulate their business affairs "within the broad framework of a suppletive legal order."¹⁴¹ The Law Merchant was founded in the informal and equitable customs of merchants, rather than in strictly enumerated rules of law. The customs of merchants evolved as business practices dictated, unlike national laws which must undergo the rigors and of the enactment process.¹⁴² The Law Merchant did not merely contribute to the growth of international trade, but its application created uniform, anational norms.¹⁴³

Holdsworth reports that on the Continent of Europe, the large market towns enjoyed a large measure of independence, allowing their mercantile courts and the law they administered to play a large role in the development of the Law Merchant.¹⁴⁴ By contrast, in England there was ready access to the Royal courts and their common law, and the legislature had begun to interfere with purely

¹³⁹ Id.

¹⁴⁰ Trakman, The Law Merchant: The Evolution of Commercial Law 17 (1983).

¹⁴¹ Id.

¹⁴² Garavaglia, 38.

¹⁴³ Id.

¹⁴⁴ 1 Holdsworth 538, 5 Holdsworth 151.

mercantile matters in the reign of Edward 1 (1272-1307).¹⁴⁵ As noted above, Edward 1 recognized the Law Merchant as part of the national law in the Carta Mercatoria¹⁴⁶ (1303) and this view was continued by Edward III's Parliament in 1353 in the Statute of the Staple¹⁴⁷.

The Staple system, dating from Edward 1's reign¹⁴⁸ set apart certain towns as exclusive centres for trade in such staple commodities of wool, woolfells, leather, lead, and tin. In each of these towns, special courts were set up to deal with merchants and mercantile matters. The law applied was the Law Merchant, not the common law. The jurisdiction of the Royal courts was excluded except in cases of felony or freehold. The mayor and two constables presided with the assistance of two foreign merchants, and there was provision for foreign merchants on juries dealing with cases involving foreign merchants. Other privileges were granted to ensure the easy access and security of foreigners and their wares.¹⁴⁹ Thus the Crown and Parliament were far more than mere bystanders in mercantile matters in this period. Rather, they took an active role in promoting and regulating foreign trade. The activities of the merchant courts in England in administering the

¹⁴⁵ 1 Holdsworth 539, fn.1, cites 3 Edw. 1 c.23 (liability for debts of fellow burgess extinguished), 11 Edw. 1 and 13 Edw. 1 St. 3 (Statutes Merchant and Staple).

¹⁴⁶ Potters', 184.

¹⁴⁷ 27 Edw.3, st.2 (1353).

¹⁴⁸ 1 Holdsworth 542, fn.3; see also fn.128, supra.

¹⁴⁹ 1 Holdsworth 542.

Law Merchant contributed to its creation.¹⁵⁰ However, the Law Merchant was to lose its status of independence from the common law and the common law courts, the fair and Staple courts went into decline, and mercantile law and arbitration ended up firmly in the stranglehold of the courts of common law, as will be discussed below.

6. THE DECLINE AND FALL OF THE LAW MERCHANT AND FAIR COURTS IN ENGLAND

The rising competition for commercial business among the Royal courts of England in the 15th century led to the 1477 statute¹⁵¹ restricting the fair courts to matters originating within the fair grounds, during the fair.¹⁵²

Garavaglia credits the fall of the Law Merchant and the fair courts in the 16th and 17th centuries to:

1. The rise in competition among the various courts of common law for jurisdiction over commercial cases, resulting in the Statute of 1477¹⁵³;
2. The rise of nationalism throughout Europe. As a major sea-power, England sought greater influence over economic affairs and a stronger voice in the shaping of the laws governing commerce.

¹⁵⁰ 1 Holdsworth 543.

¹⁵¹ 17 Edw. 4, ch.2 (1477).

¹⁵² This contrasts with earlier practice of the fair courts to hear cases which had arisen outside the limits of the fair - 1 Holdsworth 536.

¹⁵³ Statute of 1477, 17 Edw. 4, c.2 (1477).

An autonomous, anational law merchant created by the merchants themselves was hardly suitable for England's purposes;

3. By the late 17th century, merchants were becoming more sedentary, conducting trade from their home bases, by shipping, rather than at international fairs; and

4. The subsumption of the Law Merchant into statute and common law, thus robbing it of its flexibility and direct connection with current trade custom.¹⁵⁴ As a result, Garavaglia says, merchants began to shun the courts, opting instead for negotiation or arbitration of disputes.¹⁵⁵

Trakman adds other factors, including: local variations in the Law Merchant, such as distinct customs and usages developed at the Great Fairs of Champagne; parochial discrimination against foreign competitors, often in retaliation to perceived discrimination by foreign merchant tribunals; and non-merchant influences such as Royal ordinances which often had a greater influence on change in local practice than did mercantile practice.¹⁵⁶

Holdsworth credits the Statute of 1477 and economic and social changes for the breakdown of the piepowder courts in the 16th and 17th centuries.¹⁵⁷ Internal trade, with which the fairs and fair

¹⁵⁴ Garavaglia, 38, 39.

¹⁵⁵ Id.

¹⁵⁶ Trakman, The Law Merchant: The Evolution of Commercial Law, 19 (1983).

¹⁵⁷ 1 Holdsworth 540.

courts had become principally concerned (in contrast to the Staple towns and courts which were concerned principally with international trade) by the 16th century, had practically ceased to be ruled by a special law or special courts. The common law courts rigidly confined their jurisdiction, and by the end of the 16th century the fairs and their courts had become decadent. The internal trade of England had come under the regulation of the common law, which had borrowed some of the rules of the Law Merchant.¹⁵⁸

International trade, however, continued for a longer time to be governed by a separate Law Merchant. The body of mercantile law extant in the legal literature and mercantile practice of France, Germany, and Italy was in the 16th and 17th centuries adapted for use by the English by such writers as Malynes, Marius, Molloy, and Beawes.¹⁵⁹ By the end of the 17th century, this Law Merchant was gradually absorbed into the general English law. At the same time, the system of foreign trade through the Staple towns had broken down, London had assumed primary importance as the main port of entry and exit and the main commercial centre, the Guilds had broken down into commercial companies and craft guilds, all of which factors, combined with the factors discussed above, contributed to the extinguishment of the older mercantile courts.¹⁶⁰

¹⁵⁸ 1 Holdsworth 569.

¹⁵⁹ 1 Holdsworth 569, 570.

¹⁶⁰ 1 Holdsworth 570.

The demise of the merchant courts drove merchants to the courts of law, or of equity for accountings, or to arbitration.¹⁶¹ However, international merchants and mariners preferred the Admiralty over the common law courts. The reasons for the merchants' preference were many, including: the common law courts had not in the past claimed jurisdiction over contracts made or offenses committed outside the English counties, and so had not developed procedural or substantive law to deal with international commerce; the common law courts heard cases by means of juries knowledgeable of the facts and summoned from the place of the transaction, but no such juries could be found to deal with many international or maritime occurrences, and such juries as could be found were often ignorant of trade custom and the practices of merchants; the law administered by the Admiralty was the custom of merchants, supplemented where necessary by Roman (i.e. "civil") law, and the judges and lawyers of the court were civilians; the process of the court was much speedier, and recognized that parties often sought to leave by the next tide; foreigners were accustomed to and understood civil law; the Admiralty could arrest a ship, thus giving effective security for claims in respect of it; if contracts were drawn abroad there were only civilians available to assist in drafting and in fulfilling formalities; the law merchant was the jus gentium or true private international law; civil law was much closer to the law merchant than was the common law; the process of the civil law was much more effective for merchants, particularly with respect to admitting evidence when a witness was absent (under

¹⁶¹ 1 Holdsworth 571.

civil law, evidence obtained by commission from absent witnesses was admissible, and a contract could be proved by oral evidence or a copy of a document could be used as proof without production of the original, practices not permitted by the common law); under civil law the parties themselves were competent as witnesses while under the common law they were not; and the common law was generally ignorant of the Law Merchant and mercantile practice, failing to recognize such standard concepts of the Law Merchant as negotiability¹⁶² and contracts based upon mutual promises.¹⁶³ The medieval common law on contracts was exceedingly primitive and arcane. Contracts not reduced to writing under seal were not enforceable unless accompanied by consideration or "obligation," and a "mere promise" to perform, and mutual promises to perform, were not recognized as consideration.¹⁶⁴

During the reign of Elizabeth I (1558-1603), the common law courts, jealous of the increased claims of jurisdiction of the Admiralty, and seeking to obtain the economic benefits of the increase in international trade and commerce seen in the 16th and 17th

¹⁶² Potter's, 49, 185, 199; Holdsworth reports that the records of the English fair courts of the 13th century show that a writing obligatory payable to bearer was then known among the merchants, but the first reported case upon a negotiable instrument in the common law courts was heard in 1603 (Martin v. Boure, Cro. Jac. 6-8) - 1 Holdsworth 543;

¹⁶³ Pollock & Maitland, 2 History of English Law ch.5 (2nd ed., 1898, reissued 1968).

¹⁶⁴ Treitel, The Law of Contract c.3 (1970), Cohen, Commercial Arbitration and the Law 94 (1918); Vynior's Case 8 Co. Rep. 80a; Y.B. 6 James 1, Trin. 7 Jac. Rot. 2629; 77 E.R. 595 (1609).

centuries, began to wrest away the Admiralty court's business by confining it to the jurisdiction set out in the Acts of Richard II.¹⁶⁵ The common law courts acted by seeking Writs of Supersedeas and Certiorari from the Chancery, and by issuing Writs of Prohibition, and the Admiralty fought back by issuing Writs of Contempt against those who brought suits upon maritime causes in other courts. The Chancery was reluctant to issue writs against the Admiralty, and often found in favour of Admiralty jurisdiction, so the most effective and most often-used weapon of the common law courts was the Writ of Prohibition.¹⁶⁶

The courts of common law had up to this time been constrained by their own concept of their jurisdiction as being limited to matters transacted within the counties of England. As early as 1308 the common law courts had held that they had no jurisdiction over a contract made abroad¹⁶⁷; they operated by summoning a jury from the place the cause arose. Initially the jury decided the case upon their own knowledge of the case, if they did not have the requisite knowledge, it was customary to adjourn the case for a fortnight so the jurors could inform themselves of the facts.¹⁶⁸ The parties to an action were required to designate very specifically the place where the events alleged in the pleadings

¹⁶⁵ 1 Holdsworth 548, 553.

¹⁶⁶ 1 Holdsworth 553.

¹⁶⁷ 1 Holdsworth 534, fn.6; Potter's 205-6.

¹⁶⁸ 1 Holdsworth 332-337; Potter's 242-4; Selden Society, III Fleta 65,66.

happened, since the sheriff could not otherwise have summoned a jury who would know or could discover the facts of the case.¹⁶⁹

This caused considerable inconvenience in the 15th century, when the English King had possessions in France. The common law courts were prepared to hear cases from abroad, but did not have a process for doing so.¹⁷⁰ Later, the common law courts enlarged their jurisdiction to hear cases from any county unless the pleas were "local" (i.e. the facts relied upon as the foundation of the case were peculiarly tied to a place within the county, such as in a case of trespass to land) as opposed to "transitory" (e.g. contract, or trespass to the person or to goods). In the former, the Plaintiff (and the Defendant wishing to plead a "local" defence) had to allege and strictly prove that the venue was laid in the proper county, otherwise the court could not hear the plea. If his defence was "transitory", however, the Defendant could not traverse the venue laid by the Plaintiff. Most defences to actions on contracts and to actions for torts to the person or to goods were transitory. Therefore in most cases the Defendant could not traverse the venue laid by the Plaintiff, and thus a false allegation of the situs of the cause of action was unassailable. The common lawyers were quick to exploit this by alleging an act which took place outside the realm, and then pleading that this foreign place lay within a county - "to wit in the parish of St.

¹⁶⁹ 5 Holdsworth 117.

¹⁷⁰ Potter's, 191; 1 Holdsworth, 554.

Mary le Bow in the Ward of Cheap."¹⁷¹ or that a contract was made at Cheapside or the Royal Exchange¹⁷², when the contract was really made at sea or in a foreign land. The courts of common law, alive to the advantages of expanded jurisdiction, were content to proceed on the fiction as the basis of their territorial jurisdiction¹⁷³.

7. THE DEFEAT OF THE COURTS OF ADMIRALTY BY THE COMMON LAW COURTS
Originally the issuance of Writs of Prohibition in the time of Elizabeth was generally restricted to confining Admiralty to matters not arising within the counties of England. However, the weight of prohibitions became so great by 1575 and the Admiralty's complaints so great that an agreement was reached that year between the courts of Admiralty and common law to respect each other's jurisdictions¹⁷⁴. However, after 1606 when Coke was raised to the Bench at Common Pleas, and in 1613 to Kings Bench, the agreement was disregarded and the attack of the common law courts upon the Admiralty proceeded in great ferocity.¹⁷⁵ The common law courts used various devices such as writs of Prohibition to restrain other

¹⁷¹ 5 Holdsworth 118,119; 140,141. The date at which this practice began cannot be fixed with precision, but it appears to have been well established in the courts of London in the latter half of the 16th century. In Dowdale's Case (1606) 6 Co. Rep. 46b, its legality was finally upheld and the cases of 1586 and 1589 in which it had been used were approved. - Id.

¹⁷² Carter, 269.

¹⁷³ Id.; 5 Holdsworth, 118.

¹⁷⁴ Potter's, 199; 1 Holdsworth 553.

¹⁷⁵ 1 Holdsworth 553.

courts, and the other courts responded by enjoining or imprisoning suitors at common law to force them to abandon their common law suits or judgments, and by threatening those who would execute the process of the common law courts.¹⁷⁶ The Tudors had kept this competition in check, but after the passing of Elizabeth 1, the competition blossomed anew. The common law courts, sometimes with and sometimes without the aid of Parliament, waged war with Chancery¹⁷⁷, the Court of Admiralty¹⁷⁸, the Court of Requests¹⁷⁹, the Star Chamber¹⁸⁰, the Court of High Commission¹⁸¹, and numerous other courts and tribunals, secular and ecclesiastical, which drew their authority from the Royal prerogative through the Privy Council.¹⁸² The motivations of the judges in this competition included differences in philosophy, the desire for

¹⁷⁶ 5 Holdsworth 423.

¹⁷⁷ 5 Holdsworth 438.

¹⁷⁸ As discussed supra.

¹⁷⁹ 1 Holdsworth 508.

¹⁸⁰ 1 Holdsworth 509.

¹⁸¹ 5 Holdsworth 610.

¹⁸² 1 Holdsworth 508-516, 5 Holdsworth 426-440. The main courts in the late 16th and early 17th centuries were as follows: 1. The common law courts (at Westminster Hall) - King's Bench, Common Pleas, and the Exchequer; 2. The courts of equity - Chancery and Requests; 3. The courts of Royal Prerogative - Star Chamber, the Councils of Wales and the North, and the Privy Council in its judicial capacity; 4. The ecclesiastical courts - High Commission and probate courts, etc.; and 5. Admiralty. - Aylmer, History of 17th Century England: 1603-1689 44 (1963).

power and prestige, and the desire to fatten their own purses.¹⁸³ There soon followed the civil war between the Royalists and the Parliamentarians, 1642-1649, which resulted in the defeat of Charles 1 by the Parliamentary forces led by Oliver Cromwell, and Charles' execution in 1649.¹⁸⁴

¹⁸³ The chief justice of a court received a fee for each writ issued out of his court. - Selden Society, 1 Reports From the Lost Notebooks of Sir James Dyer xxvi (1994). Dyer was the chief justice of Common Pleas from 1559 to 1582. "Dyer was not opposed to the profitable influx of business. The jurisdiction of his court was seen as an inheritance to be defended, and it was thought dishonourable in 1569 for the judges to argue publicly against an extension, even when it was unwarranted." - Id. See the comments of Lord Campbell in Scott v. Avery 25 L.J. Exch. 308 at 312, in which he scathingly refers to the common law judges competing for litigation business, their jealousy of arbitration which the judges saw as robbing the judges of business and hence depriving them of income, and the competition among the common law courts of Common Pleas, King's Bench, and Exchequer, for the division of the spoils.

The staff of the Courts were more than disinterested spectators. There was no clear distinction in medieval common law between "office" and "property"; and many of the offices of the court officials were considered freehold property which could be licensed to others or even bequeathed by Will [See Robotham v. Trevor, 2 Brownl. & Golds. 12 (Hilary, 1610, 8 Jacobi, King's Bench)], and in all cases exploited for the personal benefit of the holder. The law had very little understanding of the concept of contract, but a very well-developed feudal notion of property, so it is understandable that appointment to office was seen as a grant of property with privileges and subject to the performance of certain duties. This notion lasted into modern times; Blackstone [Comm. ii 36] wrote of the law in the 18th century: "offices, which are a right to exercise a public or private employment, and the fees and emoluments thereunto belonging, are incorporeal hereditaments." - 1 Holdsworth, 247,248. The staff were entitled to fees for various procedures, and shared in damage awards ["Damages Cleer" was their share], but also extorted graft from litigants. - 1 Holdsworth 255,256. The judges shared in the spoils. - 1 Holdsworth 258.

¹⁸⁴ Aylmer, 144.

The result of all these events was to solidify the position of the common law and the common law courts. The courts of Royal prerogative had effectively disappeared, although the legal side of the Privy Council was to reappear eventually as an appellate body. The church courts were never as active after the Civil Wars as they had been before.¹⁸⁵ The jurisdiction of the Admiralty courts over commercial matters was reduced to a very low ebb.¹⁸⁶ Control over the Law Merchant was clearly in the hands of the common lawyers and of equity.¹⁸⁷ In 1698 Holt said "The common law is the overruling jurisdiction in this realm; and you ought to entitle yourselves well, to draw a thing out of the jurisdiction of it."¹⁸⁸

Professor Holdsworth is extremely critical of Coke's actions, as being not only unjustifiable in law but also detrimental to merchants. He wrote:

"Coke, as Buller, J., once said 'seems to have entertained not only a jealousy of, but an enmity against that jurisdiction.' He denied that the court was a court of record [so that it could not punish for contempt those who pursued Admiralty actions in other courts]. He denied it the necessary power to make stipulations for appearance, and performance of the acts and judgments of the court. He denied that it had any jurisdiction over contracts made on land, either in this country or abroad, whether or no they were to be performed at sea; and similarly he denied its jurisdiction over offenses committed on land, either in this country or abroad. In support of his positions he did not hesitate to

¹⁸⁵ Aylmer, 173.

¹⁸⁶ 5 Holdsworth 153.

¹⁸⁷ Id; 1 Holdsworth 570.

¹⁸⁸ Shermoulin v. Sands, (1698) 1 Ld. Raym. 272.

cite precedents which were far from deciding what he stated that they did decide. It is fairly certain that the earlier prohibitions were all founded upon the exercise by the Admiralty of jurisdiction within the bodies of counties. The common law had not in the past claimed jurisdiction over contracts made and offenses committed in ports intra fluxum et refluxum maris. Such jurisdiction was now coveted. By supposing these contracts or offenses to have been made or committed in England the common law courts assumed jurisdiction, and thus by a 'new poetical fiction' and by the help of 'imaginary signposts in Cheapside' they endeavoured to capture jurisdiction over the growing commercial business of the country. The other common law judges followed Coke's lead."¹⁸⁹

And later,

"It is clear that the court of Admiralty had on its side not only historical truth but also substantial convenience... It is clear, too, that the opposition of Coke and the common lawyers was unscrupulous."¹⁹⁰

It is difficult to imagine a more scathing denunciation of the actions and motives of Coke.

Holdsworth went on:

"The merchants keenly felt the ill effects of these attacks made by the common law courts; and the delays in the administration of justice sometimes gave rise to diplomatic difficulties," citing a complaint by the Spanish Ambassador over the delays in the Admiralty caused by prohibitions. Unscrupulous litigants found the conflict over jurisdiction to their advantage. Foreign merchants found it difficult to prove their cases at common law, and if they sued in Admiralty, the defendant could obtain a writ of Prohibition as a matter of course."¹⁹¹

¹⁸⁹ 1 Holdsworth 553-4.

¹⁹⁰ 1 Holdsworth, 558.

¹⁹¹ 1 Holdsworth 552-7; Potter's 200.

Holdsworth maintained that the common law courts were incompetent to deal with the jurisdiction they claimed.¹⁹²

8. EFFECTS OF THE VICTORY OF THE COURTS OF COMMON LAW ON COMMERCIAL AND ADMIRALTY LAW

England was commercially backward throughout the Middle Ages. It had little international trade and what it had was carried out primarily by foreigners. Its State courts heard few cases involving international trade, and knew little of the principles of commercial law¹⁹³. Cases involving foreign trade often involved considerations of diplomacy and hence were retained under the direction of the Privy Council or the Chancellor, and were sometimes referred to the courts of Admiralty or to arbitration.¹⁹⁴ The bulk of modern English commercial and maritime law comes from the adoption of Continental doctrines received into England in the 16th and 17th centuries through the Council, Chancery, Admiralty, courts of common law, and through legislation. Principles of maritime law were received primarily through the court of Admiralty¹⁹⁵. All through the 16th century, the Laws of Oleron were the principal basis of the Law Merchant in England, on both its mercantile and maritime sides.¹⁹⁶ The removal of the bulk of the jurisdiction of the courts of Admiralty removed the

¹⁹² 1 Holdsworth 554-5; 5 Holdsworth 413-420.

¹⁹³ 5 Holdsworth 113.

¹⁹⁴ Id., 116.

¹⁹⁵ Id., 102.

¹⁹⁶ Id., 129.

commercial and much of the maritime law of England from its roots in the usage of merchants and in civil law and procedure.¹⁹⁷

As the result of the supremacy of the common law courts, the Law Merchant, by the end of the 17th century, had been absorbed by the courts of common law and equity. The older mercantile courts had ceased to exist, and Admiralty, as noted above, had lost most of its jurisdiction. The Law Merchant was ceasing to be the law of the merchant class, and was becoming part of the general law of the land. In England, it ceased to have its character as a truly international law, a jus gentium, and became English law. The Roles of Oleron may still be cited to good effect in English courts, but they are no longer binding. One effect of these developments was to drive merchants more and more to arbitration for settlement of their disputes¹⁹⁸, which topic will be dealt with below.

9. THE LEGACY OF SIR EDWARD COKE

Coke was such a towering figure that his decisions have been given overwhelming importance and respect, perhaps far beyond their merit. His Reports and his four volumes of the Institutes of the Laws of England were accorded enormous respect as authoritative statements of the common law of England and of court jurisdiction¹⁹⁹, in spite of criticisms of their accuracy by

¹⁹⁷ 1 Holdsworth 559.

¹⁹⁸ 1 Holdsworth, 559; 5 Holdsworth, 570, 571.

¹⁹⁹ "Sir Edward Coke," Encarta (1994); 5 Holdsworth 461-5, 471.

contemporaries and more recent criticisms by historians and lawyers.²⁰⁰

The poor availability of case precedents in medieval and early modern times should be noted. The reports in the Year Books are often woefully inadequate, frequently being no more than private notes.²⁰¹ Case reports appear to have been taken down by students for the purpose of studying the arcane and intricate rules of pleading and of the forms of action, with which the common law was obsessed, rather than to record the substantive rules of law in issue.²⁰² Often there was no distinction between obiter and decisions.²⁰³ The names of litigants are often missing or misspelled, so citations are unreliable.²⁰⁴ Where multiple records of cases exist, they are often in conflict.²⁰⁵ The publication and distribution of case reports was overwhelmingly the effort of private individuals, and the regular or widespread availability of precedents was virtually unknown. Precedents were

²⁰⁰ 5 Holdsworth 471-493; Cohen 125, 126, 131-141.

²⁰¹ Cohen, Commercial Arbitration and the Law, 119 (1918) [cited herein as "Cohen"].

²⁰² Id.

²⁰³ Cohen, 118.

²⁰⁴ Cohen, 122.

²⁰⁵ Cohen, 119.

easily lost or misunderstood.²⁰⁶ Accordingly, the use of case precedent was subject to egregious error.²⁰⁷

While on the Bench at Common Pleas, Coke rendered a decision on arbitration agreements which stands as the watershed of much of the most restrictive law on arbitration agreements ever produced, and one of the most important decisions of the common law on arbitration. This was the 1609 decision in Vynior's Case, but before it is reviewed, it is necessary to investigate the state of arbitration law in England prior to the decision.

IV. THE TROUBLED HISTORY OF ARBITRATION IN ENGLAND

The courts of common law used Writs of Prohibition and other devices to restrict the jurisdiction and effectiveness of the local courts of piepowder and the Staple courts. The common law judges ruled that the presiding officials at the fair and market courts would also be the decision-makers, so that the panels of merchants who sat as a form of jury could no longer act as decision-makers²⁰⁸. Res judicata effects of local courts were denied²⁰⁹. Substantive rules of the common law, however ill-suited to commercial disputes, were imposed on the Law Merchant²¹⁰. These

²⁰⁶ Cohen, 118-121.

²⁰⁷ Id., 122.

²⁰⁸ 1 Holdsworth, 539.

²⁰⁹ 1 Holdsworth, 571.

²¹⁰ 1 Holdsworth, 568 et seq.

and other considerations drove the merchants more and more to arbitration, Holdsworth states.²¹¹

Powell reports that the practice of resolving disputes through extra-judicial compromise, by direct negotiation, mediation, or third-party arbitration, was common-place throughout medieval Europe²¹². Powell stated that there is ample evidence of arbitration (styled as "lovedays"²¹³) and other forms of compromise settlement in both secular and ecclesiastical disputes in England from the 13th until at least the 17th century.²¹⁴ The curia regis rolls record that in 1206 a defendant pleaded that the suit had already been decided by arbitration: "ipsi compromiserunt in legales homines ex utraque parte electos." In the late 13th and 14th century there is a steady stream of references to arbitration in the plea rolls and the Year Books²¹⁵.

Arbitration was a much safer alternative to litigation because its primary function remained the achievement of a compromise acceptable to both sides."²¹⁶ However, Powell writes that in cases

²¹¹ 5 Holdsworth 571.

²¹² Powell, 24.

²¹³ Powell, 22.

²¹⁴ Powell, Edward, "Settlement of Disputes by Arbitration in Fifteenth-Century England," [1984] 2 No.1, Law and History Review, 21.

²¹⁵ Powell, 25.

²¹⁶ Powell, 39.

involving great spiritual or temporal lords, or powerful corporations, arbitration bore a much closer resemblance to legal proceedings.²¹⁷ Such arbitrations often took place with judges as arbitrators, or under the supervision of a judge or the Chancellor.²¹⁸ In such cases it was common for the parties to enter into a recognizance or bond to observe the award.²¹⁹

Thus it appears that the "arbitrations" aimed at compromise to which Powell refers are more properly termed "mediations" under our modern use of these terms.²²⁰ This conclusion is reinforced by the paper of Douglas Yarn published in 1995²²¹, in which he states that from the Dark Ages to the end of the Middle Ages, arbitration in England was a conciliatory process meant to reconcile rather than to judge. "Loveday" arbitrations were true alternatives to litigation ("lawdays"), such arbitrations were essentially forms of mediation.²²² From the late Middle Ages, as society became more

²¹⁷ Powell, 37.

²¹⁸ Powell, 37,38.

²¹⁹ Id.

²²⁰ "Arbitration," as used in this thesis, involves the appointment of a third party empowered to issue an award binding upon the parties and enforceable in courts of law. The arbitrator has judicial power. "Mediation" is a process in which a third party attempts to persuade the parties to reach a settlement, but the mediator has no power to issue an award or dictate the terms of a settlement binding upon the parties. The mediator's powers are persuasive only. - Carbonneau, Alternative Dispute Resolution (1989).

²²¹ Yarn, D.Y., "Commercial Arbitration in Olde England (602-1698)" Jan. 1995 Dis. Res. Jo. 68.

²²² Yarn, 68.

adjudicative, arbitration was reshaped. Although in theory litigation had more legitimacy than arbitration as an adjudicative device, the courts were disfavoured in practice.²²³ Disputants chose arbitration as a substitute for litigation, but arbitration in imitation of litigation, thus giving rise to a pseudo-adjudicative form of arbitration. The use of bonds to enforce compliance with the submission and award brought such arbitrations under the scrutiny of courts and thus prompted the development of arbitration law.²²⁴ The commercial community, as it lost its merchant tribunals, also turned to arbitration.²²⁵ However, if arbitration and the courts were to meet the needs of merchants, arbitration would have to become primarily adjudicative, while the courts would have to shed their arcane and elaborate procedures and provide commercial expertise.²²⁶ As noted above, the courts of Admiralty were much more suitable for merchants, but commercial jurisdiction was effectively removed from the Admiralty courts by the courts of common law.

1. THE EARLY HISTORY OF ARBITRATION

Holdsworth found numerous instances, in the late medieval period, of arbitration of commercial and maritime disputes. Some early examples follow. In the Italian city-states in the 14th century, civic authorities referred many commercial disputes to the Officium

²²³ Id.

²²⁴ Id.

²²⁵ Id.

²²⁶ Yarn, 69.

Mercanziae, an amalgamation of the heads of merchant guilds, or consules mercatorium, for arbitration.²²⁷ Citing a number of cases in England from 1549 to 1593, including cases on freight payable, partnership accounts, freight and average, and account, Holdsworth stated, "In the numerous mercantile and maritime cases which came before the Council there is usually a direction that they were to be settled by arbitration; and among the arbitrators there were usually merchants."²²⁸ To avoid the complicated procedures of the civil law in new lawyer-dominated courts which had received Roman law, and displaced the merchant-dominated courts, merchants in Germany in the 16th century resorted to arbitration.²²⁹

Early English and Roman law retained traces of the time when self-help was the natural means of settling disputes, and resort to a court required the consent of the parties. At this time, the courts were arbitral tribunals, and Maine stated, "the magistrate carefully simulated the demeanour of a private arbitrator casually called in."²³⁰

The arbitration laws of the Romano-Germanic (i.e. "civil") countries originated in Roman law. Roman law never recognized a general principle of freedom of contract. Only certain types of contract were recognized, not including arbitration agreements. Arbitration

²²⁷ 5 Holdsworth, 69.

²²⁸ 5 Holdsworth 130.

²²⁹ 5 Holdsworth, 95.

²³⁰ Cited by Holdsworth, vol.14, 187.

agreements were known to be made, but neither they nor awards made pursuant to them had any legal effect. However, this problem could be overcome by a mutual promise made before a judge (compromissium) to which a term was added (stipulatio) that one party would pay to the other a penalty (poena) if he did not submit to the arbitration and honour the award. The only promise recognized by the law was, in the case of a compromissium (i.e. arbitration ex compromissio), the promise to pay the penalty in case of failure to comply, there was no duty in Roman law to honour the award unless the loser had assented to the award.²³¹

In ancient Rome there was a distinction between an arbiter, called in to settle a legal dispute, and an arbitrator, whose function was to perfect a contractual arrangement (e.g. by determining the price in a contract of sale.)²³²

There was an exception in Roman law in that, while arbitration agreements made as separate contracts were not recognized in law, a submission to arbitration was binding in law if made as a term of a "consensual contract" in which a particular duty of good faith was imposed on the parties. Under such a submission (arbitrium boni viri), it was possible for the parties to appoint an arbitrator to complete their contract.²³³ In both types of arbitration agreement, by an arbiter ex compromissio and by an

²³¹ David, 84,85.

²³² David, 23, 85.

²³³ David, 85.

arbitrator in arbitri boni viri, the arbitrator was not regarded as having the power to command. Rather, awards were binding because, in the first case, non-compliance invited a penalty, and in the second case, because the parties had agreed to be bound by the arbitrator's decision as forming a part of their contract. In Rome, arbitration developed solely within the domain of contract, independent of the law of procedure and of legal actions.²³⁴

In the Middle Ages, Continental piepowder courts, empowered by Royal or feudal Charters, were frequently regarded as arbitral courts, in which the parties had certain leeway as to choice of judges and in which the rules applied were not local law. By the application of the term "arbitration" to these court proceedings, it came to be thought that arbitration was an element of jurisdictional power, i.e. part of the positive power of the Royally-endorsed courts. Thus arbitral awards came to be regarded as binding and deserving enforcement. This view found support in Canon law, particularly where the parties had sworn an oath to observe the award. Unlike Roman law which allowed an arbitrator to act validly only under consensual contracts of a special type involving a special duty of good faith, in the Middle Ages, Canonists developed the view that all promises deserved to be kept (Pacta sunt servanda) and that all contracts were equally governed by the paramount principle of good faith (fides). Canonists also advocated conciliation and charity, thus considerations of harmony and equity were introduced, leading to the practice of an

²³⁴ David, 85.

arbitrator acting as an amicabilis compositor, called in to effect a compromise of a dispute.²³⁵ Gradually, the amicabilis compositor came to be regarded as empowered to impose a decision, and was easily confused with the arbiter ex compromissio. The latter form of arbitration assumed a jurisdictional aspect, while the former was purely contractual.²³⁶ Both were subject to appeal, but only for errors of equity, awards would not be overruled if merely contrary to law.²³⁷ Thus was born the modern form of arbitration by amiable composition.²³⁸

Yarn notes two English cases from the 13th and 14th centuries in which the courts used voluntary submissions to arbitration in pending cases "as a direct extension of the judicial process merely by making the arbitral award a judgment of the court."²³⁹ In each case, the dispute was referred to arbitration by merchants, and the courts gave immediate effect to the awards.²⁴⁰ Yarn goes on to note that the Statute of the Staple provided that in cases of disputes over the quality or packing of wool, the award of six

²³⁵ David, 85-86.

²³⁶ David, 87.

²³⁷ David, 88.

²³⁸ Id.

²³⁹ Yarn, 70.

²⁴⁰ Yarn, 70, citing Honesti v. Chartres (1291), Selden Soc., 2 Select Cases Concerning the Law Merchant 53-62, 148-150 (Hall ed., No.46, 1930); and Costace v. Forteneye (1389) Court of the Chamber of Guildhall of London, London Corporation Records, Plea and Memoranda Roll, ref. A29, m. 11, reprinted in Kiralfy, A Source Book of English Law 241 (1957).

assessors was to be final on the court.²⁴¹ In Admiralty, the use of arbitration was common, particularly in cases involving skill or wage issues, or insurance. In some cases involving nautical skill, the judge would act as arbitrator, or experts would be brought in to act as "amiable compositeurs."²⁴² Yarn cites two cases in Admiralty in which the court entered the award as the judgment of the court; Handcocke v. Payne (1539)²⁴³ and Frebarne v. Pelyn (1540)²⁴⁴. Like Holdsworth, Yarn notes that the Council would often refer international commercial disputes to arbitration²⁴⁵, and that as more commercial disputes came before the courts of Star Chamber and Chancery, these courts made it their practice to encourage arbitration.²⁴⁶

The cases cited by Yarn are noteworthy in that they show the willingness of courts to enter judgment on an award summarily, when the arbitration was pursuant to a reference out of court. This contrasts sharply with the treatment of an award rendered pursuant to a private submission or arbitration agreement, such an award

²⁴¹ Yarn, 70.

²⁴² Yarn, 71.

²⁴³ Select Pleas in the Court of Admiralty A.D. 1390-1404 and 1527-1545, 90.

²⁴⁴ Id., 101.

²⁴⁵ 5 Holdsworth 130.

²⁴⁶ Yarn, 70.

could be enforced only by bringing suit upon the award or upon a bond for its performance.²⁴⁷

Holdsworth writes that the Yearbooks show that recourse to arbitration was common in medieval England.²⁴⁸ But the courts disliked any practice that diminished their jurisdiction and when they were asked to enforce arbitral awards, the courts had ample opportunity to impose conditions on the validity of awards, as to the modes of enforcing them, and the conduct of arbitrators.²⁴⁹ By the end of the medieval period, the law of arbitration in England was becoming very technical and unreasonable. It became more technical and elaborate over the centuries.²⁵⁰ The growing complexity of the law of pleading at common law made it more and more uncertain that an award could be enforced.²⁵¹

²⁴⁷ 14 Holdsworth 193.

²⁴⁸ 14 Holdsworth 187.

²⁴⁹ Id.; This is in keeping with the common law system of justice, in which the superior courts supervise numerous inferior tribunals which are often staffed by non-lawyers. In this system, there is no philosophical objection to arbitration, as long as no attempt is made to exclude the overriding right of the courts to supervise the arbitral tribunals to ensure that proper procedure is followed and the law is applied - litigants cannot "oust the jurisdiction of the courts." - David, 57, Scott v. Avery (1856) 1 H.&C. 72, 5 H.L.C. 811, 2 Digest 355, 290, 31 L.J. Ex. 398, 7 L.T. 127, Czarnikow v. Roth, Schmidt & Co. (1922) 12 Ll.L.Rep. 195, [1922] 2 K.B. 478.

²⁵⁰ Id.

²⁵¹ Id.

An agreement to refer to arbitration was not actionable in the Middle Ages in England unless it was made by deed, and later unless made by deed or with consideration.²⁵² The early common law did not have a concept of a contract as an agreement between parties, founded on their mutual consent. Although we now recognize that the mutual promises of the parties to an agreement can make a binding contract, such an agreement without further consideration or the formality of seals was a mere nudum pactum and unenforceable under the common law²⁵³. By the end of the 17th century, a submission to arbitration, i.e. an agreement to refer an existing dispute coupled with the appointment of an arbitrator, was regarded as a contract for the breach of which damages were recoverable.²⁵⁴ However, a submission was not specifically enforceable²⁵⁵, and any damage award for its breach would be nominal in amount only.²⁵⁶ This fault was remedied by each of the contracting parties entering

²⁵² 14 Holdsworth 189.

²⁵³ "ex nudum pactum non oritur actio", see Vynior's Case, 1609 Co. Rep. 80a, 77 E.R. 595; Pollock & Maitland, History of English Law 185, 194, 202, 213 (2nd ed. 1898, reissued 1968); Cohen, Commercial Arbitration and the Law (1918) at 145 stated: "At the time of 7 Jac. [1609] the Courts were concerned with such matters as seisin, feoffment, seal and the like, and while deeds and bonds and debentures had value, executory contracts resting on mutual consent were treated as ex nuda pacta."

²⁵⁴ Id.

²⁵⁵ 2 Story, Commentaries on Equity Jurisprudence Administered in England and America 833 (1857). (cited herein as "Story's Equity Jurisprudence."

²⁵⁶ Id.; Street v. Rigby [1802] Ves. Jr. 814; Russell, A Treatise on the Power and Duty of an Arbitrator, and the Law of Submissions and Awards 65 (1856); Doleman v. Ossett Corp. [1912] 3 K.B. 268.

into a bond payable if that party failed to cooperate in the arbitration. The bond was in the form of an acknowledgment of debt, from which the obligor was released if he or she complied with the conditions in the bond. The terms of the arbitration agreement were set out as conditions in the bond. The bond generally became void upon compliance with the arbitration.²⁵⁷

It seems hardly coincidental that Coke rendered one of the more infamous decisions of the common law impairing the effectiveness of arbitration agreements. In Vynior's Case²⁵⁸, decided by Coke in 1609, Vynior and Wilde had agreed on arbitration and both had signed a bond under seal, which bond stipulated that Wilde would pay a penalty if he did not "stand to, abide, observe, perform, fulfil, and keep, the rule, order, judgment, arbitrament, sentence, and final determination of Wm. Rugge, Esq. arbitrator..." By a later deed, before Rugge rendered an award, Wilde revoked the authority of the arbitrator. Vynior sued in debt on the bond, Wilde replied that he was under no legal duty since no award had been rendered. Vynior pointed out that no award had been rendered because Wilde had breached the contract and revoked the appointment of his arbitrator²⁵⁹. The case, as reported in Coke's Reports, decided three points:

²⁵⁷ Russell on Awards 65-6; Vynior's Case (1610) 8 Co. Rep. 80a; 77 E.R. 595; Powell, 33; Pollock & Maitland 214 fn.1, 225.

²⁵⁸ Vynior's Case, (1610) 8 Co. Rep. 81 b; 4 Coke 302; 77 E.R. 595.

²⁵⁹ René David, Arbitration in International Trade, 109.

1. That Vynior need not specifically plead that Rugge had received notice of the revocation of his authority by Vynior. Notice was implicit in Vynior's plea of revocation, since in law revocation was ineffective without notification;

2. That Wilde was in breach of the bond to stand to and abide the arbitrament since he had broken the terms of the bond which required that he not countermand or revoke the appointment of the arbitrator, and since he had disabled himself from fulfilling the terms of the bond; and, more importantly for our purposes,

3. That although Wilde was bound in bond to:

"stand to, abide, observe, etc. the rule, etc. arbitrament, etc., yet he might countermand it; for a man cannot by his act make such authority, power, or warrant not countermandable, which is by the law and of its own nature countermandable...although these are made by express words irrevocable, or that I grant or am bound that all these shall stand irrevocably, yet they may be revoked..."

Coke likened the position of an arbitrator to that of a mere agent, whose authority is revocable at will. Relying on Brooke's Abridgement, he differentiated between agreements "without obligation" from those "with obligation," ruling that:

"And therefore (where it was said in 5 Ed. 4 3b if I am bound to stand to the award which I.S. shall make, I could not discharge that arbitrament, because I am bound to stand to his award, but if it be without obligation it is otherwise) it was there resolved, that in both cases the authority of the arbitrator may be revoked; but then in the one case he shall forfeit his bond, and in the other he shall lose nothing; for, ex nuda submissione non oritur actio."

In other words, according to Coke's Reports, Coke accepted Brooke's interpretation of the case reported in the Year Book 5 Ed. 4 3b to the effect that: (i) even though the arbitration agreement was not revocable, the appointment of an arbitrator was always revocable

[and the revocation of the arbitrator's authority made any subsequent award void²⁶⁰]; and (ii) if the party in breach had given a bond to stand to, abide, etc. the arbitration, then he could be held liable in debt on the bond, but if there was no bond (i.e. no "obligation,") then the revoking party escaped with no loss.

This last part of Coke's reasoning appears not to be in accord with two common law rules:

1. That a contract by deed (i.e. under seal), or supported by consideration, is actionable. Ex nuda pactum non oritur actio is not applicable here, it would seem, since both Vynior and Wilde executed the arbitration agreement under seal. However, the manner in which the case was presented to the court is in keeping with the early common law notion of agreements discussed by Pollock & Maitland²⁶¹, wherein agreements were enforced by means of a bond in the form of a confession of debt, and the remedy for breach of the agreement was enforcement of the debt created by the bond²⁶²,

²⁶⁰ Charnley v. Winstanley (1804) 7 East 266; Marsh v. Bulteel 5 Barn. & Ald. 507, 1 Dow. & Ryl. 106, 2 Chit. 317.

²⁶¹ 2 Pollock & Maitland, History of English Law 207, 214 fn.1, 216, 225 (2nd ed., 1898, reissued 1968).

²⁶² Cohen, 88: "At this period in our Common Law one concept at least had become firmly fixed, namely, that a bond solemnly given under seal must be enforced, unless the obligor were released by the happening of one or more of the conditions endorsed on the bond. Into this doctrine of law, as early understood, entered no consideration of principles of contract law, no discussion of executed or executory contract. The bond, by virtue of the seal, attained a sanctity all its own. Like the grant in a deed, it vested in the obligee certain rights defeasible only upon the happening of certain definite contingencies."

not a remedy for damages for breach of the underlying arbitration agreement.²⁶³ It is consistent with this practice that Vynior sued in debt on the bond, not for damages for breach of the arbitration agreement²⁶⁴ or for its specific performance, which was then not available.²⁶⁵

²⁶³ Street v. Rigby [1802] Ves. Jr. 815, 820: "Kill v. Hollister however shows, that Courts of Law are ready enough to say, the agreement of the parties shall not oust their jurisdiction; though they permit it to oust the jurisdiction of Courts of Equity. But they enforce the agreement, not as an agreement, but by granting an attachment for breach of the rule." (emphasis added).

²⁶⁴ Cohen ch.6; Powell 33, 2 Pollock & Maitland 214 fn.1, 225. Pollock & Maitland state that the early common law had no general theory of contract law, and no concept of a contract as an agreement based upon mutual consent. Nor did it have any concept of an executory contract, since early agreements were based upon simultaneous exchanges of property. Gratuitous grants were accompanied by the return of some token in order to fulfil the necessity that there be mutual exchange. Early credit arrangements took the form of the giving of hostages or the pledging of property of value equal to the debt, but the debt was not seen as a personal obligation. If the debt was paid, the debtor could claim back the pledged property (on the basis that the debtor still owned it), if it was not paid, the creditor retained the pledge. A practice arose whereby, before funds or credit were advanced to the borrower, the lender would sue the borrower in order to get a confession of debt or a "recognizance" upon which the sheriff would levy execution against the borrower's lands and goods if the borrower did not pay up within a specified time.

²⁶⁵ Street v. Rigby [1802] Ves. Jr. 815, 818; Gourlay v. The Duke of Somerset [1815] Ves. Jr. 429, 430: "A Bill seeking that, would be pro tanto a Bill to enforce the specific performance of an agreement to refer to arbitration: a species of bill, that has never been entertained."; 2 Story's Equity Jurisprudence 833 (1857): "Courts of Equity will not enforce the specific performance of an agreement to refer a matter in controversy between adverse parties, deeming it against public policy to exclude from the appropriate judicial tribunals of the State any persons, who, in the ordinary course of things, have a right to sue there. Neither will they, for the same reason, compel arbitrators to make an award..."

2. That an agreement entered into by two parties under seal may be revoked only by a further agreement of the two parties under seal. The report of the case under the style of "Wilde v. Vinor" in Brownlow and Goldesborough's Reports supports this:

"My Lord Coke held, that the power was countermandable, if the Submission be by writing, the countermand must be by writing, if by word I may countermand by word: If two bind themselves, one cannot countermand alone. If Obligor, or Obligee disable by their own act to make the Condition void, the Bond is single."²⁶⁶

That there is no right to unilaterally abrogate an arbitration agreement under seal is supported by Statham's Abridgement, published about 1470:

"If the parties put themselves into an arbitration agreement without a deed, they can discharge the arbitrators without a deed before the day, etc., or they can put off the day by the consent of both without a deed. But if the submission be by deed it is otherwise...for he should be discharged by both parties by deed. Reported in Y.B. Hilary, 49 Ed. III p. 8 pl.14 [1376]. See also Fitzh. Arbitrement 22."²⁶⁷

Julius Henry Cohen devoted much of his 1918 text to questioning the rule that arbitration agreements were revocable before award and Vynior's Case upon which the rule was founded. His research into Brooke's Abridgement and the cases cited therein led him to assert that they did not stand for the propositions asserted by Coke. He points out that Coke's words on revocability of arbitration

²⁶⁶ Quoted by Cohen at 97 (emphasis added). In other words, the obligation or bond is subject to the condition that it becomes unenforceable if the obligor "stands to" and "abides" the arbitrament. If the obligor repudiates, or fails to fulfil, the condition, the condition is then void and the bond is enforceable ("single"). - Pollock & Maitland 225.

²⁶⁷ Statham's Abridgement translated by M. Klingelsmith, quoted by Cohen at 108 (emphasis added).

agreements are purely obiter dicta, the ratio decidendi is twofold: 1. The liability on the bond matures if the obligor revokes his appointment of the arbitrator; and 2. Notice of revocation is necessary but need not be separately pleaded since it is implicit in the plea that the defendant revoked.²⁶⁸ This could hardly be otherwise, since Vynior sued on the bond, not on the arbitration agreement.

Cohen argues that Coke was wrong to equate an arbitrator to a mere agent whose authority could be revoked at will.²⁶⁹ The common law did not have a well-defined notion of agency, power, and contract at that time, which may well have led Coke into error.²⁷⁰

A review of the Year Book 5 Ed. 4 3b²⁷¹ and Brooke's Abridgement of the same case²⁷², on which Coke purported to rely, shows that neither contains the statement that "he shall lose nothing because

²⁶⁸ Cohen, 98.

²⁶⁹ Cohen, 95.

²⁷⁰ Cohen, 94.

²⁷¹ The note at Y.B. 5 Ed. 4 3b reads, in total: "If I am bound to abide by the award which J.S. shall render, I cannot discharge the arbitrament because I am bound to abide by his award, but if it is without bond it is otherwise." - Cohen, 107. This is exactly how Coke quoted the case, as shown in 8 Coke's Reports 82b, 77 E.R. 600.

²⁷² "Note: Where a man is bound to abide by the arbitrament of J.N., he cannot discharge the arbitrator. Contrary if he was not bound to abide by his arbitrament tamen videt clearly that he can discharge the arbitrator in the one case and in the other but he shall forfeit his bond." - Cohen 107.

ex nuda submissione non oritur actio."²⁷³ In fact, it appears that the latter comment must have been intended to apply only to arbitration agreements by parol (i.e. not under seal).²⁷⁴ In the early common law, in which no remedy could be obtained unless the claim could be fitted within the limited forms of action and the rigid and technical rules of pleading²⁷⁵, and in which there was no recognition of the modern concept of a binding contract based upon mutual promises, a parol agreement was unenforceable, being a mere "nudum pactum."²⁷⁶ One of the early expedients by which an agreement was made enforceable was to have the obligor provide a bond (which the common law would enforce in an action for debt) conditioned on the performance of the agreement, so that the debt on the bond became due if the condition of performance was not met.²⁷⁷ An agreement accompanied by a bond or "obligation" was referred to as an agreement "with obligation." There might be no way to obtain a remedy based on the agreement itself, and usually there was not, until the common lawyers developed the use of assumpsit (a tort action, strictly speaking²⁷⁸) to enforce

²⁷³ Cohen, 107.

²⁷⁴ Cohen 107.

²⁷⁵ Pollock & Maitland, 196; Cohen, 62.

²⁷⁶ Pollock & Maitland 194, 197.

²⁷⁷ Pollock & Maitland 203, 207, 214-16; Vynior's Case 8 Co. Rep. 80a.

²⁷⁸ Cohen, 63.

contracts.²⁷⁹ However, the obligee could enforce the debt created by the bond. But no action would lie for breach of an executory contract resting on parol promises.²⁸⁰

Thus it appears that Coke, in his gratuitous dicta, produced a confused melange of old principles regarding parol agreements and inapplicable agency principles, to invent a rule that: (i) the appointment of an arbitrator can always be revoked before the rendering of an award, and hence (ii) an arbitration agreement can always be revoked before award. If there is a bond, the obligee can recover on the bond, but cannot enforce the arbitration agreement.

It is noteworthy that the Law Merchant and Chancery did not harbour the strange notions of the common law as to seals and consideration, and the refusal to give effect to a contractual promise.²⁸¹ Carter wrote:

"Neither Chancellor nor merchant set any store on consideration or seal. There is no evidence that the doctrine of consideration came from Chancery; the evidence is the other way. In spite of Lord Mansfield, as will be remembered, the Courts of Common Law forced on the custom of merchants, which knew nothing of it, our purely indigenous doctrine of consideration. This view need not surprise us, if we remember that the civil law has very little

²⁷⁹ Pollock & Maitland 196; Cohen, 63-65; Newgate v. Degelder (1666) 2 Keb. 10.20.24. S.C. 1 Sid 281, held that an action of assumpsit would lie for the revocation of a submission, although the submission was not under seal.

²⁸⁰ Cohen, 109, 147.

²⁸¹ Carter, History of English Legal Institutions, 275 (3rd ed., 1906); Cohen, 80.

corresponding to our doctrine of consideration; consent made the contract; it was dishonourable to break a promise once made."²⁸²

Carter quoted from Concerning Impositions, the 17th-century work of Sir John Davis:

"Whereas at Common Law no man's writing can be pleaded against him as his act and deed unless the same be sealed and delivered, in a suit between merchants, Bills of Lading and Bills of Exchange, being but tickets without seals, letters of advice and credence, policies of assurance, assignations of debt, all of which are of no force at the Common Law, are of good credit and force by the Law Merchant."²⁸³

Holdsworth wrote that the rule in Vynior's Case on the revocability of the appointment of an arbitrator

"had helped to give effect to the jealousy felt by the courts for rival jurisdictions - a jealousy shown by the strictness with which they had from the first controlled arbitrations, and in the rule, recognized in the Year Books, that a submission to arbitration could not put a stop to an action already begun."²⁸⁴

The effect of the dicta in Vynior's Case, allowing a party to revoke the appointment of his arbitrator at any time before the arbitral award was rendered, could be counter-acted by stipulating a significant bond, but the Statute Against Fines, 1697²⁸⁵, which provided that penalty clauses were without effect, impaired the efficacy of this device²⁸⁶. Although the common law later

²⁸² Carter, 275.

²⁸³ Carter, 276.

²⁸⁴ 14 Holdsworth, 190.

²⁸⁵ 8,9 Wm.III.

²⁸⁶ René David, 109; Cohen, 148-151.

developed general contract law and came to provide a remedy in damages for breach of contract, yet only nominal damages could be recovered for breach of an arbitration agreement.²⁸⁷ Two later cases in the 17th century ruled that if a submission were not under seal, *assumpsit* would lie²⁸⁸.

Common law differed from Roman law on the point of enforceability of an award in that in English law, once the award was made it was enforceable whether there was a stipulatio poenae or not.²⁸⁹

In the latter half of the 17th century a method arose of applying to the court to make a submission a rule of the court, so that failure to follow it was in contempt of the court order. The judges were at first reluctant to make such orders, but the practice was established by 1670²⁹⁰, and the Arbitration Act, 1698²⁹¹ enshrined this procedure for merchants and traders. However, revocation of the arbitration agreement before award was

²⁸⁷ Street v. Rigby, (1802) Ves. Jr. 815, 817, 819: "neither of them could recover more than 1 shilling at law"; Doleman & sons v. Ossett Corp., L.R. [1912] 3 K.B.D. 257, 268: "It will be evident, however, that the remedy in damages must be an ineffective remedy where the arbitration had not actually entered into, for it would seem difficult to prove any damages other than nominal."; Cohen, 151.

²⁸⁸ 14 Holdsworth, 189 fn.4: "in the seventeenth century if it were made by *parol assumpsit* would lie." citing Newgate v. Degelder (1666) 2 Keb. 10,20,24; and Noble v. Harris (1678) 3 Keb. 745.

²⁸⁹ René David, Arbitration in International Trade, 109.

²⁹⁰ 14 Holdsworth, 189, citing Hide v. Petit, 1 Ch. Cases, 185.

²⁹¹ An Act for determining differences by arbitration, 9 & 10 Wm. III c.15.

still effective to prevent the rendering of a valid award, even if the submission had been made a rule of the court before its revocation. The defaulting party could be held in contempt of court, but the court could not order specific performance of the arbitration agreement nor order the arbitrators to render an award.²⁹²

The evil seed of revocability spawned in Vynior's Case took firm root and was followed in later cases²⁹³, in spite of intervening contrary authority such as the 1620 decision of King's Bench in Browne v. Downing²⁹⁴ and the 1685 decision of Chancery in Norton v. Mascall²⁹⁵.

In Browne v. Downing, an action on the case in assumpsit to enforce an award, the court was led by Sir Henry Montague, who, with his background in mercantile law, had succeeded Coke as Chief Justice when Coke was sacked in 1616. The Court held:

"that mutual promises to abide by the award of certain men are good enough to bind them to abide by the agreement and that though no money was due at the time of the promise."

²⁹² Cohen, 157-158, citing Mitchell v. Harris, (1793) 3 Ves. Jr. 131.

²⁹³ Hide v. Petit 1 Ch. Cas. 185 (1670); Charnley v. Winstanley 7 East 266 (1804); Ashton (Aston) v. George 2 Barn. & Ald. 395, S.C. i Chitty 200 (1821?); Milne v. Greatrix (Gratrix) 7 East 607 (1806); Clapham v. Higham, 1 Bingham 89; Gourlay v. The Duke of Somerset [1815] Ves. Jr. 429; Marsh v. Bultell (Bulteel) 2 Chitty 316 (1822).

²⁹⁴ Browne v. Downing, 2 Rolle 194 (1620); Cohen 143.

²⁹⁵ Norton v. Mascall, 2 Rep. of Cas. in Ch. 304 (1685); Cohen 134.

The report of this case was discovered by Cohen:

"quite by accident...in the quaint original French in 2 Rolle's Reports, at p.194...March does not refer to it; neither Viner nor Rolle abridges it, nor is it to be found in any of the text writers upon the subject. But in point of legal value - Vynior was at Common Pleas and was earlier in date - it is superior as a binding precedent to Vynior's Case."²⁹⁶

In Norton v. Mascall²⁹⁷, Lord Justice ordered specific performance of an award apparently based upon an arbitration agreement without deed or bond.

Unfortunately, these enlightened decisions, prescient of developments far in the future, were overlooked in later cases.²⁹⁸

2. THE PUBLIC POLICY PROHIBITION OF CONTRACTS PURPORTING TO OUST THE JURISDICTION OF THE COURTS

No concern is stated in Vynior's Case about arbitration agreements ousting the jurisdiction of the courts, yet in the middle of the 18th century, purportedly on the authority of Vynior's Case, the courts developed the rule that any contract that purported to oust the jurisdiction of the court was void as being against public policy. By this rule: (i) no submission was allowed to stand if it excluded the jurisdiction of the courts; and (ii) an arbitration agreement could not be pleaded as a bar to an Action. In 1746²⁹⁹

²⁹⁶ Cohen, 143.

²⁹⁷ 2 Rep. of Cas. in Ch. 304 (1685).

²⁹⁸ Cohen, 143.

²⁹⁹ Kill v. Hollister, (1746) 1 Wils. 129., cited at 14 Holdsworth 190, fn.7.; Cohen, p.153.

this rule was stated as settled law without reasons or citation of authority, although Lord Hardwicke had denied the existence of any such rule in 1743³⁰⁰. The House of Lords approved this rule in 1856 in Scott v. Avery³⁰¹, in which the Law Lords approved a clause in a contract that provided that no cause of action arose until the dispute had been submitted to arbitration and an award rendered. By this device the rule was evaded. The rule reappeared in Czarnikow v. Roth, Schmidt & Co.³⁰², in 1922, when the Court of Appeal ruled that an undertaking in an arbitration agreement not to require any case to be stated by the tribunal upon any question of law, for the opinion of the court, was unenforceable as being contrary to public policy.

3. RESTRICTIONS ON AWARDS

The rules as to the enforceability of an award, as shown by the Year Books, were sometimes unduly strict, sometimes unduly subtle.³⁰³ If several matters were referred, an award was wholly bad if it did not cover all the matters simultaneously - no matter could be reserved for later decision³⁰⁴. The courts applied the rules that an award must be reasonable and certain with such

³⁰⁰ Wellington v. Mackintosh (1743) 2 Atk. 570, cited at 14 Holdsworth, 190, fn.6.

³⁰¹ Scott v. Avery, (1856) 5 H.L.C., 811, 837.

³⁰² [1922] 2 K.B. 478, 92 L.J.K.B.81, 127 L.T. 824, 38 T.L.R. 797.

³⁰³ 5 Holdsworth 191.

³⁰⁴ 14 Holdsworth, 191.

strictness as to cause great injustice³⁰⁵. The interpretation of awards was so strict that no reference to the underlying intention of the arbitrators was allowed, with the result that at least one jurist remarked that it was futile to use the power of the court to refer parties to arbitration³⁰⁶. This strictness was relaxed toward the end of the reign of James I (1603-1625).³⁰⁷

In the medieval period, an award was seen to operate as an accord and satisfaction, and thus no bar to an action unless performance of the award was pleaded and proved. By the end of the 17th century an award without performance was a good bar to an action if the parties had mutual remedies against one another to compel execution of the matters awarded. But the award, not being a judgment, was enforceable only by action on it, or on the bond given for its performance. This state of the law was unsatisfactory as only money awards were thus enforceable. Any other form of award was unenforceable, until the end of the 17th century when it was held that a party failing to perform an award was liable in quasi-contract to pay damages. Awards were not specifically enforced until the first half of the 18th century. The complexities of the common law rules of pleading made action on the bond uncertain, and Holdsworth noted that there were many instances in which the strictness of the rules of pleading

³⁰⁵ 14 Holdsworth, 192.

³⁰⁶ 14 Holdsworth, 192.

³⁰⁷ 5 Holdsworth 192.

prevented the doing of substantial justice.³⁰⁸ Attempts to enforce by contempt proceedings a reference made an order of the court were met initially by reluctance by the courts to grant attachments, which reluctance gradually gave way. However, the remedy remained discretionary, and proceedings for it were elaborate³⁰⁹.

Holdsworth wrote that in Edward IV's reign it was held that an award to do something that was manifestly not to the advantage of either party was void³¹⁰. This reasonable rule was perverted into the "doctrine of mutuality," by which an award was void "if it did not give an advantage to one party without equivalent to the other."³¹¹ This rule was gradually relaxed until all that was left was the rule that if an award required acts by both parties which were intended to be mutual, and some of the acts could not be enforced, the whole award was void for want of the mutuality intended by the arbitrator³¹².

Under the British system of arbitration, the standard panel is made up of two arbitrators (each party appointing one arbitrator) and an umpire often nominated by the arbitrators. The umpire is not called upon to act unless the two arbitrators admit that they are deadlocked. The jurisdiction to decide the case then falls wholly

³⁰⁸ 14 Holdsworth, 193.

³⁰⁹ 14 Holdsworth, 193.

³¹⁰ 14 Holdsworth, 192.

³¹¹ 14 Holdsworth, 194.

³¹² Id.

to the umpire.³¹³ This is very unlike the Canadian model in which the standard panel is three arbitrators, one appointed by each party and the third by agreement of the arbitrators, with the decision being made by the majority. The early rules with respect to umpires were such as represent a celebration of the ability to judges to indulge themselves in fine distinctions which defy all logic and entirely frustrate the efficacy of the process that the rules were intended to advance. For example, it was held that arbitrators could not nominate an umpire until the expiry of their time for giving an award, but at that time, their mandate having expired, they could not validly appoint an umpire.³¹⁴ Another rule was that if the umpire was not to be appointed until the arbitrators disagreed, and if the umpire had not been provided a longer time to decide than the arbitrators, he had no power to act and his appointment was void.³¹⁵ Any technical error in an award could not be corrected and voided the award.³¹⁶ While we may take much amusement from these absurdities, no doubt the parties entangled by these rules found them to be serious inconveniences. It is impossible to dismiss these rules as meaningless technicalities since they had real effect.

V. STATUTORY REFORM BEGINS

³¹³ 1 Halsbury's Laws of England 622 (2nd ed., Viscount Halsham Ed., 1931); 5 Holdsworth 195.

³¹⁴ 5 Holdsworth 195, citing Coppin v. Hurnard (1669) 2 Saund. 129, 12 Kyd Treatise on the Law of Awards 47-48 (1791).

³¹⁵ 14 Holdsworth, 195.

³¹⁶ 1 Halsbury's Laws of England, 665 (2nd ed.). This problem was alleviated by the Arbitration Act, 1889.

The first attempt at reform³¹⁷ was in the Arbitration Act, 1698³¹⁸. In addition to allowing a submission to be made an order of the court by the consent of the parties, the Act also attempted to limit interference by the court in the conduct of the arbitration, providing that a party disobeying such arbitration should be subject to process for contempt, which process was not to be stopped or delayed by any other court of law or equity unless it was shown that the arbitrators had misbehaved and that the award was obtained by corruption or other undue means. Any award so obtained was deemed void and to be set aside.³¹⁹

³¹⁷ 5 Holdsworth 196.

³¹⁸ Arbitration Act, 1698, 9, 10 Wm III c.15.

³¹⁹ An act for determining differences by arbitration. 9&10 Wm. III, c.15 (1698). It stated, in part, "it fhall and may be lawful for all merchants and traders, and others defiring to end any controverfy, fuit or quarrel, controverfies, fuits or quarrels, for which there is no other remedy but by personal action or fuit in equity, by arbitration, to agree that their fubmiffion of their fuit to the award or umpirage of any perfon or perfons fhould be made a rule of any of his Majesty's courts of record, which the parties fhall choofe, and to infert fuch their agreement in their fubmiffion, or the condition of the bond or promife, whereby they oblige themselves refpectively to fubmit to the award or umpirage, of any perfon or perfons, which agreement being so made and inferted in their fubmiffion or promife, or condition of their refpective bonds... and in cafe of difobedience to fuch arbitration or umpirage, the party neglecting or refufing to perform and exevute the fame, or any part thereof, shall be subject to all penalties of contemning a rule of the court...the court on motion fhall iffue proceff accordingly, which procefs fhall not be ftopped or delayed in its execution, by any order, rule, command, or procefs of any other court, either at law or equity, unlefs it shall be made to appear on oath to fuch court, that the arbitrators or umpire mifbehaved themselves, and that fuch award, arbitration or umpirage was procured by corruption, or other undue means. And be it further enacted...That any arbitration or umpirage procured by corruption, or undue means, fhall be judged and efteemed void and of none effect, and accordingly be fet afide by any court of law or equity..." It must be noted that what appears to the reader

Reading the Act, what strikes the modern eye, and written in incredibly run-on sentences - is the apparently liberal nature of the enactment, which appears to limit severely the grounds upon which a party might avoid an agreement to submit to arbitration made an order of the court, and to approve agreements for the arbitration of future disputes. Such an impression of liberal intent is incorrect. Serjeant Williams pointed out that, until the statute of 1698, a common law court could not set aside an award for the misconduct of the arbitrators³²⁰. The reasoning appeared to be that, the parties having chosen their judges, they must put up with their defects. Thus there was no appeal from an award, for mistakes of fact or law, unless the error was apparent on the face of the award, and an award by an arbitrator in a position of conflict of interest was valid, provided the arbitrator had not kept his interest secret. The courts of equity could intervene where the courts of common law could not, and in the late 18th century often set aside awards or granted injunctions to stay proceedings to enforce awards, on the grounds of misconduct by the arbitrators³²¹. Equity would also set aside awards for errors of fact or law apparent on the face of the award. These rules were adopted by the courts of common law in the 19th century.³²² Holdsworth took a kindly view of the 1698 Act, nonetheless, noting

to be the use of the letter "f" in place of the letter "s" is not in fact an "f" but a different letter very similar in form to an "f".

³²⁰ 14 Holdsworth, 200.

³²¹ 14 Holdsworth, 200,201.

³²² 14 Holdsworth, 200.

that, "The defects in the law prevented the statute of 1698 from being so effective as it might otherwise have been³²³."

Notwithstanding the rule in the Arbitration Act, 1698 that revocation of a submission made a rule of the court was a contempt of court, the courts still maintained that submissions were revocable before the making of an award thereon, and that any award given on a revoked submission was void.³²⁴

In 1833, it was enacted that a submission made a rule of the court under the Act of 1698 could not be revoked without leave of the court, that the court could extend the time for making an award and could compel the attendance of witnesses and production of documents, and that an arbitrator in such court-ordered arbitrations could swear witnesses to their oath.³²⁵ However, the 1833 Act did not prevent revocation of the submission prior to it being made a rule of the court. In Aston v. George, Abbot, C.J.

³²³ 14 Holdsworth, 196.

³²⁴ 1 Halsbury's 633-634 (2nd ed. 1931); Clapham v. Higham, 1 Bing. 87, 2 Digest 398 (1822); Milne v. Gratrix, 7 East 607 (1806): "[I]t is...clear that before the statute of William [Arbitration Act, 1698] a submission to arbitration might be revoked before it was executed, and there is nothing in that statute to make it irrevocable while it continues executory....Then if before any award is made one of the parties have revoked the authority of the arbitrators, they cannot make any award to bind him....the award itself is a nullity and could not be enforced."

³²⁵ 3,4, Wm.IV, c.42.

stated: "when the submission has been revoked, there remains nothing which can be made a rule of the court."³²⁶

In a text published in 1845, Samuel Warren wrote:

"The Courts of Common Law entertain a salutary jealousy on the subject of interference with their jurisdiction. 'Nothing,' said Lord Mansfield, 'but EXPRESS NEGATIVE WORDS [in a statute] shall take away the jurisdiction of the Courts of Common Law....Nor will the courts of either Law or Equity allow themselves to be ousted of their jurisdiction, by any agreement of the parties to refer a disputed matter to arbitration. A Court of Equity will not enforce performance of such an agreement, nor a Court of Law allow it to be pleaded in bar of an action. Courts of Justice are presumed to be better capable of administering and enforcing the real rights of the parties, than any mere private arbitrators, as well from their superior knowledge, as their superior means of sifting the controversy to the very bottom."³²⁷

Rene David wrote that the system, necessitated by Vynior's Case, of making arbitration agreements orders of the court was impractical since it frustrated the parties' intention of avoiding court proceedings³²⁸.

1. THE COMMON LAW PROCEDURE ACT, 1854.

A more important reform was the Common Law Procedure Act of 1854³²⁹, which allowed the court to stay an action brought in defiance of a submission or in defiance of an agreement to submit

³²⁶ Aston (Ashton) v. George 2 B.& Ald. 395 (1819); Cohen 126.

³²⁷ Samuel Warren, A Popular and Practical Introduction to Law Studies etc., 2nd, ed., (1845), 519, 520, citing The King v. Abbott, 2 Doug. 555(n); Street v. Rigby, 6 Ves. 815-8; Thompson v. Charnock, 8 T.R.139; Cleworth v. Pickford, 7 M.& W. 321; and 1 Stor. Eq. Jur. 547.

³²⁸ René David, Arbitration in International Trade, 110 [cited herein as "David"].

³²⁹ The Common Law Procedure Act, 1854, 17 & 18 Vict. c.125.

future disputes to arbitration (s.11). The court was empowered to appoint arbitrators and umpires if the parties failed or refused to do so, or if the arbitrators or umpire were unwilling or unable to act (s.12). The Act empowered judges to refer matters of account to arbitration (s.3). However, the Act introduced the "stated case" procedure, continuing the movement to put arbitration firmly under the control of the courts. In matters of account, the court could direct that a case be stated on any question of law or fact to be decided by the judge or jury (s.4). In all arbitrations, "if it is not provided to the contrary," the arbitrator could state his award or any part thereof in the form of a stated case for the opinion of the court (s.5). The power of the court to order a stay of any action brought in defiance to an arbitration agreement left the court with wide discretion as to the grant of a stay; the stay was conditional upon the court

"being satisfied that no sufficient reason exists why such matters cannot or ought not to be referred to arbitration according to such agreement...and that the defendant was at the time of bringing the action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters to be decided by arbitration...[the court may] make a rule or order staying all proceedings...on such terms as to costs or otherwise as to such court or judge may seem fit." (s.11)³³⁰

As will be discussed below, this language provided more than ample opportunity for the courts to refuse to honour arbitration clauses, upon unconvincing grounds.

³³⁰ The Common Law Procedure Act, 1854, 17 & 18 Vict. c.125. I must comment that the language of the 1698 Act is a model of clarity compared to the Victorian circumlocution which is the 1854 Act.

Ever since the 1854 Common Law Procedure Act, the judges of England have celebrated their powers of discretion over stays of Actions in favour of arbitration clauses and choice of forum clauses, as will be shown by the following discussion of English arbitration law from 1889 to 1979.

2. THE ARBITRATION ACT, 1889.

The common law rule allowing revocation of arbitration agreements by any party was finally swept away by the Arbitration Act, 1889³³¹. The earlier Acts on Arbitration were consolidated in the 1889 Act.³³² The stated case procedure was expanded so that the arbitrator could of his own volition state a case, and the court could require the arbitrator to do so (s.19), thus enabling the court to adjudicate on any point of law arising on the reference. It did not impair the inherent power of the court to set aside an award on the ground of error of law on its face.³³³ The response of arbitrators in England has been to present an award without reasons, and if the parties request reasons, to provide them

³³¹ Arbitration Act 1889, "An Act for amending and consolidating the Enactments relating to Arbitration," 52 & 53 Vict. c.49. Section 1 provided: "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except with leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court."

³³² Arbitration Act, 1889, "An Act for amending and consolidating the Enactments relating to Arbitration", 52 & 53 Vict. c.49 (1889).

³³³ Lord Parker of Waddington, The History and Development of Commercial Arbitration, Recent Developments in the Supervisory Powers of the Courts Over Inferior Tribunals, (1959), 19,20.

separately from the award with a stipulation that they do not form part of the award. The courts tolerate this practice.³³⁴

The 1889 Act continued the provision as to the discretion of the court to stay any action brought in defiance of an arbitration agreement, but allowed any party, not just the Defendant, as the 1854 Common Law Procedure Act stipulated, to apply for a stay.³³⁵

The Arbitration Act, 1889 - perhaps with the Supreme Court of Judicature (Procedure) Act, 1894, which provided that an appeal to the Court of Appeal lay as a matter of right from any order on a special case - completed the legislative subordination of arbitration to court supervision. Holdsworth wrote:

"the statutory reforms in the law of arbitration, and the extension of the system of arbitration, have resulted in the creation and exercise of a judicial control over arbitrators and arbitrations, which, though not quite the same as, is analogous to the control the courts have, from the earliest days of the common law, exercised over all subordinate jurisdictions."³³⁶

In 1978, the Commercial Court Committee Report on Arbitration was released. It reported, inter alia, that most systems of law adopt the philosophy that the parties, having chosen their tribunal, must accept its decisions with all its faults, but that this has never been the approach of the law of England or of some systems derived

³³⁴ David, 111.

³³⁵ Arbitration Act, 1889, 52 & 53 Victoria c.49, s.4.

³³⁶ 14 Holdsworth, 198.

from English law³³⁷. English law provides two forms of review, namely the motion to set aside an award for error on its face and by a reference to the High Court of an award in the form of a stated case. Under English law the courts have jurisdiction to set aside any arbitral award, if it appears from the award itself or from documents incorporated in the award that the arbitrator reached some erroneous conclusion of fact or law. It further noted that the law of England does not permit parties to an arbitration agreement to contract out of their statutory right to obtain an order that the arbitrator state his award in the form of a stated case - Czarnikow v. Roth, Schmidt & Co.³³⁸ As will be discussed later, the Arbitration Act, 1979, did away with the stated case and severely limited appeals, and even allowed the parties to enter into exclusion agreements ousting the court's jurisdiction to give leave to appeal, but not in cases involving admiralty, commodity contracts, or insurance.

The court's discretion as to whether to grant a stay of court proceedings under S.11 of the Common Law Procedure Act, 1854 has vexed parties to arbitration agreements ever since it was enacted. The courts interpreted the provision as giving unfettered discretion, and were very miserly with stays. The Court of Appeal, in its 1889 decision in Joplin v. Postlethwaite³³⁹, dealt with an

³³⁷ This is contrary to the law as found and discussed, supra.

³³⁸ [1922] 2 K.B. 478, (C.A.).

³³⁹ Joplin v. Postlethwaite, (1890) The Law Times, Vol.61, N.S., 629.

application to stay an action for a final accounting and the winding up of a partnership, which application was made on the basis that the articles of the partnership provided that all differences related to the partnership were to be referred to arbitration. Cotton, L.J., treated the arbitration clause almost with contempt, stating that he doubted whether the issue of dissolution came within the clause, but "even if it does, I doubt whether arbitration would be a good form of tribunal for the purpose of determining whether the partnership should be dissolved."³⁴⁰ Bowen L.J. expressed himself as of the same opinion, adding: "By sect. 11 of the Common Law Procedure Act of 1854 a very great discretion is conferred upon the court in regard to staying proceedings in cases like the present." He then quoted the section, and added: "Therefore before the court makes an order staying all proceedings in an action,...it must, in each case, be satisfied that there is no such matter to be determined which ought not to be referred to arbitration."³⁴¹

Thus the court displayed a strong bias against stays, indicating the apparently unfettered discretion of refusal, and indicated that if any one of numerous matters in issue was not seen as fit for arbitration, a stay of the action would be refused. In 1892, on virtually identical facts, the Court of Appeal upheld a stay in Walmsley v. White³⁴², emphasizing the discretionary (if not

³⁴⁰ Id., p.632, col.1.

³⁴¹ Id., p.632, col.2.

³⁴² Walmsley v. White, [1892] 67 L.T. 433.

capricious) nature of the courts' exercise of their discretion as to the grant of a stay.

An agreement to submit all disputes to a foreign court was held to constitute a "submission" under s.11 of the Common Law Procedure Act, 1854³⁴³ and under s.4 of the Arbitration Act, 1889.³⁴⁴ Thus the same considerations and discretion of the court applied to applications to stay proceedings in favour of foreign forum clauses. For some years, these foreign forum clause appeared to have the approval of the courts. In The Cap Blanco³⁴⁵, The Court of Appeal dealt with a Bill of Lading which stated that any disputes as to its interpretation were to be decided in Hamburg according to German law. Without inquiring into whether there was any difference between the law of Germany and the law of England, the court quite roundly ruled that "In dealing with commercial documents of this kind, effect must be given, if the terms of the contract permit it, to the obvious intention and agreement of the parties... it is right to hold the plaintiffs to their part of the agreement." In Kirchner & Co. v. Gruban, Eve, J., stated that choice of foreign forum clauses are often entered into without due consideration, but nonetheless,

"prima facie it is an agreement by which the parties are bound and upon which the Court must act, unless for some good cause there is reason to think that the matter ought to be determined otherwise than by the tribunal to which the

³⁴³ Law v. Garrett, (1878) 8 Ch. D., 26.

³⁴⁴ Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society, Ltd., [1903] 1 K.B. 249 (C.A.).

³⁴⁵ The Cap Blanco, [1913] P. 130.

parties have deliberately agreed to submit their differences."³⁴⁶

The era of these two cases perhaps marks the high water mark for court respect for choice of forum clauses.

The jealousy of the Courts over their jurisdiction reasserted itself with a vengeance in the later cases. Adopting language from a domestic construction arbitration case, Bristol v. Aird³⁴⁷, the Court of Appeal in the 1922 case The Athenee³⁴⁸ overrode a foreign court clause on the basis of convenience and juridical advantage. Bristol v. Aird involved an application to the court to stay litigation in favour of an arbitration clause, pursuant to S.4 of the Arbitration Act, 1889. The Plaintiff resisted the stay on the grounds of apparent bias of the arbitrator, since the arbitrator was the engineer for one of the parties to the construction contract, who had the duty to certify work done and amounts owing under the contract. A dispute had arisen over the amounts certified. The House of Lords upheld the lower courts' refusal of a stay, emphasising in their reasons that the granting of a stay was a discretionary matter, and ruling that it would be improper to allow the arbitration to proceed where the arbitrator would act as witness, counsel, and judge of his own certifications. To get around the clear wording of the contract and earlier decisions on similar facts which held the parties to their bargain in spite of

³⁴⁶ Kirchner & Co. v. Gruban, [1909] 1 Ch. 413 at 419.

³⁴⁷ Bristol v. Aird, [1913] A.C., 241.

³⁴⁸ The Athenee, [1922] Ll. L. Rep. 6.

what we would see today as gross conflicts of interest³⁴⁹, the House of Lords in Bristol v. Aird introduced a convenient but disingenuous fiction: that by failing to follow the plain wording of the parties' contract, the court was upholding it. This judicial sleight-of-hand was accomplished by the reasoning that the parties must have understood that English law would apply to give the court the discretion to over-ride their contract. As Lord Moulton stated the proposition:

"...it must be remembered that these arbitration clauses must be taken to have been inserted with due regard to the existing law of the land, and the law of the land as applicable to them is, as I have said, that it does not prevent the parties coming to the Court, but only gives the Court the power to refuse its assistance in proper cases. Therefore to say that if we refuse to stay an action we are not carrying out the bargain between the parties does not fairly describe the position. We are carrying out the bargain between the parties, because that bargain to substitute for the Courts of the land a domestic tribunal was a bargain into which was written, by reason of the existing legislation, the condition that should only be enforced if the Court thought it a proper case for its being so enforced."³⁵⁰

Thus the House of Lords evinced a clear bias against arbitration clauses, stating in effect that the parties' agreement in their contract should be stood on its head. It was not a matter of holding the parties to their bargain unless some over-riding

³⁴⁹ 14 Holdsworth, 200: "till the statute of 1698, a common law court could not set aside an award for the misconduct of the arbitrators. The reason for this refusal of the courts to give a remedy in such a case was seems to have been that, as the parties chose their judges, they must put up with their defects. - Morris v. Reynolds (1703) 2 Ld. Raym. 857 per Holt, C.J. - ...an award by an arbitrator interested in the result of the award was valid, provided he had not kept his interest secret." (emphasis added) - Matthew v. Ollerton (1694) 4 Mod. 226, Earl v. Stocker (1691) 2 Vern. 251; Kemp v. Rose (1858) 1 Giff. 264-5 per Stuart V.-C.

³⁵⁰ Lord Moulton, [1913] A.C. 257 (emphasis added).

requirement of justice or public policy could be shown to make it unjust to enforce the contract, the law was now shaded against the bargain: such a bargain does not diminish the access of the parties to litigation before the Courts of England, the law of the land "only gives the Court the power to refuse its assistance (i.e. the advantage of the full litigation process in the Courts) in proper cases." An arbitration clause "should only be enforced if the Court thought it a proper case for its being so enforced." The House thus made a none-too-subtle shift from the position that prima facie the bargain deserved to be upheld to one in which the Court had to be persuaded that it should be upheld.

As to allowing some issues to be referred to arbitration and others litigated, Lord Parker evinced the bias of the courts in favour of restricting arbitrations to mere matters of account and technical matters of fact, while removing from arbitral jurisdiction all questions of the construction of contracts, stating:

"Everybody knows that with regard to the construction of an agreement it is absolutely useless to stay the action, because it will only come back to the Court as a case stated; therefore it is more convenient on a question of construction to allow the action to proceed; and at the same time with regard to accounts and matters of detail to allow the arbitration to proceed."³⁵¹

Predictably, one might say, later decisions picked up on the florid language of Lord Moulton in Bristol v. Aird and judicial respect for arbitration clauses was shown often in the breach. - The

³⁵¹ Lord Parker of Waddington, [1913] A.C. 262.

Athenee³⁵², The Fehmarn³⁵³, The Eleftheria³⁵⁴, etc.- The courts grafted on more and more qualifications which could result in the defeat of a foreign jurisdiction or arbitration clause. In 1970, in The Eleftheria, Brandon, J., reviewed the authorities and listed the principles as follows:

"(1) Where Plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the Defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is for the Plaintiff. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies, and if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the Defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the Plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial"³⁵⁵

Later, the judge stated:

³⁵² [1922] Ll.L.R. 6.

³⁵³ The Fehmarn, [1958] Ll.L.R. 551.

³⁵⁴ The Eleftheria, [1970] P.94.

³⁵⁵ [1970] P. 94, at 99.

"I think that it is essential that the court should give full weight to the prima facie desirability of holding Plaintiffs to their agreement."³⁵⁶

And still later:

"...in general, and other things being equal, it is more satisfactory for the law of a foreign country to be decided by the courts of that country."³⁵⁷

There is a strong bias evidenced by the above list. Great emphasis is placed upon the advantages of and disadvantages to the Plaintiff, who is in breach of the agreement, while almost no regard is had to the advantages or disadvantages of the Defendant who seeks to uphold the bargain. There is also a strong chauvinism shown in the assumption that no legal, cultural, religious, or other bias exists in England, and that the quality of justice there is at least the equal of that anywhere else in the world. There is no requirement that the Plaintiff have any connection with England other than a willingness to hire English barristers.

Michael Sturley, giving the results of a study into case law on Bill of Lading choice of forum clauses³⁵⁸, in article published in 1992, stated that the cases applying the principles set out in The Eleftheria show that a large measure of discretion remains for the court. Discretionary balancing can just as easily produce the conclusion that the litigation should be conducted in England as

³⁵⁶ Id., 103.

³⁵⁷ Id., 105.

³⁵⁸ Michael F. Sturley, "Bill of Lading Choice of Forum Clauses: Comparisons Between United States and English Law," [1992] 2 L.M.C.L.Q. 248.

that the choice of forum should be honoured. For example, in The Vishna Prabha³⁵⁹, the one factor against the choice of India as the forum was the court's subjective belief that the defendant's sole motive in raising the choice of forum clause was to delay payment of the claim. He states:

"Thus the trial court can usually justify whichever result it prefers. As each case turns on its own facts, and as the general principles leave considerable discretion to the trial judge, it is hardly surprising that there is little consistency in this area. The reported cases suggest that an English court is about as likely to retain the case as to give effect to the choice of forum clause."

The principles set out in The Eleftheria were applicable generally to applications to stay, whether on the basis of choice of foreign court clauses or on the basis of arbitration clauses.³⁶⁰

England was stung by criticism of the excessive interference of the English courts in arbitration proceedings by way of the stated case procedure, by appeals (often all the way through the trial court, the Court of Appeal and the House of Lords), by setting aside for errors of fact or law apparent on the face of the award, and the resulting delays and expense incurred in what is intended to be a

³⁵⁹ [1979] 2 Ll.L.R. 286 (Q.B.).

³⁶⁰ Law v. Garrett (1878) 8 Ch. D. 26; Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society Ltd. [1903] 1 K.B. 249; Kirchner v. Gruban [1909] 1 Ch. 413, 419; The Cap Blanco [1913] P. 130; The Athenee [1922] Ll.L.L.Rep. 6; The Fehmarn [1957] 2 Ll.L.L.Rep. 551; Where there is a written agreement to submit a dispute to a foreign court, "the discretion to stay is exercised on the same lines as where there is an arbitration clause." - Russell on the Law of Arbitration 184 (20th ed., 1982).

procedure for settling disputes quickly and privately³⁶¹. It was also noted that these problems led to the loss of arbitration business in England, with losses to the national economy estimated in 1978 to be as high as 500 Million Pounds per year³⁶². One writer has noted the opinion of some American practitioners that it would be an act of professional negligence to conduct arbitration in a forum which provided for a stated case procedure, or which provided for awards to be set aside for an error of law apparent on the face of the award.³⁶³

3. THE ARBITRATION ACT, 1979

The recommendations of the Commercial Court Committee Report on Arbitration were implemented in the Arbitration Act, 1979³⁶⁴. This Act abolished the stated case procedure, and the jurisdiction to set aside or remit awards for errors of fact or law on the face, replacing these with a limited right to appeal with consent of all parties or by leave of the court, but the court is not to grant leave unless it finds that the question of law concerned "could substantially affect the rights of one or more of the parties to the arbitration agreement." (s.1). The court has jurisdiction under s.2 to determine preliminary points of law arising in the course of references to arbitration upon the application of a

³⁶¹ Commercial Court Committee Report on Arbitration, 1978, ("The Donaldson Committee Report") 6,7, Cmnd. 7284.

³⁶² Id.

³⁶³ William T. Graham, "International Commercial Arbitration: The Developing Canadian Profile", in Uncitral Arbitration Model in Canada, (1987), Robert K. Paterson and Bonita J. Thompson, Eds.

³⁶⁴ U.K. Statutes, 1979, c.42.

party, but only with the consent of all the parties, or, if by the consent of the arbitrator or umpire alone, only if the High Court finds that the determination of the question of law is likely to result in substantial savings in costs to the parties. A limited right to appeal therefrom is provided by s.2(3), but only with leave of the High Court and only if the question of law is one of general public importance or there is "some other special reason." Section 3 allows the parties to an arbitration to enter into an "exclusion agreement" which excludes all rights of appeal and excludes determinations of questions of law under s.2. However, to the misfortune of the commercial community, s.4 provides that exclusion agreements have no effect with respect to arbitrations concerned with maritime claims, contracts of insurance, or commodity contracts, unless the exclusion agreement was entered into after the commencement of the arbitration, or the award or question of law relates to a contract expressed to be governed by a law other than the law of England or Wales. Thus an exclusion agreement in a charterparty or Bill of Lading is ineffective, unless it expressly provides that it is governed by a system of law other than English or Welsh law.³⁶⁵ This provision, and the grounds advanced to justify it, have been severely criticised³⁶⁶

³⁶⁵ Dicey & Morris, The Conflict of Laws 550 (11th ed., 1987, L. Collins, Ed.). This seems to be born of the rather positivist English notion, reflected in the Report of the Commercial Court Committee on Arbitration ("The Donaldson Committee Report") Cmnd. 7284, that English commercial law should be allowed to develop only under the tutelage of the English courts or Parliament. - Id.

³⁶⁶ Note, "Excluding Appeals to the Courts In Maritime Arbitration," [1992] 1 Ll.M.C.L.Q., 1. The author states that the provision "flatly contradicts the principle of party autonomy." English judges do not escape his criticism: "...many, if not most,

and at least one attempt has been made by the international maritime arbitration community to persuade the United Kingdom to drop the provision³⁶⁷.

Any attempt to use a Scott v. Avery clause to get around the jurisdiction of the court to hear appeals and to determine of questions of law is squelched by s.3(4) of the 1979 Act.

A somewhat hopeful sign may be seen in the decision of the House of Lords in B.P.T. Tioxide Ltd. v. Pioneer Shipping Ltd. and Armada Marine S.A. (The "Nema")³⁶⁸, its first consideration of the leave to appeal provisions of the Arbitration Act, 1979. The House appeared to take a restrictive approach to grants of leave to

charter disputes arise over allocation of risks which were never the subject of negotiation. Judges approach such matters as problems in grammar and logic. Many of them - in the Court of Appeal or in the House of Lords - are decades removed from involvement in commercial matters. The doctrine of stare decisis fosters a lamentable tendency to extend case law by analogy in order to fashion the law as if it were a seamless web. The little mistakes of yesteryear may combine to create a senseless quagmire from which even the most nimble legal minds cannot escape without the help of Parliament." He goes on, later, "The English authorities with special responsibilities for regulating arbitration now single out maritime, commodities, and insurance arbitrations for different treatment solely because there is 'no pressure from users' to make a change..." "It is not enough to say that parties can always seek agreement about exclusion after a dispute arises. An agreement between contesting parties about most anything at that stage is rare, especially if one realizes that the other wants it."

³⁶⁷ Id., at p.3, the author notes that the Committee on Maritime Arbitration of the Maritime Law Association of the United States voted to urge elimination of the English barrier to exclusion clauses in charterparty clauses.

³⁶⁸ B.P.T. Tioxide Ltd. v. Pioneer Shipping Ltd. and Armada Marine S.A. (The "Nema"), [1981] 2 Lloyd's. Rep. 239 (H.L.).

appeal. The House ruled that, in light of Parliament's intention to promote greater finality of arbitral awards and to avoid the former abuses of the stated case procedure, much stricter criteria should be applied on leave to appeal applications than were employed in exercising the former discretion to require the arbitrator to state a case for the opinion of the court. At the same time, however, the House took great pains to reinforce the rule that an Arbitrator must not disregard English law. Lord Diplock (with whom all the other Law Lords concurred on all points) ruled³⁶⁹ that the policy that underlay the statutory jurisdiction of the Court, as it existed from 1889 to 1979, was directed to secure that "the settled principles of law" should be applied by arbitrators as well as by the Courts of Law. Arbitrators in England are not be exposed to "a temptation to depart from settled principles of law."³⁷⁰

Further, the House was very careful to point out (repeatedly) that it was dealing with a "one off" contract, not a "standard form" or a "standard term" agreement.³⁷¹ The House indicated that its reluctance to endorse the granting of leave to appeal would vanish

³⁶⁹ Quoting from Czarnikow v. Roth, Schmidt & Co. (1922) 12 Ll.L.Rep. 195, [1922] 2 K.B. 478, (which had declared that any attempt to oust the stated case provisions by agreement was contrary to public policy) as showing "the policy that underlay the statutory jurisdiction of the Court, as it existed from 1889 to 1979, as being directed to secure that 'settled principles of law' should be applied by arbitrators as well as by Courts of Law."

³⁷⁰ [1981] 2 Lloyd's Rep. 245.

³⁷¹ [1981] 2 Lloyd's Rep. 243, 244, 245, 246, 247, 248, and 250.

if it appeared that the arbitrator had been dealing with a standard form contract, stating that if arbitrators were allowed to

"adopt any principles of law they pleased...the result might be that in time codes of law would come to be administered in various trades differing substantially from the English mercantile law."³⁷²

Thus, any arbitration taking place in England or Wales runs the risk of the grant of a leave to appeal on a question of law under the Arbitration Act, 1979, unless there is a choice of curial law other than English law, and only if the English courts see that choice as valid.³⁷³

According to Dicey & Morris³⁷⁴, under English law, if there is no express choice of the proper law of the contract as a whole (or of the arbitration agreement in particular), there is a strong presumption that the proper law of the contract (including the arbitration clause) is the law of the country in which the arbitration is held. Thus if arbitration under such an agreement takes place in England, there is a rebuttable presumption that the validity, effect, and interpretation of the arbitration agreement, and the jurisdiction of the arbitral panel, will be determined by

³⁷² Lord Diplock at [1981] 2 Lloyd's Rep. 244, quoting from Czarnikow v. Roth, Schmidt & Co.

³⁷³ "[W]here there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible [on that choice of law] provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy." Vita Food Products, Inc. v. Unus Shipping Co. [1939] A.C. 277 (P.C.).

³⁷⁴ Dicey & Morris on the Conflict of Laws (11th ed., 1987, L. Collins Ed.).

English arbitration law.³⁷⁵ Further, if the parties have not specified the "curial" law which is to govern the arbitral proceedings, English law presumes that law to be the law of the place of arbitration.³⁷⁶ If, however, it is determined that the proper law of the arbitration agreement is English law but the place of the arbitration is specified as, say, Zurich, then English law provides that it would govern the validity, interpretation, and effect of the arbitration clause (including the scope of the arbitrator's jurisdiction), but the arbitration proceedings (including the extent to which they are subject to judicial control) would be governed by the laws of Zurich³⁷⁷.

In every case, the law presumed or chosen as the proper law of the contract and/or the arbitration agreement must be a system of municipal law, English law does not recognize the choice of lex

³⁷⁵ The presumption may be overcome, under the English rules of conflict of laws, by determination that there was an implied intention of the parties that some system of law other than English law was the proper law of the contract and/ or of the arbitration agreement, or that the contract is more closely connected with a country other than England. - Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd. [1969] 1 WLR 377 (C.A.); [1970] 1 All ER 796 (H.L.); Mann, supra, 1-13.

³⁷⁶ Bank Mellat V. Helleniki Techniki S.A., [1983] 3 WLR 783, 789; [1984] Q.B. 291, 301.

³⁷⁷ Dicey and Morris Conflict of Laws, 11th ed., 1987, Chapter 16, pp.534-544, see in particular the cases noted in fn.3, p.535; J.H.C. Morris, The Conflict of Laws, 4th ed., 1993, 131-134. The English position might well astound a Swiss arbitrator accustomed to the doctrine of Kompetenz-Kompetenz. - See the discussion of Kompetenz-Kompetenz, infra.

mercatoria, of more than one system of law, or of no system of law³⁷⁸. Nor does English law recognize "floating" or "anational" arbitrations divorced from all governing curial law.³⁷⁹ Apparently, arbitrations ex aequo et bono or as amiable compositeurs are similarly not recognized in English law, according to a 1962 decision refusing to allow the arbitrators to follow a direction that the arbitrators decide "according to an equitable rather than a strictly legal criterion."³⁸⁰ However, in a 1978 decision on a similar clause, the Court of Appeal found it "entirely reasonable" to oust

"technicalities and strict constructions. That is what equity did in the old days. And that is what arbitrators may properly do today under such a clause as this."³⁸¹

³⁷⁸ "[C]ontracts are incapable of existing in a legal vacuum. They are mere pieces of paper unless they were made by reference to some system of private law." - Amin Rasheed Shipping Corp. v. Kuwait Insurance Co. [1983] 3 WLR 241, 249, per Lord Diplock; Dicey & Morris, 543; Mann, supra, 26.

³⁷⁹ "[O]ur jurisprudence does not recognize the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law." - Bank Mellat v. Helleniki Techniki S.A. [1983] 3 WLR 783; Mann, supra, 27.

³⁸⁰ Orion Compania Espanola de Seguros v. Belfort Maatschappij Voor Algemene Verzekeringen 2 Lloyd's Rep. 257, in which Megaw, J. was faced with the choice between ruling that such a clause was void in toto, or ruling that the arbitration clause was valid but that the direction to decide "according to an equitable rather than a strictly legal interpretation" should be ignored. He chose the latter, ruling that "the parties cannot make a question of law any less a question of law...by purporting to agree that it shall be decided by some extra-legal criterion."

³⁸¹ Eagle Star Insurance Co. Ltd. v. Yval Insurance Co. Ltd. [1978] 1 Lloyd's Rep. 357, per Lord Denning, relying on a statement by Scrutton, L.J. in Czarnikow v. Roth that: "Arbitrators, unless expressly otherwise authorized, have to apply the law of England." (emphasis added).

The decision of the Court of Appeal was not dealt with by the House of Lords in The Nema.³⁸²

In summary, it is evident that judicial jealousy of jurisdiction is alive and well in England, but that party autonomy and arbitral autonomy are not well regarded by the courts or law. One British text-writer recently noted: "[T]he English insistence upon the subordination of arbitration to ordinary English law is a rather more rigid rule than in many other legal systems."³⁸³

4. THE UNCITRAL MODEL LAW IN ENGLAND

England struck a committee under the leadership of Lord Mustill to consider whether, and to what extent, the Model Law should be implemented in England, Wales, and Northern Ireland. The committee provided a report recommending against the adoption of the Model Law, as, in their opinion, it "does not offer a regime which is superior to that which presently exists..."³⁸⁴ In particular, the committee was concerned that the Model Law, rather than supplying an entire code of court intervention, would create two distinct regimes of judicial intervention, one for "matters governed by this

³⁸² B.P.T. Tioxide Ltd. v. Pioneer Shipping and Armada Marine S.A. (The "Nema") [1981] 2 Lloyd's Rep. 239.

³⁸³ Harris, An Introduction to Law 126 (4th ed., 1993).

³⁸⁴ A New Arbitration Act? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law on International Commercial Arbitration 6 Arb. Int. 3 at 25 (1990) (cited herein as the "Mustill Report").

Law" and the other for matters not so governed.³⁸⁵ This concern was triggered by the failure of the Model Law to state explicitly its intended scope.³⁸⁶

The committee was critical of the Model Law's definition of "arbitration agreement"³⁸⁷, stating "In particular, the Model Law requires a signature on the document containing the contract. This would leave most Bills of Lading, many brokers' contract notes and other important categories of contracts outside the scope of the

³⁸⁵ Art. 5 of the Model Law:

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

³⁸⁶ Mustill Report, p.51:

"The problem here arises when the Law is silent on the particular matter in question. This may occur either because the draftsmen of the Law intended that the matter should fall outside its scope, or because it was taken to be so obvious..., or because the draftsmen never addressed their minds to the matter. As an example one may take the existing power under s.27 of the Arbitration Act 1950 to extend the time for commencement of arbitration....Another example is the power to intervene by injunction during the reference, which is neither excluded nor conferred....if it is considered desirable in principle to enact the Model Law, it may be necessary to work out, and state explicitly, its intended scope. Until this is done, it will not be possible to assess with precision the effect which enactment would have on current English arbitration law and practice."

³⁸⁷ Article 7(2):

"The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

Model Law."³⁸⁸ UNCITRAL had expressed this same concern in its Commission Report on Art.7(2).³⁸⁹

England has now prepared a draft Arbitration Act³⁹⁰ which will codify party autonomy, separability, and Kompetenz - Kompetenz as part of English law.³⁹¹ The above-noted problem of the Model Law with respect to Bills of Lading and other commercial instruments not signed by both parties is dealt with by defining an "arbitration agreement" as one not required to be in writing, and by providing that an agreement in writing includes:

- (i) An agreement made in writing whether or not signed;
- (ii) An agreement made by an exchange of written communications;
- (iii) An agreement evidenced in writing;

³⁸⁸ Mustill Report, 52.

³⁸⁹ Commission Report A/40/17 (21 August 1985), Holtzmann & Neuhaus 300, states in part:

"84. The Commission noted that paragraph (2) did not cover cases, encountered in practice, where one of the parties did not declare in writing his consent to arbitration. Practical examples, which are recognized by some national laws as constituting valid arbitration agreements, included the arbitration clause in a bill of lading, in certain commodity contracts and reinsurance contracts which customarily become binding on a party by oral acceptance, and in other contracts which were concluded by a written offer and an oral acceptance or by an oral offer and a written confirmation." The Commission compensated for this problem, in part, by allowing the establishment of an arbitration agreement by means of statements of claim and defence.

³⁹⁰ Draft English Arbitration Act, Bill of November 24, 1995. See E. Chiasson, "A Precipice Avoided: Judicial Stays and Party Autonomy in International Arbitration" The Advocate vol.54 part 1 at 63.

³⁹¹ Id.

(iv) An agreement not in writing but made by reference to terms in writing;

(v) An oral agreement recorded by one party or by a third party authorized to do so by the parties; and

(vi) An exchange of written submissions in arbitration or litigation containing an undenied allegation of an arbitration agreement.³⁹² As Chiasson notes,

"Those who wish to take advantage of the New York Convention [to enforce an award made under an arbitration agreement which qualifies under this law but not under Art.7 of the Model Law or Art II(2) of the New York Convention] would be wise to look to compliance with its requirements."³⁹³

However doubtful the potential success of the draft English Bill in meeting the problem of unsigned arbitration agreements in Bills of Lading and other commercial instruments, it serves to point out a serious deficiency of the New York Convention and the Model Law, particularly for a nation such as Canada which relies on maritime trade, and for arbitration institutions seeking arbitration business from such trade.

VI. A SHORT HISTORY OF ARBITRATION IN FRANCE

Since France is a civil code country in the Romano-German tradition, it is not surprising that arbitration ex compomissio and as amicabilis compositor (as discussed above) were practised in

³⁹² English Draft Bill of November 24, 1995, Sns.5,6. See Chiasson, *supra*, p.70 fn.35.

³⁹³ Chiasson, *supra*, p.70 fn.35. Chiasson notes that perhaps some comfort can be obtained from Art.7 of the Convention which provides, *inter alia*, that the Convention does not impair rights to enforce arbitration awards under domestic law.

France. Royal authority favoured arbitration, while Parliaments sought to restrict it. By his Edict of August, 1560, Francis II made arbitration compulsory for all commercial disputes among merchants, decreed that all arbitration agreements were binding even if no penalty had been stipulated, and restricted appeals. If a penalty was stipulated, parties were free to revoke the arbitration agreement provided they were prepared to pay the penalty. No appeal was allowed against the award unless the penalty was paid, and the penalty was not recoverable even if the appeal resulted in the overturning of the award.³⁹⁴

Parliaments resented arbitration as encroaching on their jurisdiction and reducing the incomes of their members. Awards were null if not rendered within a time limit, and the practice grew of filing them in a court registry or with a notaire to prove their date. This gave the courts the opportunity to review awards. The award, once so filed, became enforceable as a judgment of the court. This system applied equally to arbitration and amiable composition, so the distinction between them became blurred - all arbitrators gained the power to decide in accordance with equity.³⁹⁵

The French Revolution brought new rules. All obligations, statutes, and society were seen as founded on principles of "liberty, equality, and fraternity," and the free will of the

³⁹⁴ David, 88,89.

³⁹⁵ David, 89.

people. Arbitration and the right to choose one's own judge were seen as a birthright, a droit naturel, to be protected against legislative encroachment. These rights were enshrined in the Constitution of 1791 and the Constitution of Year III (Art. 210). Arbitration thus became compulsory, took the place of courts and was intended to administer justice on a basis other than law.³⁹⁶ This situation was not to last. The bloody excesses that followed the revolution created a boomerang effect. Arbitration soon became regarded as a threat to law and order, and it was contemplated that voluntary arbitration would be outlawed. It was in this climate of suspicion that arbitration was treated in the Code of Civil Procedure of 1806, which introduced various restrictions and formalities to arbitration. Awards would not be binding until ratified by a court order. Arbitration thus became only the first step in a procedure leading to a judgment.³⁹⁷

In the mid-19th century, judicial hostility to arbitration grew. Codification helped create confusion between law and State, the idea became widespread that the State had not only the right but the duty to be the sole judge for citizens - arbitration was no longer regarded as arising from a natural right or civil liberty, rather it was seen as ousting court jurisdiction, an offense to justice. In 1843 the Cour de Cassation refused to enforce an agreement to arbitrate future disputes (clause compromissoire)

³⁹⁶ David, 55-56. 89,90.

³⁹⁷ David, 90.

which did not name the arbitrators and define the dispute.³⁹⁸ Since then, the French courts have upheld clauses compromissaires in international commercial cases, although they are still void in domestic cases.³⁹⁹ A statute of December 31, 1925 recognized the validity of clauses compromissaires in commercial matters.⁴⁰⁰ The arbitration law of France was reformed by two Orders (décrets) of 1980 and 1981 which place France among the forefront of liberal treatment of international commercial arbitration.⁴⁰¹

Quebec remained, until recently, under the thrall of the 1843 decision of the Cour de Cassation of France. The lawyers and

³⁹⁸ L'Alliance c. Prunier, judgment of July 10, 1843, Cass. civ. 1843, Receuil Sirey 1843.1.561. "[T]he Cour de Cassation, the French Supreme Court, rendered an exceedingly conservative answer to the question of what requirements applied to the validity of compromissory clauses. With blatantly circuitous reasoning, the Court held that the requirements enumerated in article 1006 of the Code de procedure civil, despite its literal reference to the submission, applied to both the compromis and the clause compromissoire. Therefore, a valid agreement to submit future disputes to arbitration had to define the subject matter of the dispute and appoint the arbitrators. Because the clause compromissoire could not satisfy these requirements, the Court concluded that such clauses were unlawful under French domestic law." - Carbonneau, T., "Arbitral Adjudication, A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce" [1984] vol.19:3 Tex. Int'l L.J. 33, 53 fn.88.

³⁹⁹ Statute of July 5, 1972, amending the civil code Art.2061.

⁴⁰⁰ David, 91.

⁴⁰¹ Carbonneau, T., "The Reform of the French Procedural Law on Arbitration: An Analytical Commentary on the Decree of May 14, 1980" [1981] 4 Hast. Int'l & Comp. L.J. 273; Carbonneau, T., "Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce" [1984] vol. 19:33 Tex. Int'l L.J. 33, 39 fn.12, 53; Carbonneau, T., and Janson, F., "Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability" [1994] 2 Tulane J. Int'l & Comp. L. 193, 217.

legislators of Quebec remained suspicious of arbitration until recent legislative reforms.⁴⁰²

THE COMMON FATE OF THE LAW MERCHANT IN CIVIL AND COMMON LAW SYSTEMS
The Law Merchant has suffered a common fate in civil and common law systems - merchants' customs and trade usages, and extra-judicial means of dispute resolution, have been subverted to the legal process⁴⁰³:

"Commercial law today has lost its original character, even in countries where it is still distinguished (at least in theory) from the common law of droit civil. Its rules are no longer evolved from business itself. It is no longer international law, and it is applied by the ordinary courts of justice, or under their supervision. When businessmen provide for arbitration in their contract, they may perhaps endeavour to revive, albeit under other conditions and in a different environment, a 'law for businessmen'. Legislators - or in the common law countries the courts - have striven to 'absorb' the law merchant within the more general system of the national law (jus civile)....Commercial codes have been compiled, which have consecrated the take-over of commercial law by the 'lawyers'. Commercial tribunals have been abolished in some countries, and in some countries civil code and commercial code have been fused in one code only. Law as it is conceived by lawyers would appear thus to have won a complete victory, with the total disappearance of the autonomy of commercial law in our modern societies."⁴⁰⁴

⁴⁰² David, 63.; David wrote: "The fear may have arisen that, through the device of 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." - Id.

⁴⁰³ René David, Arbitration in International Trade, 14 (1985).

⁴⁰⁴ Id.

The legal rules of commercial behaviour are more a legalistic game played by lawyers, judges, and legislators, than a reflection of business needs and practice:⁴⁰⁵

"The phenomenon of arbitration, through its recent development, makes clear that business does still require a special set of rules made in consideration of its needs. The unity of civil and commercial law is therefore, frequently, no more than a sham. The law governing trade relations is in theory only to be found therefore in the provisions of codes and statutes compiled by jurists. More important in the practice of business are the standard forms and the general conditions emanating from commercial organizations."⁴⁰⁶

VII. RESPECT FOR ARBITRATION AGREEMENTS IN CANADIAN COURTS

1. THE GOOD OLD DAYS (PRE-1986).

Davidson's description of the pre-1986 situation in Canadian arbitration law is apt:

"The main difficulty was the extent to which the courts could interfere in and control the arbitral process, thereby destroying one of the main reasons for using the arbitration process, i.e. to avoid the domestic courts. The Canadian arbitral system (at least in the common law provinces) was (and to a large extent as regards domestic arbitration still is) based upon the English Arbitration Act of 1889. This Act was rooted in the nineteenth century perceptions which looked upon the arbitral process as a somewhat suspicious departure from the court's normal jurisdiction and something the courts could only tolerate as long as the courts controlled the process."⁴⁰⁷

Canada's nine common law provinces had arbitration statutes based upon the Arbitration Act, 1889 of England, with all the opportunities for judicial interference in arbitration and arbitral

⁴⁰⁵ René David, Arbitration in International Trade, 15 (1985).

⁴⁰⁶ Id.

⁴⁰⁷ P. Davidson, "International Commercial Arbitration in Canada", (1991) 12 Int'l Law & Bus. 97, 98. (cited herein as "Davidson").

awards fostered by that Act. As Davidson notes, in the absence of a statutory provision, these provinces and the two territories apply the common law derived from England.⁴⁰⁸ The Federal government had not enacted any arbitration statute. In Quebec, arbitrations were governed by the Code of Civil Procedure inherited from France, with minor updates. Until 1966, "clauses compromissoires" (agreements to arbitrate future disputes) were void as against public policy, under Quebec law.⁴⁰⁹ Canadian statutes "represented a reluctant tolerance of arbitration, exemplified by the scope they presented for judicial supervision of arbitral processes."⁴¹⁰ Anomalously, the Arbitration (Foreign Awards) Act⁴¹¹ which gives effect to the Protocol on Arbitration Clauses, 1923 and the Convention on the Execution of Foreign Awards, 1927, has been in effect in Newfoundland since 1931, and appears to remain in effect.⁴¹²

⁴⁰⁸ Davidson, 99.

⁴⁰⁹ See the discussion of National Gypsum Co. Ltd. v. Northern Sales Ltd., [1964] S.C.R. 144, below.

⁴¹⁰ R.K. Paterson, "Canadian Developments in International Arbitration Law: A Step Beyond Mauro Rubino-Sammartano's International Arbitration Law, (1991) V.27 No.3. Will. L.R. 573, at 574.

⁴¹¹ S. Nfld. 1931, c.2.

⁴¹² J. Castel, "The Enforcement of Agreements to Arbitrate and Arbitral Awards in Canada", (1991) 17 Cda-U.S. L.Jo. 491, 492.

Keefe and Heintzman⁴¹³ in their 1991 paper point to Canadian case law prior to 1986 which shows extreme reluctance on the part of Canadian courts to refer matters to arbitration. They state that the courts began with the point of view that if the sole issue was the determination of a question of law, then the arbitral tribunal was not the appropriate forum and a stay of proceedings should be refused. Anglin, J., in the Supreme Court of Canada's decision in Stokes-Stephens Oil Co. Ltd. v. McNaught⁴¹⁴ (1918) stated that if the sole issue to be dealt with was a question of law, a stay of the action might properly be refused. In Jussem v. Nissan Automobile Co. (Canada) Ltd⁴¹⁵, the court held that it would not exercise its discretion to stay the action under section 7 of the Ontario Arbitrations Act where there were substantial questions of law involved. [Section 7 of the Ontario Act was virtually identical to Section 4(1) of the English Arbitration Act, 1950, which is, in turn, almost identical to S.4 of the English Arbitration Act, 1889.⁴¹⁶] Particularly instructive, they say, is

⁴¹³ John A. Keefe and Thomas S. Heintzman, "The Enforceability of the Agreement to Arbitrate in Canada", International Commercial Arbitration and ICC Practice, (1991).

⁴¹⁴ Stokes-Stephens Oil Co. v. McNaught, (1918) 57 S.C.R. 549, at 558.

⁴¹⁵ Jussem v. Nissan Automobile Co. (Canada) Ltd., (1972), [1973] 1 O.R. 697.

⁴¹⁶ Arbitration Act, 1950 (England), S.4(1):
"If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of a matter agreed to be referred, any party to those 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

the case of M. Loeb Ltd. v. Harzena Holdings Ltd⁴¹⁷., in which the dispute was over the interpretation of a lease. Cory J., having reviewed the authorities on Section 7 of the Ontario Arbitrations Act, summarized the principles governing the exercise of the Court's discretion:

"First the party resisting the stay must bear the burden of convincing the court that the litigation should not be stayed.

Secondly, if a matter of law or mixed fact and law must be determined then the courts have tended to refuse the application to stay litigation.

Thirdly, if the dispute involves the interpretation of an agreement, the action should not be stayed.

Fourthly, if the matter in dispute involves a question of fact and particularly if that question turns on the testimony of experts in technical fields, then arbitration is a particularly appropriate method of resolving the issue and the litigation should be stayed.

Fifthly, if the matter in dispute involves the interpretation and application of foreign law and the parties have already agreed to arbitration on that aspect, then the litigation should be stayed pending the determination of the arbitration on the aspect of foreign law and its application. Lastly, and perhaps this is trite, the interpretation of documents has been deemed to be a question of law and thus if interpretation of documents is the real essence of the dispute between parties, then the litigation should not be stayed pending the arbitration."

Having found the law to be thus, it is quite understandable that Justice Cory, finding that the dispute involved the interpretation

proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, 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." S. 4 of the Arbitration Act, 1889 is identical except that it uses "submission" instead of "arbitration agreement".

⁴¹⁷ M. Loeb Ltd. v. Harzena Holdings Ltd., (1980) 18 C.P.C. 245 (Ont.H.C.)

of the lease, refused to stay the action, thus defeating the arbitration agreement.

Since almost all commercial disputes involve some interpretation of the contract, or of documents, one wonders what matters were considered proper to refer to arbitration other than mere accountings or technical points of fact.

Keefe and Heintzman go on to note that only where the parties had made arbitration a condition precedent to litigation did the courts feel bound to stay judicial proceedings, following Scott v. Avery.⁴¹⁸ The Supreme Court of Canada recognized Scott v. Avery clauses as part of Canadian law in Deuterium of Canada Ltd. v. Burns and Roe⁴¹⁹, in 1974.

2. THE EXCHEQUER COURT OF CANADA AND THE FEDERAL COURT OF CANADA, BEFORE 1986

Since there was no Federal arbitration statute, and no provision in the Exchequer Court Act or the Federal Court Act, the Admiralty Act or any other Federal Statute stating which arbitration law was applicable to Admiralty matters, there was confusion as to whether to apply the arbitration law of the province in which the Federal Court action was brought, or the law of arbitration of England as it stood when Canada received its maritime law. With respect to the common law provinces, this would make little difference, since

⁴¹⁸ (1855) 5 H.L.C. 811, 10 E.R. 1121.

⁴¹⁹ 44 D.L.R. (3d) 693.

they all applied the English Arbitration Act, 1889 or some variation thereof, but it made a great difference for actions brought in Quebec. In Clement Tremblay v. Druce,⁴²⁰ in 1957, the Quebec Admiralty District of the Exchequer Court applied English Admiralty law and English arbitration law to Admiralty practice matters and arbitration matters, respectively, in dismissing an application to stay an action commenced in the Quebec Admiralty District in defiance of an agreement to arbitrate in Montreal. However, in National Gypsum Co., Inc. v. Northern Sales Ltd.⁴²¹, the Supreme Court of Canada, by a 3 of 5 majority, ruled in 1963 that the applicable arbitration law was that of Quebec. The case involved a dispute under a charterparty, signed in New York and containing the New York Produce Exchange form of arbitration clause, which called for arbitration in New York. The defendant moved for dismissal of the suit on the ground that the court's jurisdiction had been ousted by the arbitration clause, or for a stay in favour of the arbitration which was already under way in New York. The application was dismissed by the Quebec Admiralty Court, which decision was upheld by the majority in the Supreme Court of Canada. The latter court reasoned that the court had jurisdiction ratione materiae and ratione loci by reason of the Admiralty Act and Rules, and that its jurisdiction could not be

⁴²⁰ Clement Tremblay v. Henry C. Druce, [1957] Ex.C.R. 250, (Quebec Admiralty District). This case applied English Admiralty rules that the court has jurisdiction in personam on the basis of personal service of a writ of summons on the defendant within the territorial jurisdiction of the court, noting that jurisdiction over the res arises from arrest of the ship in the jurisdiction of the court.

⁴²¹ [1964] S.C.R. 144.

interfered with by the arbitration clause. The object of such a clause is not to modify the rights of the parties but to enforce them, and how a right is enforced is a matter of procedure. Procedure is governed by the lex fori which in the present case was the procedure in force in the Superior Court of the Province of Quebec. Under the Civil Code, a "clause compromissoire" [an agreement providing for the arbitration of future disputes⁴²²] was void as contrary to public policy⁴²³. Thus the arbitration agreement was vitiated by absolute nullity, could not be acted upon by the courts in Quebec or the Admiralty Court Quebec Division, and any award made upon it would not be res judicata in Quebec.⁴²⁴

In dissents prescient of later decisions of the Supreme Court of Canada in a line running from Quebec North Shore Paper v. C.P.R.⁴²⁵ (1976) through ITO-International Terminal Operators Ltd.

⁴²² David, 91.

⁴²³ Comp. l'Alliance v. Prunier, Sirey 1843.1.562, a decision of the Cour de Cassation (Supreme Court of France) in 1843, concluded that clauses compromissoires were invalid, except in matters of maritime insurance in respect of which the clause was expressly authorized under Art.332 of the Code du Commerce. - [1964] S.C.R. 150-151. The invalidity of clauses compromissoires was affirmed by the Quebec Court of Appeal in 1962, in Vinette Construction Ltée c. Dame Drobrinsky [1962] Que Q.B. 62. However, the courts of France had recognized the validity of clauses compromissoires in international commercial matters in a line of cases running from 1860 onward. By the French Statute of 31 December, 1925, clauses compromissoires were authorized for commercial disputes - Fouchard, L'Arbitrage Commercial International para.95 (1965).

⁴²⁴ [1964] S.C.R. 144,151.

⁴²⁵ Quebec North Shore Paper v. C.P.R., [1977] 2 S.C.R. 1054.

v. Miida Electronics Inc. (the "Buenos Aires Maru")⁴²⁶ in 1986 and Whitbread v. Walley⁴²⁷ in 1990, Ritchie and Cartwright, JJ., ruled that the law to be applied was that of the High Court of Justice of England, as adopted into Canada by the Admiralty Act, 1934 (Can.). By that Act, the law to be applied by the Admiralty Divisions of the Exchequer Court of Canada was the same all across Canada, and under that law, the arbitration clause was perfectly valid.⁴²⁸

In 1965, Quebec amended Art. 951 of its Code of Civil Procedure to provide:

"An undertaking to arbitrate must be set out in writing. When the dispute contemplated has arisen, the parties must execute a submission. If one of them refuses, and does not appoint an arbitrator, a judge of the court having jurisdiction makes such appointment..."

In spite of this revision of the Code of Civil Procedure, the Superior Court of Quebec continued to hold clauses compromissaires void as against public policy, since the Quebec Civil Code had not been amended to the same effect.⁴²⁹ However, in The Angelic Power⁴³⁰ Pratte, J., of the Federal Court of Canada Trial Division

⁴²⁶ ITO- International Terminal Operators Ltd. v. Miida Electronics Inc. (The "Buenos Aires Maru"), [1986] 1 S.C.R. 752.

⁴²⁷ Whitbread v. Walley, [1990] 3 S.C.R. 1273.

⁴²⁸ [1964] S.C.R. 144, 162.

⁴²⁹ Borenstein v. Trans American Investment & Development Co., [1970] Que. S.C. 192; Sun & Sea Estates Ltd. v. Aero-hydraulic Corp., [1968] Que. P.R. 210; cf Singer Plumbing & Heating Co. v. Richard, [1968] Que. Q.B. 547.

⁴³⁰ Le Syndicat de Normandin Lumber Ltd. v The Angelic Power et al, [1971] F.C.R. 263, at 268.

held that "I do not see how the Quebec legislator could have regulated the form and effect of an agreement whose validity he does not admit." He went on to hold that the law of Quebec recognized such arbitration clauses as valid and ordered a stay of the action in favour of arbitration. It would appear from the reaction of the judges of the Superior Court of Quebec to the amendment of the Code of Civil Procedure, that some of the judges of the civil law jurisdiction in Canada were no more willing to give up jurisdiction over actions than are the common law judges. Doubts have been raised by civil lawyers as to whether it is possible to overcome the prohibition of clauses compromissoire in the Civil Code and its interpretation to that effect by the Court of Cassation of France in 1843⁴³¹, by an amendment to the Code of Civil Procedure⁴³².

Before the 1986 reform to federal arbitration law, the jurisdiction of the Federal Court of Canada to grant a stay of an Action before the court was found in subsection 50(1) of the Federal Court Act, which provided that the court

"may in its discretion, stay proceedings in any cause or matter:

(a) on the ground that a 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."

This subsection was applied to all applications for stays, whether on the basis of arbitration clauses, choice of foreign court

⁴³¹ Comp. l'Alliance v. Prunier, Sirey 1843.1.562, Cour de Cassation (Supreme Court of France).

⁴³² David, 91.

clauses ("choice of forum clauses"), or on the basis of forum non conveniens.

The Eleftheria⁴³³, with its extensive list of discretionary grounds by which refusal of a stay could be justified, became the foundation case in Canada and England.⁴³⁴ The principles of the Eleftheria are set out above, in the text at footnote 363. Its principles and those of other English decisions on stay applications were applied by the Federal Court of Canada, Trial Division, in Bomar Navigation Ltée v. The M.V. Hansa Bay⁴³⁵, in 1975, and by the Federal Court of Appeal in the Sea Pearl,⁴³⁶ in 1982. Sea Pearl involved an application for a stay on the basis of a London arbitration clause in a charterparty. Neither party had any connection with Canada or England. The vessel had been arrested in Canada, and then released on a letter of guarantee from a Canadian Bank which guaranteed payment of any judgment given by the Federal Court, but which would be rendered inoperative if the matter were referred to arbitration. The Federal Court of Appeal criticized the judge below for deciding the case on

⁴³³ [1969] 1 Lloyd's Rep. 237, Brandon, J.

⁴³⁴ A. Barry Oland, "Forum Non Conveniens in Canada: The Common Law Position, The Federal Court of Canada, Suggested Reform." Meredith Memorial Lectures, Current Problems in Maritime Law 293 (1986).

⁴³⁵ Bomar Navigation Ltée v. The M.V. Hansa Bay, [1975] F.C. 231, 234.

⁴³⁶ Ship M.V. "Sea Pearl" v. Seven Seas Dry Cargo Shipping Corp., (1982) 139 D.L.R. (3d) 669. [also often indexed under the name "Seapearl"]

"a mere balance of convenience. In so doing, the learned judge below applied what I consider to be the wrong principle. Prima facie, an application to stay proceedings commenced in the Federal Court in defiance of an undertaking to submit a dispute to arbitration or to a foreign court must succeed because, as a rule, contractual undertakings must be honoured. 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..."⁴³⁷

One could be forgiven for expecting that such a ringing statement of court respect for arbitration clauses and choice of foreign forum clauses would have resulted in a much greater rate of success among applications for stays of actions before the Federal Court. In his study of Federal Court decisions from the date of the Eleftheria into 1985, A. Barry Oland⁴³⁸ found that of 19 cases of applications for a stay of Federal Court proceedings, only 7 resulted in a stay. Of 11 cases in which there was an application on the grounds of an arbitration agreement, there were 4 stays and 7 refusals, in one case of refusal the court found that the arbitration clause in the charterparty had not been effectively incorporated in the bill of lading, in two other refusal cases it was not clear if the arbitration clause applied. Excluding these, we get a 50-50 balance of stays and refusals in cases where arbitration clauses clearly applied. Of five cases involving choice of foreign forum clauses, only 2 resulted in stays of Canadian actions. In the absence of an arbitration clause or

⁴³⁷ Pratte, J., 139 D.L.R. (3d), 681.

⁴³⁸ A. Oland, "Forum Non Conveniens in Canada: The Common Law Position, The Federal Court of Canada, Suggested Reform." Meredith Lecture Series, Current Problems in Maritime Law 293 (1986).

choice of forum clause, i.e. applications on pure forum non conveniens grounds, no stay orders were granted, it appears. Thus the success rate of stay of proceedings applications in Federal Court remained rather dismal. The reasons for refusing stay orders appear to have remained much the same after The Eleftheria and Sea Pearl.

3. THE ADOPTION OF THE THE UNCITRAL MODEL LAW AND NEW YORK CONVENTION IN CANADA

The Model Law was adopted by UNCITRAL in June, 1985. Canada and all its provinces and territories have now adopted it or enacted legislation substantially in its terms, and were the first to adopt the Model Law, in 1986⁴³⁹. The enthusiasm with which Canada rushed to embrace the Model Law was prompted by the dismal state of Canadian arbitration law up to that time. Because of the prevailing view⁴⁴⁰ that arbitration fell within provincial legislative competence under the divisions of power in the British North America Act, 1867 (now the Constitution Act, 1982), and the "water-tight compartments" of the Labour Conventions Case⁴⁴¹, the Federal government had not adopted the United Nations Convention

⁴³⁹ Ontario adopted the New York Convention in 1986, then in 1988 adopted the Model Law and repealed the statute of 1986 which had enacted the provisions of the New York Convention.

⁴⁴⁰ P. Davidson, "International Commercial Arbitration Law in Canada," (1991) 12 Int. L.&B., 97, at 99.

It was felt that arbitration and enforcement of arbitral awards fell within s.92(14) (Property and Civil Rights in a Province) and s.92(14) (the Administration of Justice in a Province). - Id.

⁴⁴¹ A.G. for Canada v. A.G. for Ontario, [1937] A.C. 326 (P.C.). (The "Labour Conventions Case").

on the Recognition and Enforcement of Arbitral Awards, 1958, (the "New York Convention"), nor either of the League of Nations Protocol on Arbitration Clauses, 1923 and Convention on the Execution of Foreign Arbitral Awards, 1927. The provinces could not enter into the New York Convention because only the Federal government has treaty-making power. Only by the cooperation of both levels of government could there be comprehensive reform of international commercial arbitration law in Canada.⁴⁴² As late as 1982, the Canadian Department of Justice expressed the view that Canadian business did not see any need for Canada to become a party to the New York Convention.⁴⁴³ Professor Paterson credits this to the fact that most of Canada's foreign trade was with the United States, and the similarity of our legal systems⁴⁴⁴. By the mid-1980s, however, there arose an understanding of the economic opportunities offered Canadian business by Pacific Rim business, and the desirability of updating Canada's international commercial arbitration laws⁴⁴⁵.

⁴⁴² A. Cutler, "Canada and the Private International Trade Law Regime", in Canadian Foreign Policy and International Economic Regimes, 104, 108 (A. Cutler, & M. Zacher, Eds., 1992); Davidson, 99.

⁴⁴³ B.C. Law Reform Commission, Report on Arbitration, 58 (1982).

⁴⁴⁴ R.K. Paterson, "Canadian Developments in International Arbitration Law: A Step Beyond Mauro Rubino-Sammartano's International Arbitration Law," (1991) 27:3, Williamette Law Review, 573.

⁴⁴⁵ *Id.*, 574.

Canada acceded to the New York Convention on May 12, 1986, and it entered into force for Canada on August 10, 1986. All of the provinces and territories adopted the provisions of the New York Convention, by statute. The "reciprocity" reservation is not applied anywhere in Canada, but the "commercial" requirement applies to all jurisdictions except Quebec. None of the jurisdictions in Canada distinguishes between a "submission" of an existing dispute and an "arbitral clause" (or "arbitration agreement") whereby the parties agree to arbitrate disputes which may arise in future.⁴⁴⁶

All of the provinces and territories, except Quebec, have separate statutes for domestic and international arbitration. Five of the nine common-law provinces and the Northwest Territories retained their domestic arbitration statute based on the 1889 English Act.⁴⁴⁷ Ontario now does not have the New York Convention in force, but applies the Model Law, in relation to domestic and international commercial arbitration, in two varied forms. Of the provinces and territories, only Quebec recognizes and enforces all awards rendered anywhere in Canada and not only awards of an international nature. As noted above, all the provinces and territories have adopted the Model Law, or some variation of it, as their law on international commercial arbitration. Thus the

⁴⁴⁶ L. Kos-Rabcewicz-Zubkowski, "Canada", Int'l. Handbook on Comm. Arb., Supp.10, June 1989, 9; Davidson, 104,105.

⁴⁴⁷ Tetley, William, "Arbitration and the Choice of Law", Tenth International Conference of Maritime Arbitrators, 1991. These provinces are Manitoba, New Brunswick, Nova Scotia, P.E.I., and Newfoundland.

international commercial arbitration laws of the thirteen jurisdictions in Canada are very similar but not always identical⁴⁴⁸. With respect to domestic commercial arbitration matters, British Columbia, Alberta, Saskatchewan, and Ontario have adopted statutes based upon the Model Law, the last three based their domestic commercial arbitration statutes on the Uniform Arbitration Act form of the Model Law.⁴⁴⁹

The Federal Parliament of Canada passed the United Nations Foreign Arbitral Awards Convention Act, 1986 to enact the New York Convention, which is attached as a Schedule to the Act, and passed the Commercial Arbitration Act which enacts the Model Law as the "Commercial Arbitration Code." Both Acts came into effect on August 10, 1986. The word "international" in Article 1(1) of the Model Law has been deleted from Article 1(1) of the Code, and the descriptions in the Model Law as to when arbitration is to be considered "international" have also been deleted. Thus the Code applies to all commercial arbitrations, whether international or national. However, section 5(2) of the Act provides that the Code applies only to matters in which one of the parties is the Federal

⁴⁴⁸ Ludwik Kos-Rabcewicz-Zubkowski, "Canada," International Handbook on Commercial Arbitration, Supplement 10, June, 1989.

⁴⁴⁹ The Alberta Arbitration Act, 1991, S.A. 1991, c.A-43.1, the Saskatchewan Arbitration Act, 1992, c.A-24.1, and the Ontario Arbitration Act, 1991, S.O. 1991, c.17, are all based upon the Uniform Law Conference of Canada Uniform Arbitration Act, which is an adaptation of the UNCITRAL Model Law. See Uniform Law Conference of Canada, Proceedings of the 72nd Annual Meeting, Aug., 1990. The British Columbia Commercial Arbitration Act S.B.C. 1986 c.3, amended 1988 and 1990, is an adaptation of the UNCITRAL Model Law unique to British Columbia.

Crown or a Crown corporation, or in relation to maritime or admiralty matters. Section 6 provides that "court" in the Code includes the Federal Court, or any superior, county or district court. Thus the Code applies to all maritime and admiralty matters, domestic and international, in all the courts in Canada. The Code enacts the Model Law with no other changes. The numbering and content of the articles in the Code and the Model Law are identical.

The United Nations Foreign Arbitral Awards Convention Act was held to be constitutionally valid in respect of foreign arbitral awards "having a federal character in a constitutional sense."⁴⁵⁰ Thus it appears that the effect of the Convention is limited to matters within federal legislative competence.⁴⁵¹

Understandably, the adoption of the new laws and the radical departure from the creaking provincial statutes based on the English Arbitration Act, 1889 excited much comment⁴⁵². Academics

⁴⁵⁰ Compania Maritime Villa Nova S.A. v. Northern Sales Co., [1992] 1 F.C. 550; [1992] 137 N.R. 20 (Fed. C.A.). The Court noted the submission of Counsel in support of constitutionality that S. 6 of the Act "created a federal cause of action for the recognition and enforcement of foreign arbitral awards falling within federal legislative competence. - [1992] 1 F.C. 561.

⁴⁵¹ Id.

⁴⁵² A few examples: Uncitral Model Arbitration in Canada, Robert K. Paterson and Bonita J. Thompson, Eds. (1986); Paul J. Davidson, "International Commercial Arbitration Law in Canada," (1991) 12 Int. L.&B., 97; Robert K. Paterson, "Canadian Developments in International Arbitration," (1991) 27:3 Will.L.R., 573; Tenth International Conference of Maritime Arbitrators, papers by various authors.

and practitioners alike sought to expose the features and policy of the new Model Law, and particularly its apparent bias against court control of arbitration. The new statutes enacting the Model Law also were radical in Canada⁴⁵³ for specifying that in construing them, a court could have recourse to the Report of Uncitral on the work of its 18th session, and to the Analytical Commentary of The Secretary General to the 18th session. Section 6 of the International Commercial Arbitration Act of British Columbia allows recourse to all travaux preparatoires of Uncitral.

The early comments by some authors indicated an initial understanding that the Model Law adopted the continental principle of "Kompetenz - Kompetenz."⁴⁵⁴ Under true Kompetenz - Kompetenz, the power and exclusive jurisdiction of the tribunal to determine the existence and validity of the arbitration agreement and the scope of the authority or "jurisdiction" of the arbitral tribunal, would not be within the purview of any court to review on appeal or on an application to set aside an award. Three countries have laws which permit the parties to exclude all powers of their national courts to entertain an application to set aside an award - Belgium and Switzerland by statute, and Sweden by a decision of its Supreme Court⁴⁵⁵. However, under Art.V(1)(c) of the New York

⁴⁵³ External aids to the construction of statutes, to show Parliamentary intention, are usually impermissible under common law. - Dreidger, Construction of Statutes, 149-163 (1983).

⁴⁵⁴ van den Berg, *supra*, 312; Filip De Ley, *infra*.

⁴⁵⁵ Philip De Ly, "The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning," (1991) 12:1 Nw J.Int.L.&B., 48, at pp.64-75.

Convention, recognition and enforcement of an award may be refused if a party opposing its enforcement furnishes proof that the award deals with a difference not contemplated by the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration.

Kompetenz - Kompetenz is seen as the ultimate exercise of party autonomy⁴⁵⁶; the right of the parties to endow the arbitral tribunal with sweeping powers and authority beyond the purview of Courts, subject, of course, to any problems which may arise under the New York Convention when enforcement of awards is sought⁴⁵⁷. However, if the parties have granted such powers to the arbitral tribunal, the exercise of them would appear not to be contrary to Art.V of the Convention, unless they offend the enforcing forum's laws as to arbitrability or public policy, in which cases Art.V(2) provides for the refusal of recognition and enforcement.

However, further perusal of the Model Law and the travaux preparatoires indicate that party autonomy and freedom of the arbitrators to decide on questions of their authority are limited under the Model Law.⁴⁵⁸

⁴⁵⁶ Filip De Ly, *supra*, p.67.

⁴⁵⁷ Under Art.V(1)(c) of the New York Convention, recognition and enforcement of a foreign or non-domestic award may be refused if the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or if it contains decisions on matters beyond the scope of the submission.

⁴⁵⁸ See, generally, Holtzmann & Neuhaus.

In the first place, the Model Law applies mandatorily to any arbitration agreement which is being applied in the jurisdictions in which it the Model Law has been enacted⁴⁵⁹. Secondly, by Art.1(5), the Model Law leaves questions of subject-matter arbitrability to the general law of the country adopting the Model Law.⁴⁶⁰ Thirdly, there are a number of places in which the Model Law provides for court intervention, particularly in Articles 13(3) (challenge to the appointment of an arbitrator), 14(1) (termination of arbitrator's mandate for failure or impossibility to act), 16(3) (appeal to the court from an arbitrator's preliminary ruling on a plea that the arbitrator does not have jurisdiction or is exceeding his authority, 34 (application to court to set aside an award), and 36 (enforcement of awards).

Article 5 provides that Court interference is limited to those instances specifically provided:

"5. Extent of court intervention.
In matters governed by this Law, no court shall intervene except where so provided by this law."

Further, Article 16(1) provides that:

"The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

⁴⁵⁹ William Tetley, "Arbitration and the Choice of Law," Tenth International Congress of Maritime Arbitrators, (1991), 13.

⁴⁶⁰ Art.1(5): "This Law shall no affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law."

Art.16 goes on to provide in Art.16(3) that the arbitral tribunal may deal with pleas that it has no jurisdiction or is exceeding its authority. Such a plea may be decided by the tribunal as a preliminary award or in an award on the merits. However, a preliminary ruling that it has jurisdiction may be appealed to the court, as of right, within 30 days, and the decision of the court on this point shall be subject to no appeal.

Under Article 34, application may be made to set aside the award. One of the grounds for setting aside the award is that the arbitral tribunal has exceeded its jurisdiction.⁴⁶¹ Thus if the arbitrator faced with a challenge to arbitral authority or jurisdiction delays the ruling on the challenge, and delays any ruling on the issues of the existence and validity of the arbitration agreement, until the rendering of the final award, or fails to deal with the plea challenging jurisdiction or authority, the award may be tested under Art.34, particularly under Art.34(2)(a)(iii) which provides, as grounds for setting aside an award, that the award deals with a dispute not contemplated by or not falling within the terms of the submission, or contains decisions on matters beyond the scope of the submission. Under Art.36, recognition and enforcement of an award may be refused on these same grounds, thus both domestic

⁴⁶¹ Art.34(2)(a)(iii) provides that an award may be set aside by a court if the party applying to set it aside proves that: "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration..."

and international awards on commercial and admiralty matters can be so challenged.

The travaux preparatoires make it plain that the UNCITRAL working group considered how far to go in allowing the arbitral tribunal to go in deciding its own jurisdiction, and decided upon concurrent authority of the tribunal and the court⁴⁶², with the final decision on the issue of the existence and validity of the arbitration agreement, its scope, whether any particular issue falls within it, and the bounds of the authority of the arbitral tribunal, all being within the ultimate power of the court to decide, provided a party raised the issue⁴⁶³.

This latter point is of crucial importance to the courts dealing with applications to stay Actions on the grounds of an arbitration agreement. The court decisions, as will be discussed shortly, show that the courts have had considerable difficulty with these provisions, and the results are not very true to the Model Law.

4. ARTICLE 8 AND MANDATORY REFERRALS TO ARBITRATION

"Article 8 requires the courts to recognize and give effect to arbitration agreements. It thus provides for a critical element of any arbitration law: the exclusive competence of

⁴⁶² Dr. habil. Tadeusz Szurski, "Arbitration Agreement and Competence of the Arbitral Tribunal," Uncitral's Project for a Model Law on International Commercial Arbitration, Interim Meeting, Lausanne, May, 1984, 53, at 74-75.

⁴⁶³ Report of UNCITRAL on the work of its 18th session, 31, 32. (cited herein as "Commission Report").

arbitral tribunals over the substance of disputes that are the subject of a valid arbitration agreement."⁴⁶⁴

Article 8(1) of the Model Law reads:

"Arbitration agreement and substantive claim before court.
(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not late 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."⁴⁶⁵

At first blush, this appears to be the end of the ability of the courts to claim that they are not bound to stay actions brought in defiance of arbitration agreements, but the travaux preparatoires and case law show that this area is not without its problems.

Article 8 is modelled after Article II(3) of the New York Convention, and suffers the same uncertainty as to the rules under which the court is to decide whether the arbitration agreement is "null and void, etc.", as in the New York Convention.⁴⁶⁶ Professor Blom has remarked, "The meaning of these expressions, especially 'inoperative' may be the subject of some debate."⁴⁶⁷ "Null and void" would normally import considerations of arbitrability of subject-matter⁴⁶⁸. Article 1(5) provides that the forum state's laws on arbitrability retain their force under the Model Law. Thus

⁴⁶⁴ Holtzmann & Neuhaus, 302.

⁴⁶⁵ Emphasis added.

⁴⁶⁶ Holtzmann & Neuhaus, 303.

⁴⁶⁷ Paterson & Thompson, supra, 132.

⁴⁶⁸ "It was noted that an arbitration agreement concerning a non-arbitrable subject-matter would normally be regarded as null and void." - Fifth Working Group Report A/CN.9/246 (6 March 1984) para. 22; Holtzmann & Neuhaus, 320.

if the arbitration is to take place in the forum, it appears clear that considerations of arbitrability under the forum laws are germane to consideration of whether the arbitration agreement is "null and void" or "incapable of being performed." However, the issue is not so clear if the court of the forum state is asked to enforce an agreement calling for arbitration in another state. Neither the Model Law nor the New York Convention provides a choice of law provision for this case, and the solution is unclear.⁴⁶⁹

Articles 34(2)(a)(i) and 36(1)(a) of the Model Law provide that, in the absence of party choice of law, the law of the place of arbitration governs the validity of the arbitration agreement. However, Articles 34(2)(b)(i) and 36(1)(b)(i) provide that a court may set aside an award or refuse it recognition and enforcement, if the subject matter of the award is not arbitrable under the laws of the country of that court, which in the case of a foreign award are not likely to be the same as the laws of the place where the award was made.⁴⁷⁰

The issues of formation, of formalities, and of the essential validity of the arbitration agreement might fall to be decided by foreign law.⁴⁷¹ It is not clear whether to apply Canadian substantive law, or Conflicts of Law rules of Canada or some other nation, to decide which system of laws to apply, at least in the

⁴⁶⁹ Holtzmann & Neuhaus, 303-304.

⁴⁷⁰ Id.

⁴⁷¹ Id.

absence of a specification in the agreement as to which system of law to apply. The cases show that the courts have assumed, apparently without considering this issue, that Canadian law is to apply, at least in the absence of an express choice of law by the parties⁴⁷². This is in keeping with the general practice in other nations,⁴⁷³ and is arguably in keeping with Canadian conflict of laws rules.⁴⁷⁴

Further, the Model Law provides for a mandatory reference to arbitration but does not specify that a stay of court proceedings is mandatory. This has led to some confusion, as will be discussed below.

5. THE INTERPLAY OF ARTICLES 5, 8, 16, 34, AND 36 - HOW SHOULD COURTS APPROACH APPLICATIONS TO STAY?

The crucial issue here, in practice, is that of how far a court dealing with a contested application to stay an Action should delve

⁴⁷² Kaverit Steel and Crane Ltd. v. Kone Corp., (1992) 87 D.L.R. (4th) 129; Nanisivik Mines Ltd. et al v. F.C.R.S. Shipping Ltd., [1992] F.C.R.662, to name just two examples.

⁴⁷³ René David, *supra*, 221; The U.S. courts have determined that: "When arbitration is subject to the dictates of the U.N. Convention, normal conflict-of-laws rules should not be used to determine which law governs the validity of an arbitration clause. Neither the law of Italy nor the law of a particular state or territory can be chosen - only U.S. federal law controls [in the U.S. Arbitration Act, Title 9, U.S.C.S.]. (Rhône Méditerranée Compagnia Francese di Assicurazioni E Riassicurazioni v. Lauro, 1982 555 F. Supp. 481 affd 712 F.2d 50). The purpose and intent of the U.N. Convention overrides contravening domestic or parochial law. (Ledée v. Céramiche Ragno, 684 F.2d 184). -Oehmke, International Arbitration, 51 (1990).

⁴⁷⁴ J.G. Castel, Canadian Conflict of Laws, 319.

into all the possible issues as to: (i) who are parties to the arbitration agreement; (ii) the definition of the disputes between the parties; (iii) the determination of the existence and validity of the arbitration agreement; (iv) its scope; (v) the determination of which disputes fall within the scope of the arbitration agreement; (vi) the determination as to whether the subject-matter of the dispute is arbitrable under the laws of the forum court; and (vii) whether there exists some basis, other than subject-matter inarbitrability, for holding that the arbitration agreement is "inoperative" or "incapable of being performed." To state the converse, to what extent should the court defer to the arbitral tribunal on these issues?

To deal with these issues is to deal with the interplay of Articles 5, 8, 16, 34, and 36 of the Model Law, and, in particular with the interplay between the inquiry of the court under Art.8(1) (mandatory referral unless the court finds the arbitration agreement to be "null and void, inoperative, or incapable of being performed"), Art.16(1) (separability and Kompetenz-Kompetenz) and Art.16(3) (court review of arbitral findings of jurisdiction). In other words, who is to get first crack at issues as to the existence and validity of the arbitration agreement, and its scope?

A review of the Model Law and the travaux preparatoires indicates as follows.

Art.8(1) is modelled on Art.II(3) of the New York Convention, thus the action before the court must be "in" the same "matter" that is the subject of the arbitration agreement, not merely "related" to it or "involved" in it.⁴⁷⁵

While the Working Group recognized the underlying principle that the arbitral tribunal should be the first to rule on its competence, subject to later control by a court, the prevailing opinion was that, where the parties differed as to the existence of a valid arbitration agreement, that issue should be settled by the court, without first referring the matter to the tribunal which allegedly lacked jurisdiction.⁴⁷⁶

The scope of the inquiry by the court into the validity of the arbitration agreement is the same as that under Art.II(3) of the Convention: the court may refuse to refer the parties to arbitration only if it finds the agreement to be "null and void, inoperative, or incapable of being performed."⁴⁷⁷ In the absence of express party choice of the proper law of the arbitration agreement, the Model Law does not provide any choice of law rules by which to address these tests of the validity of the arbitration agreement, but the Working Group indicated that it would not

⁴⁷⁵ Summary Record, A/CN/.9SR.312, paras. 1,2; Holtzmann & Neuhaus, 302,325,325.

⁴⁷⁶ Third Working Group Report, A/CN.9/233 para.77, Holtzmann & Neuhaus 315.

⁴⁷⁷ Holtzmann & Neuhaus, 302-303.

necessarily be the law of the forum.⁴⁷⁸ For the purposes of setting aside or recognition and enforcement of an award, Arts.34(2)(a)(i) and 36(1)(a)(i) indicate that the law of the place of the arbitration governs the validity of the arbitration agreement, in the absence of choice of applicable law by the parties.⁴⁷⁹ It would seem consistent, therefore, to apply this same law when the court is dealing with an application for referral to arbitration under Art.8(1).⁴⁸⁰ This presents a quandary, however, when the parties have not made a choice of applicable law and it is not known where the arbitration is to take place, a situation common in the case of ICC arbitrations.⁴⁸¹ As noted above, Canadian courts have, in the absence of party choice, assumed that Canadian law is applicable to the issues of validity of the arbitration agreement. While this is consistent with

⁴⁷⁸ Id.

⁴⁷⁹ Seventh Secretariat Note, A/CN.9/264, Art.16 para.3; Holtzmann & Neuhaus pp.508,509.

⁴⁸⁰ Id., and see van den Berg supra, 126-128.

⁴⁸¹ Under the Rules of the International Chamber of Commerce, the ICC Court of Arbitration will choose the place of arbitration if the parties have not done so. The place chosen is usually a neutral territory, i.e. one having no connection with the dispute or the parties. Since the law of the place of arbitration has some control over the arbitration process, and may even be held to be the proper law of the arbitration agreement, leaving the choice of place to an institution may have unfortunate effects. - Redfern & Hunter, 119, fn.98.

Canadian conflict of law rules⁴⁸², it is not consistent with the Model Law, nor with the New York Convention.⁴⁸³

Since, in the absence of express party choice of the law applicable to the arbitration agreement, the travaux préparatoires indicate that the law controlling the validity of the arbitration agreement is the law of the place of arbitration, and the place of arbitration may not be in the forum State, or may not yet be determined, it would seem logical that the court should defer to the arbitral tribunal in first instance as to issues of validity and scope of the arbitration agreement, and leave court control of such issues to the courts of the place of arbitration. Contests over these issues can be brought to court under Art.16(3) (appeal from arbitral decisions as to jurisdiction) or Art.34 (setting aside). If the parties do not bring such issues to the courts within the time limits set out in Art.16(2), and 16(3), they are generally deemed to have waived their right to do so, except with respect to issues of arbitrability and public policy.⁴⁸⁴

When considering the principle of Kompetenz-Kompetenz contained in Art.16, the Working Group acknowledged, however, that the arbitral

⁴⁸² J. Castel, Canadian Conflict of Laws, 319.

⁴⁸³ India v. McDonnell Douglas Corp., [1993] 3 Lloyd's Rep. 48, (1994) 19 Y.C.A. 235; National Thermal Power Corp. v. The Singer Co., (1992) 3 Sup. Ct. Cases 551, (1993) 18 Y.C.A. 403 (Supreme Court of India). As these two cases show, there is not universal international agreement on this question, under the New York Convention.

⁴⁸⁴ Fifth Working Group Report, A/CN.9/246 para.51, Holtzmann & Neuhaus pp.479,502.

tribunal's power to determine its own jurisdiction is neither exclusive nor final. The tribunal's determination is subject to immediate court review under Art.16(3) and later review under setting aside proceedings under Art.34. Further, the issue of arbitral jurisdiction will arise and be ruled upon by the court in referral applications under Art.8 where arbitral jurisdiction is put into issue.⁴⁸⁵

6. THE CRUCIAL IMPORTANCE OF JUDICIAL ATTITUDE

From the above analysis it can be seen that the respect which courts will give to the principles that court interference with, and involvement in, international commercial arbitration should be kept to a minimum, and that courts should defer in first instance to arbitral consideration of issues of validity of arbitration agreements and scope of arbitral jurisdiction, depend very much on the courts' appreciation of the general principles and policies underlying the Model Law and the New York Convention, and upon the judges' attitudes toward ceding judicial jurisdiction to arbitrators. Strict analysis of the terms of the Model Law, particularly from traditional common-law principles of statutory construction, would not enjoin the courts from engaging in full-ranging analyses of issues of validity and jurisdiction in Art.8 applications. The potential of the Model Law will not be fulfilled in Canada unless our judges view it as a whole, with its underlying principles in mind, and with healthy respect for international commercial arbitration as an autonomous dispute-resolution regime

⁴⁸⁵ Holtzmann & Neuhaus 479.

operating under international standards. Parochial attitudes and traditional hostility to arbitration must be eschewed. In the words of one author:

"The extent to which a court will or will not intervene in the arbitral process has as much to do with the judicial atmosphere as it does with the words used in the Acts."⁴⁸⁶

7. THE POSITED IDEAL

This thesis posits that the provisions of the Model Law require that the involvement and inquiry of the Court upon an application for referral should be the absolute minimum necessary to determine that it is arguable that an arbitration agreement exists between opposing parties and that it is arguable that a matter in the Action is within the scope of the arbitration agreement.⁴⁸⁷ If these preconditions are met, it falls to the party opposing the referral to prove that the agreement is "null and void, inoperative, or incapable of being performed." If failure of the agreement to meet one of these conditions is not immediately and readily apparent, then the Court must refer those parties and the claims between them to arbitration, and stay the Action between them with respect to those claims, it has no discretion to refuse a referral.⁴⁸⁸ In case of doubt as to the existence or validity

⁴⁸⁶ J. B. Casey, International and Domestic Commercial Arbitration, p.4-1 (1993).

⁴⁸⁷ Rio Algom v. Sammi Steel Co. (1991) 47 C.P.C. (2d) 251; PPG Industries v. Pilkington PLC (UK) 825 F. Supp. 1465 (USDC); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth (1985) 473 U.S. 614 (USSC); Republic of Nicaragua v. Standard Fruit Co. 937 F.2d 469,478 (9th Cir, 1991).

⁴⁸⁸ Id.; Nanisivik Mines Ltd. v. Canarctic Shipping Co. (1994) 113 D.L.R. (4th) 536; 167 N.R. 294.(F.C.A.); 1 Halsbury's Laws of England, 643, para.1091; Nova Knit v. Kammgarn, [1977] 2 All E.R.

of the arbitration clause or as to the scope of the arbitration agreement (i.e. whether the matters in issue fall within the jurisdiction of the arbitrators as set out by the arbitration agreement), the matters must in first instance be referred to the arbitrator, if it is arguable that there exists a valid arbitration clause and if it is arguable that the matters come within the jurisdiction of the arbitration agreement⁴⁸⁹. Disputes over the findings of the arbitrator as to jurisdiction (whether on the basis of the existence and validity of the arbitration agreement or upon its scope) can be dealt with by appeals to the Court under Art.16(3) or in an application to set aside the award under Art.34.⁴⁹⁰ A liberal view should be taken of what subject matter falls within arbitration agreements, such that tort claims and other types of claims which depend upon the existence of the commercial arrangement between the parties, which need not be contractual, can be included as matters to be referred.⁴⁹¹ Inarbitrability of subject-matter rendering an arbitration agreement "null and void, inoperative, or incapable of being performed" should be limited to matters which offend the basic

463,467 (H.L.).

⁴⁸⁹ Id.; Prima Paint v. Flood & Conklin, 388 US 395 (U.S.S.C.).

⁴⁹⁰ Rio Algom v. Sammi Steel Co., 47 C.P.C. (2d) 251, [1991] O.J. No.268 (Ont. Ct. Gen Div.).

⁴⁹¹ Art.7(1); Kaverit Steel & Crane Ltd. v. Kone Corp. (1992) 87 D.L.R. (4th) 129,134,135, [1992] 3 W.W.R. 716; Lonrho Ltd. (U.K.) v. Shell Petroleum Co. (U.K.), (1979) IV ICCA Y.C.A. 320 (Ch.D.); Astro Vencedor Compania Naviera S.A. of Panama v. Mabanft GmbH "The Damianos.", [1971] 3 W.L.R.24 (C.A.); Scherk v. Alberto-Culver, (1974) 417 US 506, 41 L Ed 2d 270, 94 S Ct 2449 (U.S.S.C.).

notions of morality and justice of the forum or which are specifically defined as inarbitrable by the law of the forum.⁴⁹² Agreements voidable for fraud are not "void" or "null" but merely voidable.⁴⁹³ "Inoperative" and "incapable of being performed" do not mean merely "inconvenient", they mean that the arbitration agreement is impossible to put into operation no matter what the personal capacity of the parties.⁴⁹⁴ Nor do they mean that an arbitration agreement is "inoperative" if it has not been put into operation - nothing in Article 8 requires that anything have been done to institute arbitration before applying to the Court for a referral.⁴⁹⁵ The insolvency of a party or the possibility that the right to proceed to arbitration may be time barred is no reason to regard arbitration as "inoperative."⁴⁹⁶ Nor should the presence

⁴⁹² Schreter v. Gasmac Inc. [1992] O.R. (3d) 608; Arcata Graphics Buffalo Ltd. v. Movie (Magazine) Corp. Unreported, Ont. C.J.-Gen. Div. Mar. 12, 1993.

⁴⁹³ Mackender v. Feldia, [1967] 2 Q.B. 590, [1966] 3 All E.R. 847 (C.A.).

⁴⁹⁴ Paczy v. Haendler & Naterman GmbH, [1981] 1 Lloyd's Rep. 302 (Eng. C.A.).

⁴⁹⁵ Per the dissent of Cummings J.A. in Burlington Northern Railroad Co. v. C.N.R. [1995] B.C.J. No. 1084, DRS 95-16015 (BCCA). The author contends that the majority in Burlington Northern has seriously misconstrued the Model Law in ruling that "inoperative" means simply "not in operation" so that a party which had not given notice to commence arbitration pursuant to the arbitration agreement was debarred from a stay of proceedings. See the judgment of Cummings J.A., for the court, in Prince George v. McElhanney Engineering, [1995] 9 W.W.R. 503 (B.C.C.A.).

⁴⁹⁶ Coopers & Lybrand Ltd./B.C. Navigation v. Canpotex Shipping Services Ltd. (1987) F.T.R. 79; Paczy v. Haendler & Naterman GmbH, [1981] 1 Lloyd's Rep. 302 (Eng. C.A.); The Media, (1931) 41 L.L.L.R. 80; W. Bruce Ltd. v. Strong, [1951] 2 K.B. 447, [1951] 1 All E.R. 1021; The Merak, [1965] 1 All E.R. 230 (C.A.); The Jemrix, [1981] 2 Lloyd's Rep. 544.

of parties and issues in the Action who and which are not the subject of an arbitration agreement render an arbitration agreement "inoperative" or "incapable of being performed" with respect to parties and issues who are within it.⁴⁹⁷ Courts should discourage appeals from orders referring parties to arbitration.⁴⁹⁸ Overall, the Courts should apply an approach in keeping with the intent of the legislators and of UNCITRAL to provide a liberal, autonomous regime fostering the settlement of international commercial disputes with Court assistance but without Court interference, maximizing party and arbitral autonomy.⁴⁹⁹

While there are a number of cases in which many of these standards have been met, few are above criticism, and there are many examples of failure to approach the Model Law with an attitude conducive to the fostering of arbitration, and of failure to apply its provisions with a fair and liberal view to the overall scheme of the Model Law, or at all. Further, there are deficiencies in the Model Law, when interpreted under common law precedents, which have

⁴⁹⁷ Kaverit Steel & Crane v. Kone Corp., (1992) D.L.R. (4th) 129; Nanisivik Mines Ltd. v. Canarctic Shipping Co., (1994) 113 D.L.R. (4th) 536; Lonrho Ltd. v. Shell Petroleum (U.K.), (1979) IV ICCA Y.C.A. 320 (Ch. D.). cf Prince George v. McElhanney Engineering Services Ltd., [1994] B.C.J. No.3072 (B.C.S.C. Chambers, Parrett J.); Afton Operating Corp. v. C.N.R. [1994] B.C.J. No.45 (B.C.S.C. Chambers, Hamilton J.).

⁴⁹⁸ Stokes-Stephens Oil v. McNaught (1918) 57 S.C.R. 549, per Sir Charles Fitzpatrick, C.J. at 550-551; and see s.16, U.S. Federal Arbitration Act, 9 U.S.C.S., which prevents appeals from referrals to arbitration and from stays of Actions in favour of arbitration.

⁴⁹⁹ See, generally, UNCITRAL's Project for a Model Law on International Commercial Arbitration, P. Sanders, Ed. (1984).

caused difficulties to the Courts and to parties seeking referrals to arbitration.⁵⁰⁰ Far too often, the Courts of Canada have not approached the Model Law as a departure from old hostilities to, and restrictions upon, arbitration. Rather, there has been a too-ready assumption that old precedent remains applicable, which assumption acts to restrict the operation of the new Law, and frustrate the fulfilment of its promise. These matters will be discussed below.

8. PROCEDURE UNDER ARTICLE 8, KOMPETENZ-KOMPETENZ, AND SEPARABILITY

Under the common law, a court, in considering whether to grant a stay of an Action in favour of arbitration, employed a two-stage process. First, it determined: (i) the precise nature of the dispute; (ii) whether the dispute falls within the arbitration clause; and (iii) whether the arbitration clause is still effective.⁵⁰¹ Having passed Stage 1, the court would then deal with Stage 2, in which it decided in its discretion whether to hold the parties to the arbitration agreement or to let the action

⁵⁰⁰ e.g. The restrictive requirements of Art.7(1) as to the form of "arbitration agreement" qualifying for the application of the Law, and its inadequate provisions with respect to the incorporation of arbitration clauses by reference, which make its application to Bills of Lading very uncertain; the confusion in Art.8 between the mandatory entitlement to a referral and the uncertainty as to entitlement to a stay of court proceedings; the lack of definition of any of "null or void, inoperative or incapable of being performed" in Art.8, and the awkward situation left by Art.1(2) which provides that only Arts.8,9,35, and 36 apply if the arbitration is to take place outside Canada. These issues will be discussed below.

⁵⁰¹ Heyman v. Darwins, 1942 A.C. 356; Boychuk Const. v. St. Paul's R.C. School Dist., (1966) 56 D.L.R. (2d) 722 (Sask. Q.B.); Dunwoody v. Thiessen, [1988] S.J. No.485 (Sask Q.B. Aug.10, 1988).

proceed, and would apply the considerations set out in Seapearl and Heyman v. Darwins.⁵⁰²

Under Article 8 of the Model Law, the stages roughly correspond to those under the prior law. The court's discretion in Stage 2 has been removed; once Stage 1 is passed successfully, referral to arbitration is mandatory (unless the court finds that the arbitration agreement is "null and void, inoperative, or incapable of being performed", which correspond to some extent to the last question in the former Stage 1).⁵⁰³ But the majority of Canadian court decisions to date have relied upon Heyman v. Darwins and have held that it is only after the court is satisfied as to the requirements of Stage 1 that the provision for mandatory reference becomes applicable.⁵⁰⁴

A standard argument against the enforcement of arbitration agreements has been, and continues to be, that the contract containing the arbitration agreement was never concluded, is invalid, or is no longer in force, and hence the arbitration agreement disappears with the contract which contained it. The

⁵⁰² Sea Pearl, supra; Heyman v. Darwins, [1942] A.C. 356, [1942] 1 All E.R. 337; The Eleftheria, supra; Boychuk Const. (Sask.) Ltd. v. St. Paul's R.C. Sep. Sch. Dist. No.20. (1966) 56 D.L.R. (2d) 722.

⁵⁰³ Gulf Canada Resources Ltd. v. Arochem Int'l Ltd., (1992) 66 B.C.L.R. 113; Prince George (City) v. A.L. Sims & McElhanney Engineering, [1995] 9 W.W.R. 503.

⁵⁰⁴ Gulf Canada Resources Ltd. v. Arochem Int'l Ltd., (1992) 66 B.C.L.R. 113; Prince George (City) v. A.L. Sims & McElhanney Engineering, [1995] 9 W.W.R. 503.

arbitral tribunal is then without any effective mandate to determine anything - "it cannot exist in a legal vacuum."⁵⁰⁵ This argument should continue to hold force, if at all, only where a party alleges that the arbitration agreement was induced by fraud.⁵⁰⁶

Another obvious argument for counsel opposing a stay is that the scope of the arbitration agreement, properly construed, does not cover the disputes alleged in the Plaintiff's Statement of Claim, and therefore those disputes are not within the jurisdiction of the arbitral panel. The court is then faced with the problem of how the Model Law intends this to be dealt with: does the Court ignore Art.16, construe the arbitration agreement, and make a full determination as to what all the issues are and which of them, if any, come within the arbitration clause? Arguably the scheme of the Model Law is that the Court should refer the matter to the panel and then wait to see if there are challenges to jurisdiction to be dealt with under Art.16(3), Art.34, and Art.36, in keeping with the principle of Kompetenz-Kompetenz. However, how blind can one expect the court to be to obvious doubts as to the very existence or validity of an arbitration clause? It seems

⁵⁰⁵ Schwebel, International Arbitration: Three Salient Problems ch.1 (1987).

⁵⁰⁶ Prima Paint Corp. v. Flood & Conklin Mfg. Corp. 388 U.S. 395 (U.S.S.Ct., 1987). Held: a claim of fraudulent inducement of a contract generally - as opposed to fraudulent inducement of the arbitration agreement particularly - is for the arbitrators, not the courts. Accordingly, in Michele Amoroso e Figli v. Fisheries Development Corp., 499 F. Supp. 1074 (1980), the court held that it is solely for the court to determine allegations of fraud addressing the arbitration clause itself.

unreasonable for the court to refer parties to arbitration on a mere allegation that there is an arbitration agreement, without receiving some proof of its existence, and without some inquiry into its validity and coverage. Another question is as to how much proof should the court require to show what the real disputes are. At the stage of an application for a stay, there will usually be no Statement of Defence, so the only statement of issues before the court may be the Statement of Claim, which the plaintiff may deliberately load with claims which fall outside the arbitration agreement, not caring that they can never be substantiated. The most frequent approach of the Canadian courts so far has been to plunge into the construction of the arbitration agreement in the hearing of the application to stay. At this stage of the court's inquiry, the law being applied is the grand old common law in most cases, as in Nanisivik and Kaverit, which will be discussed shortly.

The modern trend in international arbitration theory and practice is to regard an arbitration clause in a contract as constituting a separate and autonomous agreement.⁵⁰⁷ Under the separability theory, an assertion that the main contract is invalid does not prevent the arbitral tribunal from ruling on the validity of the arbitration agreement in that contract. The separability of the arbitration clause thus forms the basis of the ability of the arbitrators to rule on their own jurisdiction - their competence

⁵⁰⁷ Schwebel, International Arbitration: Three Salient Problems, ch.1 (1987); C. Svernlöv, "The Evolution of the Doctrine of Separability in England: Now Virtually Complete?" Vol. 9 No.3, Jo. Int'l Arb. (Sept. 1992) 115.

to rule upon their own competence, or "Kompetenz-Kompetenz".⁵⁰⁸ There are two aspects to Kompetenz-Kompetenz. First, it means that the arbitral tribunal is the judge of its own competence and jurisdiction, ruling upon the existence and validity of the arbitration clause, and upon its scope (thus determining whether a particular dispute comes within the adjudicatory mandate granted by the parties to the arbitral tribunal). Second, under the theory of Kompetenz-Kompetenz, a court faced with a challenge to the validity or existence of an arbitration agreement must refer these issues to the arbitral tribunal; the Court is ousted of its jurisdiction over these issues. This presumes that the arbitration agreement is drafted in terms sufficiently wide to encompass disputes as to the validity and scope of the arbitration agreement, and is not more narrowly limited.⁵⁰⁹

Most major arbitration jurisdictions, including the United States, Germany, Switzerland, Sweden, and the former Soviet Union, have accepted the doctrines of separability and Kompetenz-Kompetenz as applicable to challenges to agreements on the bases of illegality, duress, and public policy.⁵¹⁰ In England, the Courts have been

⁵⁰⁸ Id. As noted above, the competence of the arbitral tribunal to rule on its own competence is known in France as "compétence de la compétence" and in Germany as "Kompetenz-Kompetenz".

⁵⁰⁹ Id. As opposed to the wide arbitration clause in Prima Paint (supra) which encompassed "any claim arising out of or in relation to this agreement", the clause in Michell Amoroso (supra) was limited to disputes "arising out of this Agreement" and the court in the latter case held that the clause so drawn did not encompass a dispute over the fraudulent inducement of the contract.

⁵¹⁰ Svernlov (supra); Prima Paint (supra).

less receptive to these doctrines, although they are gaining acceptance slowly.⁵¹¹ An arbitration clause is now generally regarded as a self-contained agreement ancillary to the contract in which it is contained⁵¹², which agreement survives termination of the main contract by breach⁵¹³, repudiation and acceptance thereof⁵¹⁴, frustration⁵¹⁵, rescission, subsequent invalidity, and conclusion by performance⁵¹⁶. However, the traditional view in English law is that disputes as to whether the a contract incorporating an arbitration clause was ever concluded and whether such a contract was void ab initio fall outside the scope of the arbitration clause regardless of its wording. Such issues are reserved for the Courts.⁵¹⁷

The Supreme Court of Canada gave rather progressive recognition to the notion of Kompetenz-Kompetenz in 1918, in Stokes-Stephens Oil Co. v. Mcnaught.⁵¹⁸ The Court ruled that where the apparent

⁵¹¹ Svernlov (supra); Paul Smith Ltd. v. H & S International Holdings Co. Inc., [1991] 2 Ll. Rep. 127; cf Chimimport PLC. v. G D'Alesio SAS [1994] 2 Ll Rep. 367, in which the Court ruled that the arbitrator could not determine his own jurisdiction.

⁵¹² Bremer Vulkan v. South India Shipping Corp. [1981] A.C. 909, 980.

⁵¹³ Heyman v. Darwins, [1942] A.C. 356.

⁵¹⁴ Id.

⁵¹⁵ Id.

⁵¹⁶ Mustill & Boyd, The Law and Practice of Commercial Arbitration In England 81,82,85 (1982).

⁵¹⁷ Heyman v. Darwins, [1942] 1 All E.R.337, 345.

⁵¹⁸ (1918) 57 S.C.R. 549.

intention of the parties was to refer to arbitration not only disputes between them but also the question as to whether those disputes fell within the arbitration clause, this issue should be referred to the arbitrators. The issue of the scope of the arbitral agreement was not within the exclusive competence of the Court. The Court adopted the ruling in Willesford v. Watson⁵¹⁹ an 1873 decision in Chancery, in which the arbitration agreement covered "Any dispute, question, or difference...between the parties...touching these presents or any clause or matter or thing herein contained, or the construction hereof... or touching the rights, duties, and liabilities of either party in connection with the premises." Lord Chancellor Selborne held that under that clause: "the very thing that the arbitrators ought to do (was) look into the whole matter, to construe the instrument, and to decide whether the thing which is complained of is inside or outside the agreement." He declined to have the Court "limit the arbitrators' power to those things which are determined by the court to be within the agreement." The Supreme Court held that the arbitration clause before them was, if anything, wider than that in Willesford v. Watson, and "vests in the arbitrators the power to determine whether or not any claim presented to them is within the purview of the submission."⁵²⁰ The question as to whether tort claims fell within the arbitration clause was also held to be within the power of the arbitrators.⁵²¹

⁵¹⁹ Willesford v. Watson, (1873) 8 Ch. App. 473.

⁵²⁰ Stokes-Stephens Oil co. v. McNaught, (1918) 57 S.C.R. 553.

⁵²¹ Id., at 553.

Unfortunately, the progressive decision of Stokes-Stephens v. McNaught on Kompetenz-Kompetenz was severely limited by dicta of the House of Lords in Heyman v. Darwins⁵²², in 1942. The Law Lords recognized the separability of arbitration clauses only in the limited sense that if a contract containing an arbitration agreement were: (i) frustrated; (ii) ended by one party's repudiation performance of the contract, and the acceptance of that repudiation by the other party; or (iii) supervening illegality, the arbitration agreement survived for the purpose of resolving disputes remaining between the parties.⁵²³ Further, a party who repudiates further performance under the contract, or declares that the contract is ended by frustration or illegality, is not debarred from relying on the arbitration clause.⁵²⁴ However, the basis of the approach of the House was that there must be no dispute that there is a binding contract, since a challenge to the contract was a challenge also to the arbitration clause - they stood or fell together. Heyman v. Darwins Ltd⁵²⁵ is generally viewed as holding that only the Court could ever construe an arbitration clause, although support for Kompetenz-Kompetenz may be found in some of the speeches of the Law Lords.⁵²⁶ As to the issue of how the

⁵²² Heyman v. Darwins [1942] 1 All E.R. 337.

⁵²³ See the speech of Lord Macmillan at [1942] 1 All E.R. 347.

⁵²⁴ Id.

⁵²⁵ [1942] A.C. 356.

⁵²⁶ 2 Halsbury's Laws of England, 4th ed. Reissue (1991) states: "A dispute as to whether there has ever been a binding contract between the parties is not within the scope of an arbitration agreement, and so an arbitrator does not have

Court should react to the allegations by a party resisting a stay, that an arbitration agreement is not in effect or as to its construction, in Modern Buildings Wales v. Limmer⁵²⁷ the English Court of Appeal ruled that it is incumbent upon the Court to discover whether there is an agreement in force, "and if that involves determining a question of construction, that question must be decided there and then."

In other words, by Heyman v. Darwins and Modern Buildings v. Limmer, the Court in Stage 1 of an application for a stay or referral under Art.8(1) has sole jurisdiction to determine whether the existence and validity of the arbitration agreement, the parties to it, and what issues are arbitrable under it and which are not. The court is far from the position of being ousted from decisions as to whether a matter should be referred to arbitration, even if it has lost its discretionary powers over the granting of a stay once the prerequisites are established. Again, whether the courts will eschew this old approach and apply liberal notions to

jurisdiction to make a binding award on the reference of such dispute." - citing Heyman v. Darwins per Viscount Simon LC and Lords Macmillan and Wright in support of this proposition. However, Lord Wright said: "I see no objection to a submission of the question whether there ever was a contract at all, or whether, if there was, it had been avoided or ended. Parties may submit to arbitration any or almost any question." Lord Porter gave a speech containing a passage in almost identical terms. See The Tradesman, S.A. Hersent v. United Towing Co. Ltd., [1961] 3 All E.R. 662, in which Kaminski J. relied upon the speeches of the latter two Lords in Heyman v. Darwins.

⁵²⁷ Modern Buildings v. Limmer, (1975) 2 Lloyd's Rep. 318 (C.A.)

arbitration agreements in keeping with the policies underlying the Model Law depends on judicial attitudes. As will be discussed, the common law approach continues to find support in Canadian courts.

Heyman v. Darwins became, and remains, the leading case on the issue of the effect of frustration and repudiation. Unfortunately, the interpretation of Heyman v. Darwins most hostile to arbitration⁵²⁸ continues to be regarded by many Canadian judges as the leading case on the prerequisites to a stay of proceedings based upon an arbitration agreement. The failure of Canadian judges to disabuse their minds of the outmoded notions in Heyman v. Darwins with respect to separability and Kompetenz-Kompetenz, even when applying the Model Law, will be discussed below.

9. GUIDANCE AVAILABLE FROM INTERNATIONAL AUTHORITIES

Although the Model Law does not provide much guidance with respect to the application of Art.8(1) either by defining its terms or providing a choice-of-law rule (as noted above⁵²⁹), a review of the history of international arbitration in the 20th century provides ready sources of guidance for courts applying Art.8(1). The first source is in the League of Nations Protocol on

⁵²⁸ It is possible to find support in Heyman v. Darwins for Kompetenz-Kompetenz. See the discussion of The Tradesman in fn.526, supra.

⁵²⁹ See discussion beginning at fn.464, supra.

Arbitration Clauses done at Geneva on September 24, 1923 (the "1923 Protocol")⁵³⁰.

By Art.1 of the 1923 Protocol:

"Each of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration..."

Article 4 of the 1923 Protocol provides:

"The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract between persons to whom Article 1 applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators. Such reference shall not prejudice the competence of the judicial tribunal in case the agreement or the arbitration cannot proceed or becomes inoperative."⁵³¹

England enacted the 1923 Protocol by the Arbitration Clauses (Protocol) Act, 1924.⁵³² The provisions of this latter Act were carried forward into the English Arbitration Act, 1950, s.4(2) of which reads:

"Notwithstanding anything in this Part of this Act, if any party to a submission to arbitration made in pursuance of an agreement to which the [1923 Protocol] applies, or any person

⁵³⁰ See 1 Halsbury's Laws of England 643 fn.o. By January 31, 1931, 58 States including England, France, Germany, Austria, Belgium, Denmark, Norway, Finland, Italy, Greece, Netherlands, Poland, Switzerland, Spain, and Japan had ratified the Protocol. Canada and the United States did not. - Id.

⁵³¹ Emphasis added.

⁵³² 14 & 15 Geo. 5, c.39.

claiming through or under him, commences any legal proceedings 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 those 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 that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."⁵³³

The wording of the 1923 Protocol found its next iteration in the New York Convention Art.II(3):

"...shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed."

Thus, we see that the qualifications "inoperative or cannot proceed" have been expanded to include "null and void" and are aimed at the arbitration agreement only, whereas before the qualifications were aimed at the arbitration agreement and the process of arbitration.

Art.II(3) of the New York Convention was enacted in England by the Arbitration Act, 1975, s.1(1) of which reads:

"If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of a matter agreed to be referred, any party to the 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

⁵³³ Emphasis added. The only difference of substance between s. 1 or the Arbitration Clauses (Protocol) Act, 1924 and s.4(2) of the Arbitration Act, 1950, was the addition of the words "or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred".

the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to a matter agreed to be referred, shall make an order staying the proceedings."

This section, if the words "claiming through or under him" and "that there is not in fact any dispute between the parties with regard to a matter agreed to be referred" are removed, is strikingly similar to Art.8(1) of the Model Law, and even more strikingly similar to s.8(1) of the B.C. International Commercial Arbitration Act.

To find citations of English cases dealing with these provisions requiring mandatory referrals to arbitration or stays of proceedings, one need look no further than Halsbury's⁵³⁴, which is perhaps the most fundamental source of English law for researchers. English texts such as Mustill and Boyd⁵³⁵ and Russell on Arbitration⁵³⁶ provide useful guidance as to the interpretation of the terms of the international conventions and the English Acts reflecting them.

To find non-English cases which have dealt with the New York Convention, one need only consult the Yearbook Commercial Arbitration, which has been published every year since 1974.

⁵³⁴ Halsbury's Laws of England.

⁵³⁵ Mustill and Boyd, The Law and Practice of Commercial Arbitration in England, 2d ed., 1989.

⁵³⁶ Russell on the Law of Arbitration, 20th ed., 1982, A. Walton & M. Vitoria, Eds.

Unfortunately, these sources, with the occasional exception of some decisions of the U.S. courts, have been almost always overlooked by most Canadian courts in dealing with the Model Law and the New York Convention.

10. THE MANDATORY NATURE OF THE REFERRAL OR STAY REQUIREMENT

The mandatory nature of the stay requirement was recognized in the 1931 edition of Halsbury's, which said that in cases to which the Arbitration Clauses (Protocol) Act, 1924 applied, upon application "a stay must be granted unless the court is satisfied that the agreement or arbitration has become inoperative or cannot proceed."⁵³⁷ In 1977, the House of Lords ruled that under s.1 of the Arbitration Act, 1975, the respondents having shown an arbitration agreement between the parties:

"It remains however open to the appellants to show, the onus being on them, that 'there is not in fact any dispute between the parties with regard to the matter agreed to be referred'. If they succeed in this, the stay will be refused. Either way, no discretion enters into the matter, and the unknown merits of the respondents or demerits of the appellants are irrelevant."⁵³⁸

11. NULL AND VOID, INOPERATIVE, AND INCAPABLE OF BEING PERFORMED AS DEFINED IN ENGLISH CASE LAW UNDER THE NEW YORK CONVENTION

The English case law indicates as follows:

1. Null and Void:

⁵³⁷ 1 Halsbury's Laws of England 643, para.1091.

⁵³⁸ Nova Knit v. Kammgarn (Lord Wilberforce), [1977] 2 All E.R. 463, 467.

An arbitration agreement is null and void if it is void ab initio on grounds of illegality.⁵³⁹ But an agreement alleged to be voidable is not void until revoked, and hence is not "null and void" under s.4(2) of the Arbitration Act, 1950.⁵⁴⁰ A plea that a contract is "void of illegality" does not prevent an exclusive jurisdiction or arbitration clause from operating to determine the proper dispute-settlement forum. A plea of illegality or non-disclosure does not automatically void the contract, but gives the innocent party a right to elect to avoid the contract or confirm it. But if that party elects to avoid the contract, it is not avoided from the beginning but only from the moment of avoidance. The foreign jurisdiction or arbitration clause is not abrogated, and any dispute as to non-disclosure remains within the clause.⁵⁴¹ An arbitration clause, in a contract alleged to have been rescinded by reason of repudiation or frustration, survives to have effect as to disputes arising from the contract, subject to the wording of the arbitration clause having sufficient scope to cover the disputes in issue.⁵⁴²

2. Inoperative:

⁵³⁹ The Tradesman, S.A. Hersent v United Towing Co. Ltd., [1961] 3 All E.R. 661.

⁵⁴⁰ Id.

⁵⁴¹ Mackender v. Feldia, [1967] 2 Q.B.590, [1966] 3 All E.R. 847 (C.A.), as interpreted in Ash v. Lloyd's Corp., (1991) 6 O.R. 235.

⁵⁴² Heyman v. Darwins, [1942] 1 All E.R. 337, 343.

Until all matters in dispute under the contract between the parties have been settled, the arbitration clause remains in operation; the discontinuation of the contract does not render the arbitration clause "inoperative".⁵⁴³ Failure to comply strictly with time limits set out in the arbitration clause does not render it "inoperative".⁵⁴⁴ An arbitration agreement is not "inoperative" because the claim in issue is time-barred.⁵⁴⁵ An arbitration agreement may be rendered inoperative by a subsequent agreement of the parties to deprive the arbitration agreement of effect.⁵⁴⁶ Overlap in the issues in the arbitration and issues in proceedings between parties not bound by the arbitration agreement, and the possibility of inconsistent findings, do not make it "inoperative".⁵⁴⁷

3. Incapable of Being Performed:

An arbitration agreement is incapable of being performed only if the circumstances are such that it could no longer be performed

⁵⁴³ Radio City (Universal) Ltd. v. Compagnie Luxembourgoise de Radiodifusion, [1936] 2 All E.R. 721.

⁵⁴⁴ Id.

⁵⁴⁵ The Media, (1931) 41 Ll.L.L.R. 80; W. Bruce Ltd. v. Strong, [1951] 2 K.B. 447, [1951] 1 All E.R. 1021; The Merak, [1965] 1 All E.R. 230 (C.A.), in which an Action for damages was stayed where there was an arbitration agreement incorporated in a Bill of Lading but no submission to arbitration had been made within the time limit specified in the arbitration clause; The Jemrix, [1981] 2 Lloyd's Rep. 544.

⁵⁴⁶ H. Kruidenier (London) Ltd. v. Egyptian Navigation Co., The El Amria (No.2), [1980] 2 Lloyd's Rep. 166.

⁵⁴⁷ Lonrho v. Shell Petroleum, (1978) Times, 1 February.

even if all parties are ready, willing, and able to perform it. Where a party's impecuniosity renders him unable to institute the arbitration, that does not render the arbitration agreement "incapable of being performed", nor do inconvenience or difficulty in carrying out the arbitration.⁵⁴⁸ Delay in instituting arbitration, short of such inexcusable and inordinate delay that amounts to a repudiation of the arbitration agreement, does not render the arbitration agreement "inoperative" or "incapable of being performed".⁵⁴⁹ The incapacity must be something beyond the control of the parties, for example where the arbitration agreement specifies a particular arbitrator but the named arbitrator is unable or refuses to act, and the court has no power under the parties' agreement to alter the situation.⁵⁵⁰ The fact, that a preliminary step required by the arbitration agreement has not been taken, does not render the arbitration agreement "inoperative" or "incapable of being performed", nor otherwise debar the court from ordering a stay.⁵⁵¹ The words "incapable of being performed" refer only to the question whether an arbitration agreement is capable of being performed up to the stage when it results in an award, and do not extend to the question whether, once the award is made, the party against whom it is made will be capable of

⁵⁴⁸ Paczy v. Haendler & Naterman GmbH, [1981] 1 Lloyd's Rep. 302.

⁵⁴⁹ Id.

⁵⁵⁰ Id.

⁵⁵¹ Channel Tunnel Group Ltd. Balfour Beatty Construction Ltd., [1992] 2 All E.R. 609 (C.A.).

fulfilling the award⁵⁵². An arbitration agreement is not "incapable of being performed" because the claim in issue is time-barred.⁵⁵³

12. EXISTENCE OF DISPUTES

Halsbury's 4th edition Reissue of 1991 tells us that:

"A dispute of difference arises where there is disagreement about central issues: no claim need be formulated, and the cause of action need not be fully constituted."⁵⁵⁴

According to English precedent, a mere denial of a claim can constitute a dispute. Although it was argued by the Plaintiff that its claim was indisputable, the court found that there was a dispute until the claim was admitted.⁵⁵⁵ Further, in Ellerine Bros. (Pty) Ltd. v. Klinger⁵⁵⁶, the English Court of Appeal held that s.1(1) of the Arbitration Act, 1975 was not limited either in content or in subject matter, and accordingly if the Plaintiff made some request or demand and the Defendant did not reply, a dispute arose between the parties. It followed that, at the time the

⁵⁵² The Rena K, [1978] 1 Lloyd's Rep. 545.

⁵⁵³ The Media, (1931) 41 Ll.L.L.R. 80; W. Bruce Ltd. v. Strong, [1951] 2 K.B. 447, [1951] 1 All E.R. 1021; The Merak, [1965] 1 All E.R. 230 (C.A.), in which an Action for damages was stayed where there was an arbitration agreement incorporated in a Bill of Lading but no submission to arbitration had been made within the time limit specified in the arbitration clause; The Jemrix, [1981] 2 Lloyd's Rep. 544.

⁵⁵⁴ 2 Halsbury's Laws of England, 4th ed. Reissue, 341 para.614 (1991), citing cases from 1923 to 1980.

⁵⁵⁵ Tradax Internacional S.A. v. Cerrahogullari TAS, the M Eregli, [1981] 3 All ER 344, [1981] 2 Lloyd's Rep. 169.

⁵⁵⁶ Ellerine Bros. (Pty) Ltd. v. Klinger, [1982] 2 All ER 737 (C.A.).

Plaintiff caused a writ to issue, there was a dispute between the parties because the Defendant had never agreed that it was under an obligation to account or to vouch or to pay anything to the Plaintiff. Thus s.1(1) applied and the court was bound to refer the dispute to arbitration.

Even where liability is not contested, there is a dispute if the amount of damages remains in issue.⁵⁵⁷

13. LEADERSHIP FROM THE SUPREME COURT OF THE UNITED STATES

In Scherk v. Alberto-Culver⁵⁵⁸, Alberto-Culver alleged that Scherk, a German citizen, had fraudulently induced it to purchase three companies from Scherk, the companies being organized under German and Liechtenstein law. The negotiations had taken place in Europe, as did the signing and closing. The contracts provided for arbitration in Paris, applying Illinois law. The clauses applied to "any controversy or claim (arising) out of this agreement or the breach thereof." Alberto-Culver sued in the U.S., Scherk petitioned for a stay of proceedings in favour of arbitration. Alberto-Culver's claims included claims under U.S. securities statutes. The Supreme Court granted a stay, overturning the lower courts. The Court ruled, in part:

⁵⁵⁷ First Steamship Co. Ltd. v. C T S Commodity Transport Shipping Schiffahrtsgesellschaft mbH, The Ever Splendor, [1988] 1 Lloyd's Rep. 245.

⁵⁵⁸ Scherk v. Alberto-Culver, (1974) 417 US 506, 41 L Ed 2d 270, 94 S Ct 2449.

"The United States Arbitration Act⁵⁵⁹, [which applies to interstate and international commerce and maritime matters] reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid the costliness and delays of litigation."

"The Act provides for a stay of proceedings in a case where the court is satisfied that the issue before it is arbitrable under the agreement and s.4 of the Act directs a federal court to order parties to proceed to arbitration if there has been a 'failure, neglect, or refusal' of any party to honour an agreement to arbitrate."⁵⁶⁰

Relying on The Bremen v. Zapata Offshore Co.⁵⁶¹ and Prima Paint v. Flood and Conklin⁵⁶², the court held that the claims were within the arbitration clause:

"In The Bremen we noted that forum-selection clauses 'should be given full effect' when a 'freely negotiated private international agreement (is) unaffected by fraud....This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud, as in this case, the clause is unenforceable. Rather, it means that an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion."⁵⁶³

In Mitsubishi Motors v. Soler Chrysler-Plymouth⁵⁶⁴, the court quoted from Prima Paint:

"...questions of arbitrability must be addressed with a healthy regard for the federal policy favouring arbitration...any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract

⁵⁵⁹ The United States Arbitration Act, 9 U.S.C.

⁵⁶⁰ The Bremen v. Zapata Offshore, 41 L Ed 2d 276.

⁵⁶¹ 407 US 1; also indexed as Zapata Off-Shore Co. v. The "Bremen" and Unterweser Reederai G.M.B.H., The "Chaparral" in [1972] 2 Ll.L.R., 315.

⁵⁶² Prima Paint v. Flood & Conklin, 388 US 395 (U.S.S.C.).

⁵⁶³ 41 L Ed 281, fn.9.

⁵⁶⁴ 87 L Ed 2d 444, at 455.

language itself or an allegation of waiver, delay, or a like defense to arbitrability."⁵⁶⁵

And, quoting from Wilko v Swan:

"Contractual provision specifying in advance the forum in which disputes will be litigated and the law to be applied...is an almost indispensable precondition to the achievement the orderliness and predictability essential to any international business transaction....A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."⁵⁶⁶

The court went on to hold that anti-trust matters, not arbitrable in the domestic situation, were to be treated as arbitrable in international matters, as "it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration."⁵⁶⁷

In The Bremen⁵⁶⁸, the U.S. Supreme Court was dealing with a claim against the tug Bremen, German owned, by the U.S. owners of a floating drilling platform, the Chaparral. The tow was to be from Louisiana to Italy. The Bremen's owners were the low bidders. The contract provided for any dispute to be decided by the London Court of Justice, and included two clauses that absolutely exculpated the Bremen from all liability. During the tow, a severe storm blew up in the Gulf of Mexico, causing some \$3.5 million damage to the

⁵⁶⁵ 87 L Ed 455.

⁵⁶⁶ 87 L Ed 458.

⁵⁶⁷ 87 L.Ed. 2d, 463.

⁵⁶⁸ The Bremen v. Zapata Off-Shore Co. 407 U.S. 1, 32 L.ED.2d 513 (1972).

Chapparal. The Bremen towed the Chaparral to Tampa, Florida, the nearest port of refuge. The Bremen was there arrested and released on bail. The Bremen's owners sued in London for damages for breach of the towing contract. Zapata's application to the London court to contest the court's jurisdiction was dismissed, on the grounds that the parties should be held to their bargain in the absence of strong reasons to the contrary. The matter was taken up to the Court of Appeal, which gave leave to appeal and dismissed it in the same judgment⁵⁶⁹.

On the other side of the pond, the Bremen's owners applied for a stay of the U.S. proceedings in favour of London court Action and Zapata applied for an injunction preventing the Bremen owners from proceeding in London. The lower courts held for Zapata, but the U.S. Supreme Court ruled that too little effect had been given to the forum selection clause.

The problem facing Zapata was the exclusion of liability provisions of the towing contract. There was evidence before the U.S. courts that the exclusion of liability provisions were enforceable in English law, that the London court would apply English law, and hence Zapata would recover nothing. Such a clause was not enforceable in U.S. law. The lower U.S. courts held that such a clause was unenforceable as contrary to public policy, that forum selection clauses reached in advance of controversy were unenforceable as contrary to public policy, and further ruled that,

⁵⁶⁹ [1968] 2 Lloyd's Rep. 158.

as Zapata was a U.S. citizen, the discretion of the U.S. courts to remand the case to a foreign court was limited.

The Supreme Court dismissed all these grounds, holding:

"...far too little weight and effect was given to the forum clause....For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States....The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and our courts....We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved by our courts....The choice of forum was made in an arm's-length negotiation by experienced and sophisticated businessmen and absent some compelling and countervailing reason should be honored by the parties and enforced by the courts. The argument that such clauses are improper because they tend to 'oust' a Court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest on historical judicial resistance to any attempt to reduce the power and business of a particular court...It reflects a provincial attitude."⁵⁷⁰

The U.S. federal courts also exhibit a policy of liberal interpretation of the scope of arbitration clauses:

"[T]he clear weight of authority holds that the most minimal indication of the parties' intent to arbitrate must be given full effect, especially for international disputes."⁵⁷¹

"The scope of the [arbitration] clause must be...interpreted liberally."⁵⁷²

U.S. federal law also holds that the decisions of arbitral tribunals as to their authority are entitled to deference, finding

⁵⁷⁰ Id., 318-320 (emphasis added).

⁵⁷¹ Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 478 (9th Cir., 1991).

⁵⁷² Id.

a "powerful presumption that the arbitral body acted within its powers."⁵⁷³

In dealing with allegations by parties resisting stays in favour of arbitration, courts in the U.S. are directed by case law to look not at the legal labels attached to claims by the Plaintiff, but to the factual allegations underlying those claims. Thus if claims are made in tort and under statutes, but the facts underlying those claims are related to the parties' commercial relation and fall within the parties' arbitration agreement, the claims must be referred to arbitration, where the U.S. Federal Arbitration Act ("FAA")⁵⁷⁴, which enactment includes the New York Convention, applies.⁵⁷⁵

The FAA provides a choice of law provision by which the validity and scope of arbitration clauses are to be decided: these issues are to be decided in accordance with U.S. federal law as set out in the FAA. "[O]nce a dispute is covered by the FAA, federal law applies to all questions of the arbitration agreement's interpretation, construction, validity, revocability, and enforceability."⁵⁷⁶

⁵⁷³ Parsons Whittemore Overseas Co. v. RAKTA, 508 F.2d 969, 976 (2d Cir. 1974).

⁵⁷⁴ Title 9 U.S.C.S.

⁵⁷⁵ J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile S.A., 863 F.2d 315 (U.S.C.A. 4th Cir.). Chapter 1 of the Federal Arbitration Act ("FAA") applies to interstate commerce and maritime matters. Chapter 2 of the Act enacts the New York Convention.

⁵⁷⁶ Rhône Méditerranée v. Lauro, (1982) 555 F.Supp. 482.

The United States made both the "commercial" and "reciprocity" reservations in adopting the New York Convention. In dealing with an application for a stay of proceedings under the New York Convention provisions in the FAA, the court must address four questions:⁵⁷⁷

1. Is there an agreement in writing to arbitrate the subject dispute?⁵⁷⁸
2. Does the agreement provide for arbitration in the territory of a signatory country?⁵⁷⁹
3. Does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial?⁵⁸⁰
4. Is a party to the contract not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign States?⁵⁸¹

The first question deals with the existence and scope of the arbitration agreement. If the arbitration clause arguably encompasses the parties' dispute, the court should permit the arbitrator to decide whether the dispute falls within the clause. The last three questions address the citizenship of the parties and the nature of the relationship between them. If the court answers

⁵⁷⁷ Tennessee Imports Inc. v. Filippi and Prix Italia, S.R.L., 745 F.Supp 1314 (1990).

⁵⁷⁸ New York Convention Arts.II(1), II(2).

⁵⁷⁹ Convention Arts.I(1), I(3); 9 U.S.C.S. s.206; Declaration of U.S. on accession, 9 U.S.C.A. s.201, Note 43 (1990 Supp.).

⁵⁸⁰ Convention Art.I(3); 9 U.S.C.S. s.202.

⁵⁸¹ 9 U.S.C.S. s.202.

all four questions in the affirmative, it must enforce the arbitration agreement unless it finds the agreement "null and void, inoperative, or incapable of being performed."⁵⁸² Any interpretation of these conditions must recognize the presumption in favour of arbitration and must also foster the adoption of standards which can be uniformly applied on an international scale.⁵⁸³ An expansive interpretation of the "null and void" clause would be antithetical to the goals of the Convention, and the court should not allow parochial interests to interfere with enforcement of arbitration clauses.⁵⁸⁴ The court should limit the application of the "null and void" clause to cases in which the arbitration agreement itself is subject to an internationally recognized defense such as duress, fraud or waiver, or when the agreement contravenes fundamental policies of the forum State.⁵⁸⁵ Thus, the Convention's "null and void" exception is to be narrowly construed.⁵⁸⁶

By Rhône Méditerranée v Lauro⁵⁸⁷, an arbitration agreement may be found to have been rendered null and void by waiver, and by public

⁵⁸² Ledée v. Céramiche Ragno, 684 F.2d 184 (1982).

⁵⁸³ I.T.A.D. Associates, Inc. v. Podar Bros., 636 F.2d 75 (1981).

⁵⁸⁴ Ledée supra; Scherk v. Alberto-Culver, supra.

⁵⁸⁵ Ledee, supra; Rhône Méditerranée, supra.

⁵⁸⁶ Riley v. Kingsley Underwriting Agencies Ltd., 969 F.2d 953, 959, cert. denied, 113 S.Ct. 658, 121 L.Ed.2d 584 (1992), Meadows Indemnity v. Baccala & Shoop, 760 F. Supp. 1036 (1991).

⁵⁸⁷ Supra.

policy considerations, but such findings will not be lightly made. In Parsons Whittemore v RAKTA⁵⁸⁸, a foreign award was upheld in the U.S. even though it breached U.S. domestic law; the court ruled that the public policy exception to recognition and enforcement should be construed narrowly, and thus an international award would not be refused recognition and enforcement unless its enforcement would violate the forum state's most basic notions of morality and justice - to use the public policy defence as a parochial device protective of national political interests would seriously undermine the New York Convention's utility. The court also held that, while the Convention provides that an award may not be enforced if rendered on a subject matter outside the arbitrator's jurisdiction, that does not sanction second-guessing the arbitrator's construction of the parties' agreement.⁵⁸⁹ Further, the "manifest disregard of law" defence available in the United States will not be extended to Convention awards as a licence to review the record of arbitral proceedings for errors of fact or law.⁵⁹⁰

There is no discretion left to a U.S. court as to whether to compel arbitration if the above-noted prerequisites are met. However, there has been a division in the authorities in the U.S. as to whether to dismiss the Action outright upon referral to arbitration, or merely to stay it. Neither the Convention nor the

⁵⁸⁸ 508 F.2d 969 (U.S.C.A., 2nd Circ., 1974).

⁵⁸⁹ Id.

⁵⁹⁰ Id.

FAA provides for the staying of an Action pending arbitration.⁵⁹¹ Whether the Action is dismissed or stayed, the court retains authority to stay related or collateral litigation involving non-arbitrating parties or non-arbitrable disputes, as being within the discretion of the court in controlling its docket.⁵⁹²

The Defendant, in order to obtain a stay of the Action in favour of arbitration, need not make such a request expressly of the court; raising the arbitration clause as a defense is treated as an application for a stay pending arbitration pursuant to s.3 of the FAA.⁵⁹³

In a case in which the parties had designated a non-existent arbitral institution, the District Court for the Southern District of New York held that, while the forum-designation clause was void, the clear intent of the parties was to designate a neutral tribunal for arbitration. The court ordered arbitration under the American Arbitral Association, since the court found that solution acceptable to both parties as shown by the various iterations of the parties' contract.⁵⁹⁴

⁵⁹¹ Tennessee Imports, supra.

⁵⁹² Tennessee Imports, supra.

⁵⁹³ McCreary Tire & Rubber Co. v. C.E.A.T. S.P.A., 501 F.2d 1032 (1974).

⁵⁹⁴ Rosgoscirc v. Circus Show Corp., 1993 U.S. Dist. LEXIS 9797.

A statement of policy by the Supreme Court of Canada, to apply to international commercial arbitration in such liberal attitudes as to arbitration and choice of forum clauses would be extremely helpful. It is very interesting to compare the policy of the United States, as evidenced by the above-noted rulings, to the rulings of the Canadian courts since 1986, when supposedly Canada adopted very liberal international commercial arbitration laws.

14. OTHER INTERNATIONAL PRECEDENTS

As noted above, the Yearbook Commercial Arbitration provides a ready source of international cases on the New York Convention. Liberal interpretation and application of the Convention are the general rule. A few examples follow.

Switzerland:

In M. v. Fincantieri-Cantieri and Oto Melara⁵⁹⁵, the claimant, M., sought payment of sales commissions on sales of military materials to Iraq. Payments had been suspended by the Defendants (two Italian companies) when the U.N. embargo against sales of war materials to Iraq went into effect. The embargo had been adopted in Swiss and Italian law. The Plaintiff instituted arbitration proceedings under his contract with the Defendants. The Defendants objected that the dispute was not arbitrable subject matter because the embargo had made the contract illegal. The tribunal found that it had jurisdiction, and the Defendants appealed to the Supreme Court of Switzerland. The court noted that in Swiss law:

⁵⁹⁵ M. v. Fincantieri-Cantieri and Oto Melara, (1995) 20 Y.C.A. 766.

"When dealing with the issue of arbitrability, the Swiss legislator consciously rejected a solution based on a conflict-of-laws provision (referring to the applicable law, the law of the seat of the of the parties or the lex fori) and chose a material provision of private international law, based upon the matter of the dispute, by making it possible to submit to arbitration 'any dispute involving property'".

Thus it is not necessary under Swiss law to employ a conflict-of-laws approach to ascertain which law applies to the arbitrability of the dispute.

The court went on to rule that: "In the present case, public policy could only be relevant if it required imperatively that the claim at issue be submitted to a State authority. The fact that the claim affects public policy would not suffice, in itself, to rule out the arbitrability of the dispute..." The arbitrability of the dispute cannot be denied in Swiss law for the reason that mandatory provisions of law or public policy make the claim null and void or its execution impossible; arbitrability can be denied only as far as the claims are concerned with matters that Swiss law reserves exclusively for determination for the courts. The finding of the arbitral tribunal as to its jurisdiction was upheld.

France:

In SA CFTE v Dechavanne⁵⁹⁶, the French Court of Appeal (Grenoble) dealt with an appeal from an award on an international individual labour contract. The Defendant argued that the arbitration clause was null and void because French law provides that labour matters are reserved to the Labour Court. The court noted that in 1989 the

⁵⁹⁶ SA CFTE v. Dechavanne, (1995) 20 Y.C.A. 198.

French government had withdrawn the "commercial" reservation made when France ratified the New York Convention in 1958, and that thus France undertakes without any reservation "to recognize any agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship". The labour contract, being international in nature, fell outside the exclusive jurisdiction of the Labour Court, and under the Convention. Further, the court held that Dechavanne was acting as a "commerçant" when he entered into the contract, since it involved his sale of controlling shares in the company which employed him.

This case can be compared to the decision of the Alberta Court of Queen's Bench in Borowski v. Fiedler⁵⁹⁷, in which an international individual employment contract was held not to be "commercial" and hence was outside the coverage of the Model Law.

In Bomar Oil NV v. ETAP⁵⁹⁸, the French Supreme Court dealt with the issue of incorporation of an arbitration clause by general reference, to standard contract terms, in a contract formed by telexes. Bomar argued that the arbitral clause, not being contained in a written contract signed by the parties (as required by Art.II of the New York Convention), but only appearing in a document to which the main contract referred, was "non-existing"

⁵⁹⁷ Borowski v. Fiedler, [1994] 10 W.W.R. 623, [1994] A.J. No. 617.

⁵⁹⁸ Bomar Oil v. ETAP, (1995) 20 Y.C.A. 660.

under the Convention. The court had no difficulty finding that there was an effective arbitration clause incorporated by the general reference in the exchange of telexes by which the contract was formed. As will be seen by the discussion below, the courts of Canada have not taken such a liberal approach to the "in writing, signed by the parties" requirements of the New York Convention and Model Law, although the courts of the United States take a very liberal view⁵⁹⁹, and the courts of Hong Kong have generally done so.

New Zealand:

In Baltimar Aps. Ltd. v. Nalder & Biddle Ltd.⁶⁰⁰, the Court of Appeal of New Zealand dealt with an international shipping contract which provided for arbitration in London. Nalder and Biddle sued in New Zealand, Baltimar applied for a stay. The court granted a stay, noting first that the provisions for a stay under s.4 of the Arbitration (Foreign Agreements and Awards) Act, 1982, which enacts the mandatory referral provision of the New York Convention, "are mandatory. In the absence of the specified disqualifying conditions ['null and void, inoperative, or incapable of being performed'], the Court has no discretion." The court noted that the courts of England, under the Arbitration Act, 1975, may refuse a stay "if there is not in fact any dispute", and use that provision in the English Act to delve into the reality of the

⁵⁹⁹ See Arnold v. Arnold Inc., 920 F.2d 1269, 1281-82 (6th Cir.1990).

⁶⁰⁰ Baltimar Aps. Ltd. v. Nalder & Biddle Ltd., (1995) Y.C.A. 755.

dispute. However, there is no such provision in the New Zealand Act, and the court quoted a passage from Mustill and Boyd which criticizes the correctness of the English approach as: (i) "not self-evident"; (ii) involving delays and long inquiries by the courts, on mere affidavit evidence, into the reality of disputes; and (iii) "The Defendant might well object that this kind of trial in miniature by the Court is not something for which he bargained, when making an express contract to leave his rights to the sole adjudication of the arbitrator". The New Zealand court then ruled that:

"The discussion about the Court pre-empting the arbitrator's jurisdiction goes a long way to dispel any suggestion that it retains an implied power to rule on whether there is a genuine dispute. Moreover to rule that there is such a power is to ignore the mandatory terms of Sect.4(1) of our Act..."

Australia:

In Saunderson v. Caltex Tanker Co., Samsung Shipbuilding Third Party⁶⁰¹, the Plaintiff brought suit in the Supreme Court of New South Wales for injuries received while a crewman on a vessel owned by the Defendants and built by the Third Party Samsung. When the Defendant caused Third Party Proceedings to be taken, Samsung applied for a stay under the International Arbitration Act, 1974, which enacts the New York Convention in Australia. The Defendant opposed the stay application, arguing that the Defendant's claim over sounded in tort, not contract, and the court had exclusive jurisdiction to determine matters of contributory negligence as between the Defendant and the Third Party under the Law Reform

⁶⁰¹ Saunderson v. Caltex Tanker Co., Samsung Shipbuilding Third Party, (1995) Y.C.A. 622, 9 Int'l Arb. Rep. (1994, no.5) p.B-1.

Miscellaneous Provisions Act, 1946, under which Act the Third Party is made directly liable to the Plaintiff. The court turned aside this argument, ruling that the Third Party claim "arises out of the contractual relationship between Caltex and Samsung irrespective of the specific manner in which it is pleaded. It is only by reason of the shipbuilding contract that Caltex is in a position to claim against Samsung..." The court went on to note that the courts of Australia, in dealing with the application of the mandatory stay provisions of the New York Convention, have given "matter" a wide and generous definition as meaning "the whole matter" and as encompassing "all claims made within the scope of the controversy", and have given an equally generous definition to "capable of settlement by arbitration", as requiring:

"that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy. The words 'capable of settlement by arbitration' indicate that the controversy must be one falling within the scope of the arbitration agreement and, perhaps, one relating to rights which are not required to be determined exclusively by the exercise of judicial power."⁶⁰²

As to the submission of the Defendant that the stay order could not be granted until judgment was entered by the Plaintiff against the Defendant, as no dispute would arise until then, the court ruled:

"In my view, a dispute arose between the parties immediately Caltex served the cross-claim upon Samsung, which at no stage was willing to accede to the relief claimed....Thus Samsung has made out a case for a mandatory stay of the cross-claim. No question of discretion arises."

Japan:

⁶⁰² Tanning Research Laboratory, Inc. v. O'Brien, [1989-90] 169 C.L.R. 332, 351-2.

In JEC v. Feld⁶⁰³, JEC of Japan and Ringling Bros. of New York entered into a contract to run amusements in Japan. The contract provided that disputes were to be settled by arbitration, to take place in the country of whichever party was respondent in the arbitration. JEC sued Feld, an employee of Ringling Bros., in Tokyo District Court, alleging that Feld had failed to account for revenues. Feld obtained an order from the District Court in New York enjoining the court proceedings in Tokyo and compelling JEC to arbitrate in New York. The Tokyo District Court refused to hear the case, and JEC appealed to the High Court of Tokyo. The latter court ruled that the parties' contract must be upheld. In the absence of party choice of law, the law of the place of arbitration would control the validity and scope of the arbitration agreement. Finding that the place of arbitration should be New York according to the parties' contract, that U.S. federal law applied, and that U.S. federal law would uphold the validity and give wide scope to the arbitration agreement, the Tokyo court applied that law to find the arbitration agreement valid and the dispute within its scope. Although Feld was not a party to the arbitration agreement, but an employee of a party, the court found that U.S. law would extend the coverage of the arbitration agreement to Feld. Therefore Feld was covered for the purposes of this proceeding in the Tokyo courts.

This approach, determining the proper law of the arbitration agreement to be foreign law and applying that foreign law to the

⁶⁰³ JEC v Feld, (1995) 20 Y.C.A. 745, Hanrei Jihou (no.1499) p.68 (original in Japanese).

issues of the validity and scope of the arbitration agreement so liberally, is an ideal model of liberal respect for arbitration removed from parochial concerns over loss of judicial jurisdiction.

V. THE MODEL LAW AS APPLIED BY THE COURTS OF CANADA

1. THE MANDATORY NATURE OF ARTICLE 8, AND CONFUSION OVER "REFER" AND "STAY"

The first series of Art.8 applications which came before the Federal Court of Canada, and the courts of Alberta, illustrate the initial reaction of the Canadian courts to the Model Law - a restrictive approach, a narrow focus on Art.8 in isolation from other provisions and policies of the Model Law, and great difficulty in accepting the mandatory nature of Art.8

The first opportunity for the Federal Court of Canada to deal with Art.8 of the Commercial Arbitration Code (Art.8 of the Model Law) was in BC Navigation S.A. (Bankrupt) v. Canpotex Shipping Services Ltd⁶⁰⁴. The Defendant applied successfully for a stay. In a short judgment, Denault, J. ruled: "Parliament imposes an imperative duty upon the court to refer the parties to arbitration...the fact that the right to proceed to arbitration could be time-barred...is no reason for regarding arbitration as inoperative or refusing to stay. Walton, Russell on Arbitration." Thus the court recognized the mandatory nature of Art.8(1), but the court then went on:

⁶⁰⁴ B.C. Navigation S.A. v. Canpotex Shipping Services Ltd.,
(1987) 16 F.T.R. 79.

"even if I had decided otherwise, I would still, in the exercise of my discretion, have granted a stay of all proceedings, according to s.50 of the Federal Court Act, in view of this rule expressed by the majority in Sea Pearl..."

The inclusion of the latter reasoning is troubling. The court indicates that alongside, or perhaps as an alternative to, Art.8(1), the court retains some discretionary power to grant stays of proceedings, and that the Sea Pearl case is still applicable.

The next case of an application under Art.8(1) to the Federal Court was Navionics Inc. v. Flota Maritima Mexicana S.A. et al,⁶⁰⁵ decided without knowledge of the previous case. The case is not a model of success. The defendant applied for a stay on the basis of an arbitration agreement, before filing its Statement of Defence, on an affidavit sworn by counsel with a copy of the charterparty containing the arbitration agreement attached. The motion was dismissed on the basis that the affidavit was not sworn on personal knowledge, but leave was given to re-apply. The Plaintiff then moved for judgment, and forced the Defendant to file a Statement of Defence. After obtaining a fresh affidavit from South America, the Defendant moved again for a stay.

The court then ruled that the first motion was dismissed, the second motion could not be a continuation of it, so the time limit in Art.8(1) was missed. The court considered the Analytical

⁶⁰⁵ Navionics Inc. v. Flota Maritima Villa Nova, (1989) 26 F.T.R., 148.

Commentary⁶⁰⁶ which says that the opinion of the drafters was that once the time limit was missed, Art.8(1) "prevents that party from invoking the agreement during subsequent phases of the court proceedings."⁶⁰⁷

Faced with this, the court went on:

"The only logical conclusion from the foregoing is that article 8 should be given a fairly strict interpretation. Furthermore, I should also apply a strict construction approach on the grounds that its imperative provision is an exceptional departure from the court's inherent jurisdiction and from its traditional discretion in dealing with any application to stay proceedings."

And later:

"...a simple end run will do the trick...I should find first of all that article 8 of the Code, which makes the stay mandatory, in no way affects or impinges upon the permissive jurisdiction of the court under s.50...I find that there is a prima facie triable issue which should go to arbitration."

The fact that the "end run" ran was directly contrary to the interpretation of article 8 suggested by the Analytical Commentary does not seem to have troubled the court. The court showed, also, its reluctance to give up on the idea that its traditional discretion with respect to granting stays under s.50 of the Federal Court Act was impaired by the Commercial Arbitration Code. It is questionable whether the court paid due heed to S.4.(1) of the

⁶⁰⁶ Analytical Commentary contained in the Report of the Secretary-General to the Eighteenth Session of the United Nations Commission on International Trade Law, reprinted in the Canada Gazette (Vol.1, 1986, No.40, Supplement pp.118-120, October 4, 1986), (cited herein as "Analytical Commentary").

⁶⁰⁷ Analytical Commentary, Uncitral document No.A/CN.9/264, page 24.

Commercial Arbitration Act (Canada) which calls for the Act to be interpreted "in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose."

The holding that a statute which impinges on a jurisdiction formerly exercised by the court should be given a strict construction so as to limit its effect on that jurisdiction is a time-honoured response of common-judges, entirely in keeping with the law jealousy of jurisdiction shown by the common law courts throughout their history, as discussed earlier in this paper. It is unfortunate that the Court did not heed the words spoken in 1974 by Justice Laskin, in Deuterium of Canada v. Burns & Roe, Inc.⁶⁰⁸:

"In the face of arbitration statutes which, like that in Nova Scotia and others elsewhere in Canada, are designed to place private arbitration on a regulated footing, I am not prepared at this date to revert to a common law policy of jealous reaction to the attempted suppression of the original jurisdiction of the ordinary Courts."

In its 1992 decision in Ruhrkohl Handel Inter GmbH v. Fednav Ltd and The Federal Calumet⁶⁰⁹, the Federal Court of Appeal agreed with the judge below that Art.8(1) of the Commercial Arbitration Code imposed an imperative duty on the court to refer the matter to arbitration but that the duty had been waived by failure to comply with the limitation therein. The Court of Appeal went on to consider whether it retained a discretion to stay the proceedings under s.50 of the Federal Court Act. The court

⁶⁰⁸ (1974) 44 D.L.R. (3d) 693, at 710.

⁶⁰⁹ Ruhrkohl Handel Inter GmbH v. Fednav Ltd. and the Federal Calumet, [1992] 3 F.C.98 (F.C.A. May 29, 1992).

referred to the opinion of the UNCITRAL Working Group in the Analytical Commentary to the effect that, once the limitation in Art.8(1) is missed, no further reliance may be placed upon the arbitration agreement, but that no provision on such general effect had been incorporated in Art.8 because of the difficulty in devising "a simple rule which would satisfactorily deal with all aspects of this complex issue." Rather amazingly, the court saw in this "an invitation not to adopt such a large construction of Article 8(1) and not to set aside the discretion 'to stay proceedings in any cause or matter' given to the Court by section 50 of the [Federal Court] Act." Even more amazingly, the court went on: "I need not however decide this issue because, as we shall see, I am of the view that the Trial Judge did in any event properly exercise his discretion." (The trial judge had found that the Plaintiff applicant had missed the limitation in Art.8 and had accordingly refused a stay.) The Federal Court of Appeal then went on to apply the old common-law discretionary tests in Sea Pearl, considering the failure of the Plaintiff applicant to show: (i) as required by the Arbitration Act, 1889, that it was ready and willing to do all things necessary to carry out the arbitration; and (ii) evidence of the relative advantages and disadvantages of the parties if the Action were stayed. The court ended by concluding that missing the limitation in Art.8(1) "might well constitute, absent strong reasons to the contrary, a significant factor weighing against the granting of a stay."

Thus the Federal Court of Appeal undercut the limitation in Art.8(1), insisting that the court retained discretion as to whether to grant stays of proceedings under s.50 of the Federal Court Act, and reducing the effect of missing the limitation in Art.8(1) to the status of merely another factor for the court to consider in the exercise of its discretion over the granting of stays.

The insistence that the court retained its discretion under s.50(1) of the Federal Court Act continued in Mirimachi Pulp & Paper Inc. v. C.P. Bulk Ship Services Ltd.⁶¹⁰ Joyal, J. found that "article 8 imposes a mandatory duty upon the court to stay proceedings," referred to the previous two cases, quoting the passage from Navionics as to strict interpretation, and added:

"this court in the exercise of its discretion, has jurisdiction to grant a stay of proceedings when the interest of justice so dictates: Federal Court Act s.50(1)(b)."

The court in Mirimachi Pulp apparently failed to notice, or to find any significance, in the difference between the Commercial Arbitration Code wording "refer the parties to arbitration" and the former provisions based on the Arbitration Act, 1889 (U.K.) which used "stay of proceedings." The case report states that "the defendants applied for an order staying the Plaintiff's Action on the grounds that it is in the interest of justice that the proceedings be stayed as the parties had agreed to arbitration in the United Kingdom." This was no doubt the form of application

⁶¹⁰ Mirimachi Pulp & Paper Ltd. v. C.P. Bulk Ship Services Ltd., (1992) 58 F.T.R. 81.

proper under s.50(1) of the Federal Court Act, and remains so for applications on the basis of choice of foreign court clauses, but its propriety is questionable for applications under Art.8(1) of the Commercial Code.

The court quoted Art.8(1) of the Code, with its reference to "refer the parties to arbitration." and followed it immediately with the statement: "By Article 8, Parliament imposes a mandatory duty upon the court to stay proceedings and refer the parties to arbitration where an arbitration agreement exists between the parties", naming Navionics and Canpotex as authorities. Then, after quoting from Navionics as to the strict interpretation to be given to Art.8, representing as it does an "exceptional departure from the court's inherent jurisdiction", the court went on to say:

"I would like to add that this court, in the exercise of its discretion, has jurisdiction to grant a stay of proceedings when the interest of justice so dictates."

The court relied on Sea Pearl, as authority for the propositions that s.50(1) of the Federal Court Act gives the court discretionary power to stay proceedings in the interests of justice, and that contractual undertakings to submit disputes to arbitration should be honoured. There is no discussion or analysis of the difference between a reference to arbitration and a stay of proceedings. Nor is there any discussion of the effect, if any, of the mandatory language in Art.8 of the Commercial Arbitration Code on the court's discretion under s.50(1) or upon the Sea Pearl decision. Thus one is left wondering: does the Court have an imperative duty to grant stays coupled with a discretion to withhold them? The two

positions seem mutually exclusive. Or is it only when a stay is not available under Art.8 of the Code that s.50 stays are available? In that case, what about the limitation in Art.8(1) and the Analytical Commentary?

The Federal Court of Appeal dealt squarely with the confusion between "stay" and "refer" in applying Art.8, in Nanisivik Mines Ltd. and Zinc Corp of America v. Canarctic Shipping Co. Ltd⁶¹¹., which involved the issue, among others, as to whether to stay the action as against parties who were not entitled to relief under Art.8, since they were found not to be parties to the arbitration agreement. This issue had been dealt with by the Federal Court of Appeal five years earlier in Iberfreight S.A. v. Ocean Star Container Line A.G.⁶¹², but that decision is not cited in the Nanisivik report. The court quoted from Kaverit Steel and Crane Ltd. v. Kone Ltd.⁶¹³ a decision of the Alberta Court of Appeal, to the effect that the Court cannot refer to arbitration parties to the action who are not parties to the arbitration agreement, but that the Court has a discretion to order a stay of proceedings involving all the parties to the action, pending the conclusion of the action. In Nanisivik, the Court held that Zinc Corp. was not a party to the arbitration agreement, but then ordered that action

⁶¹¹ [1994] 2 F.C. 662. (Federal Court Of Appeal).

⁶¹² Iberfreight S.A. v. Ocean Star Container Line A.G., (1989) 104 N.R. 164 (F.C.A.).

⁶¹³ (1992) 87 D.L.R. (4th) 129.

of the plaintiff Zinc Corp. be stayed under the court's discretion under s.50(1)(b) of the Federal Court Act.

Nanisivik is interesting for a number of points. The court quite properly pointed out that Art.8 does not provide for a mandatory stay of the action, but a mandatory referral to arbitration. Justice Mahoney in his analysis noted that the decisions of the Trial Division to date had all ruled that Art.8 left no discretion as to the reference to arbitration if the conditions of the article were met. He then quoted from Kaverit v. Kone to the effect that the Chambers judge had been wrong in his decision to refuse a refer anything to arbitration because of a multiplicity of issues, not all of which fell within the arbitration agreement. The Alberta Court of Appeal ruled that: "...the statute commands that what may go to arbitration shall go. No convenience test limits references." This reasoning was adopted by the Federal Court of Appeal, which went on to note that Canada has joined in a new international consensus that arbitration agreements are to be enforced provided they are in writing, not null and void nor inoperative nor incapable of performance.

The Court in Nanisivik went on to deal with the issue as to whether a stay of the court action was discretionary or mandatory after the court had referred the parties to arbitration. Justice Mahoney noted that there were two lines of authority in the Federal Court Trial Division. One line treated the stay as a matter of discretion, to be exercised according to Sea Pearl. The other line

holds that the stay follows the mandatory reference without an exercise of discretion. The Court found the first line the decision of the Court below in Nanisivik, "even an agreement in a bill of lading cannot remove all discretion from the Court to continue proceedings before it, and to decide whether or not a stay of such proceedings will be granted." Further support is seen in Navionics v. Flota Maritima, (supra) which the Federal Court of Appeal analyzed to replace the word "stay" used by the Court in Navionics in referring to "Article 8 of the Code which makes the stay mandatory" with "reference." This allowed the Court of Appeal to read Navionics to say that the judge there differentiated between the reference which was mandatory under Art.8 and the discretionary stay of proceedings. This arguably clears up the logical inconsistency of Navionics in that the judge there said a stay was mandatory under Art.8 and at the same time the Court had a discretion to order a stay under s.50 of the Federal Court Act.

The second line is found in BC Navigation v. Canpotex (supra). There the Motions Judge stated: "Parliament imposes an imperative duty upon the court to refer the parties to arbitration.... This finding disposes of this application, but even if I had decided otherwise, I would still, in the exercise of my discretion, have granted a stay of all proceedings according to s.50 of the Federal Court Act." Justice Mahoney interpreted this to mean that the Motions Judge held that the requirement to refer was mandatory and the reference either effected a stay or required it.

With all due respect to the Federal Court of Appeal, these "interpretations" of Navionics and BC Navigation, rewrite the reasoning of the judges on this point. However desirable it may be for the Court of Appeal to correct these flawed decisions, correction is what it is, not interpretation, in the view of this writer.

Continuing to deal with the matter of a stay, Justice Mahoney referred to the United States Supreme Court decision in Scherk v. Alberto-Culver⁶¹⁴ to the effect that no test of forum conveniens should be applied since this would almost always result in no dispute ever going to arbitration. Then the court reasoned that the policy considerations militating in favour of a referral also militate in favour of a stay of proceedings. Therefore, Justice Mahoney concluded that once a referral had been made, there is no residual discretion in the court to refuse to stay all proceedings between all the parties to the arbitration, even though there may be residual issues between them not subject to the arbitration.

The Court did not specify the authority for such a stay, presumably it is under s.50(1) of the Federal Court Act, either on the ground that the claim is being proceeded with in another jurisdiction (50(1)(a), or in the interests of justice 50(1)(b).

Notwithstanding the ruling in Nanisivik, Justice Huddart of the B.C. Supreme Court, dealing with an application for a referral to

⁶¹⁴ (1974) 417 U.S. 506 at 516.

arbitration under the federal Commercial Arbitration Code, in Siderurgica Mendes Junior S.A. and Mitsui & Co (Canada) Ltd. v. The Ice Pearl⁶¹⁵, indicated in dicta that the court had a discretion to stay the proceedings of Mitsui even though clearly it was not party to the arbitration clause in a Bill of Lading. The court went on to decide that the clause was not in effect with respect to the other Plaintiff, so there was no referral or stay in any case.

Statutes in Canada show several approaches to the issue as to whether the grant of a referral to arbitration necessarily requires the stay of the Action, and to what extent. The federal Commercial Arbitration Act⁶¹⁶ does not make any special provision with respect to the issue, it merely attaches the Model Law as the Commercial Arbitration Code. The Model-Law-based Uniform Arbitration Act⁶¹⁷, adopted by Alberta, Saskatchewan, and Ontario for domestic commercial arbitrations, provides in s.7(1) for a mandatory stay of proceedings ("refer" is not used), but in s.7(5) provides that a court may stay the proceeding with respect to matters dealt with in the arbitration agreement and allow it to continue with respect to other matters where the agreement deals with only some of the matters in issue, and it is reasonable to separate the issues. Thus the stay is mandatory with respect to

⁶¹⁵ Siderurgica Mendes Junior S.A. v. Mitsui & Co. (Canada) Ltd., [1996] B.C.J. No.151 (B.C.S.C. January 31, 1996).

⁶¹⁶ R.S.C. 1985, c.17.

⁶¹⁷ See Uniform Law Conference of Canada, Proceedings of the 72nd Annual Meeting, August, 1990.

matters covered by the arbitration agreement, but the court has discretion as to whether to stay the proceedings with respect to matters not covered. The Uniform Arbitration Act is not clear, however, as to the fate of parties to the proceeding who are not parties to the arbitration agreement.

The International Commercial Arbitration Acts of Alberta, Saskatchewan, and Ontario all contain sections providing that upon referral to arbitration under Art.8 of the Model Law, "the proceedings of the court are stayed with respect to the matters to which the arbitration relates."⁶¹⁸ It is an unsettled question whether these courts retain a discretion to stay other matters and other parties before the court when referring others to arbitration.

British Columbia went its own way. In what is perhaps an attempt to erase the confusion in the Model Law as to whether a referral to arbitration required the court to stay the Action before the court, s.8(2) of the International Commercial Arbitration Act provides for a mandatory stay of proceedings, "referral" is not used. Unfortunately, this may leave the courts of B.C. with no discretion to stay a proceeding as to issues and parties not covered by the arbitration agreement pending the settlement of some

⁶¹⁸ Ontario International Commercial Arbitration Act, R.S.O. 1990 c.I.9, s.8; Saskatchewan International Commercial Arbitration Act, S.S. c.I-10.2, s.9; Alberta International Commercial Arbitration Act, S.A. 1986, c.I-6.6, s.10, which also provides for a mandatory stay of proceedings where the matter is referred to arbitration under Art.II(3) of the New York Convention.

issues in arbitration. It seems desirable that the courts should have such a discretion, in order to avoid unnecessary duplication of proceedings, inconvenience, and wasted expense.

In Stancroft Trust v. Can-Asia Capital Co. Ltd.⁶¹⁹, a rather confused⁶²⁰ decision of the B.C. Court of Appeal under the B.C. International Commercial Arbitration Act, there were three defendants, two of whom filed Statements of Defence, and the third of whom applied for a stay before filing an Appearance. The judge of first instance stayed the proceedings as against all three defendants. The Court of Appeal overturned the stay with respect to the two Defendants who had filed Statements of Defence, ruling that they had missed the limitation in Art.8. The Court turned aside the use of one of the Rules of Court to grant a stay in such cases, but did so on a technical interpretation of the Rule invoked by these Defendants rather than on the question as to whether the courts retain any discretion as to staying proceedings against Defendants not covered by an arbitration agreement while other Defendants proceed with arbitration. Thus the position in British Columbia is clear as to the mandatory nature of the limitation in Art.8 but unclear as to whether the courts retain any discretion as to whether to stay proceedings with regard to parties and issues not covered by the arbitration agreement. This case does seem to

⁶¹⁹ (1990) 67 D.L.R. (4th) 131.

⁶²⁰ The court referred to s.8 of the International Commercial Arbitration Act as having been derived from the English Arbitration Act, 1889, rather than the Model Law, and quoted s.15 of the B.C. domestic Commercial Arbitration Act in a form which had been repealed in 1988.

indicate, although it did not give much analysis on the subject, that it is not proper to stay an Action against all Defendants if some only are entitled to a stay.

As noted above, the U.S. courts retain an inherent jurisdiction to stay matters not caught by an arbitration agreement⁶²¹, as do the English Courts⁶²² and the courts of Ontario retain an inherent jurisdiction to dismiss or stay an Action as an abuse of process.⁶²³

In the early Ontario case Boart Sweden AB et al. v. NYA Stromnes AB et al.⁶²⁴, the court referred to arbitration only part of the issues and some of the parties, but stayed the Action with respect to all claims and parties. Justice Campbell referred to the strong public policy in favour of enforcing arbitration agreements, which policy would be violated by dealing with all matters in a single court proceeding. He found in Art.8 of the Model Law:

"a clear direction to defer to the arbitrators....To conclude otherwise would drive a hole through the article by encouraging litigants to bring actions on matters related to but not embraced by the arbitration and then say that everything had to be consolidated in Court, thus defeating the policy of deference to the arbitrators."

⁶²¹ Tennessee Imports, supra.

⁶²² Channel Tunnel v. Balfour & Beatty, supra.

⁶²³ J.B. Casey, International And Domestic Commercial Arbitration, p.4-4 (1991), citing Earl Putnam Organization Ltd. v. MacDonald, (1978) 21 O.R. (2d) 815 (C.A.).

⁶²⁴ Boart Sweden AB et al. v. NYA Stromnes AB et al. (1989) 41 B.L.R. 295 (Ont. S.C. Dec.21, 1988).

Justice Campbell went on to refer to inconvenience to witnesses to have to participate in two parallel proceedings and the "mischievous" effect of continuing to litigate matters which were intertwined with matters which would be arbitrated.

Thus:

1. It seems to be settled, after initial resistance, that Canadian courts must honour the mandate in Art.8 to refer to arbitration those parties and those issues covered by the arbitration agreement;

2. There seems to be no controversy over the position that it is permissible to stay a proceeding as against those Defendants who qualify under Art.8 while allowing the proceeding to continue against those not covered by the arbitration agreement - Stancroft Trust, Nanisivik, Kaverit, and Iberfreight S.A. v. Ocean Star Container Line A.G.⁶²⁵ are all in agreement on this; and

3. However, the cases vary as to whether the court retains discretion to stay proceedings with respect to parties and issues not referred to arbitration. This might be excused as more a function of the failure of the Model Law to deal with this issue than any failure of the courts to apply the Model Law or the various forms of enacting statute faithfully, but the interdependence of the Model Law and the New York Convention on this point, and the ready availability of precedent on the latter from England, the U.S. and other countries should permit the Canadian courts to develop a principle in keeping with

⁶²⁵ 104 N.R. 164 (F.C.A.).

international practice. The failure of the Canadian courts in this regard is disappointing.

EARLY LOTUSLAND EXPERIENCE

The first application in British Columbia under Art.8 was in ODC Exhibit Systems Ltd. v. Lee⁶²⁶, in which the B.C. Supreme Court dealt with a claim by a B.C. company that it had exclusive distributorship rights granted by a Swedish company. There were two contracts, each containing an arbitration clause calling for arbitration in Sweden under Swedish law, the second contract being in place of the first. The court was provided with evidence that the Defendant had repudiated the first contract, and that the Plaintiff had been fraudulently induced to accept the cancellation and enter into the second contract in its place. The court noted that each of the arbitration clauses stated that it applied to "any dispute arising out of this agreement." The Court retreated to conventional contract analysis and old precedent, to rule that neither arbitration agreement applied to the Plaintiff's claims, which were essentially tortious. The first contract was held to have been cancelled by the parties' entry into the second contract, the first contract was then "entirely at an end; it no longer exists." All disputes arising under the first contract had been "settled" by the entry into the second contract. As to the second contract, the alleged acts had occurred before it came into being. Thus, the Court held that neither arbitration clause was applicable. Further, the court gave a restrictive construction of

⁶²⁶ ODC Exhibit Systems Ltd. v. Lee, (1988) 41 B.L.R. 286.

the arbitration clause in the second contract, ruling that the disputes did not "arise out of the contract" since they were with respect to actions taken before the contract came into being. Hence the court held that the clauses, and hence the mandatory stay provision of Art.8, did not apply. The court decided on forum conveniens principles that the B.C. Court was the proper forum.

The decision in ODC is unsatisfactory in a number of ways. The doctrine of separability (also known to Canadian law from Heyman v. Darwins), and the principle of Kompetenz-Kompetenz, were ignored. If arbitration agreements survive the repudiation of agreements and the acceptance of repudiation, why should they not survive a repudiation followed by a settlement induced by fraud?⁶²⁷ The court in ODC did not consider the overall policy of the Model Law, nor any provision other than Art.8, which in modified form is Section 8 of the B.C. International Commercial Arbitration Act⁶²⁸. The court analyzed Section 8(1) as providing "a condition precedent for the bringing of an application for a stay of proceedings under S.8(1) that the Court action must be one in respect of a matter agreed to be arbitrated." Counsel's submissions that S.8(1) mandated a stay of proceedings were sidestepped. No reference was made to international standards of

⁶²⁷ See the annotation to Boart Sweden AB v. NYA Stromnes AB, (1988) 41 B.L.R. 297.

⁶²⁸ The modification replaces the word "refer" with "stay", so the court has a mandatory duty to stay the Action between the parties, upon satisfaction of the same conditions found in Art.8 of the Model Law, rather than to "refer the parties to arbitration".

arbitrability; the court followed a 1980 decision of the B.C. Supreme Court as to subject-matter coverage of an arbitration clause, Petersen v. Ab Bahco Ventilation⁶²⁹.

In England, the courts have held that a suitably-drafted arbitration clause can cover disputes as to whether a contract has been varied or replaced by a subsequent contract⁶³⁰, and a claim that the contract contained an implied term or that there was a collateral contract.⁶³¹

ODC is an excessively narrow interpretation of an arbitration clause, not in keeping with liberal international standards of arbitrability and subject-matter coverage of arbitration clauses. The restrictive interpretation in ODC is a world apart from the policy espoused by recent decisions of the United States Supreme Court.

ONTARIO'S FIRST APPLICATION UNDER ARTICLE 8

Less than four weeks after the decision in ODC, a case on virtually identical facts came before the Ontario Supreme Court, in Boart Sweden v. NYA Stromnes AB⁶³². There were multiple claims and parties, many of which and whom were held not to be within the arbitration clause. The Ontario court took a more international

⁶²⁹ Petersen v. Ab Bahco Ventilation, [1980] 3 W.W.R. 245.

⁶³⁰ Halsbury's Laws of England, 4th ed. Reissue (1991) p.337 para.612, fn.13. and cases cited therein.

⁶³¹ *Id.*, fn.15 and case cited therein.

⁶³² (1989) 41 B.L.R., 295.

approach, noting the "very strong public policy" in favour of holding parties to arbitration agreements, and ruled that to retain all of the matters in the court Action would be a violation of that policy. Hence the parties and matters covered by the agreement were referred to arbitration. The report of the case is accompanied by an annotation which severely criticizes the decision in ODC Exhibit Systems, for concluding that there was no applicable arbitration clause, and for ignoring the principle of separability and the mandatory nature of Art.8.

Boart Sweden is not, however, a model of the application of the Model Law. Those claims which were characterized as an "economic tort" and an "oral contract", were not stayed:

"The tort claim and the oral contract claim can only be dealt with in the Court here because they depend on causes of action unknown to the law of Sweden. They cannot be arbitrated because they involve additional issues and parties outside the four corners of the agreement."

The Court's reasoning in this regard is tautological - the Court's conclusions are stated as reasons for those conclusions. No explanation is given as to why the involvement of other issues and parties renders these issues inarbitrable. Nor is there any analysis of the effect of the express choice of law under the contract upon disputes between the parties, nor was there any justification given for refusing to refer to arbitration causes of action which were "unknown to Swedish law." To the credit of the court in Boart Sweden, however, recognition was given to the "strong public policy" in favour of enforcing arbitration agreements and the "clear direction" in Art.8 "to defer to the

arbitrators..." The Court went on: "To conclude otherwise would drive a hole through the article by encouraging litigants to bring Actions on matters related to but not embraced by the arbitration and then say that everything had to be consolidated in court, thus defeating the policy of deference to the arbitrators."⁶³³ In keeping with this approach, the court stayed the non-referred matters pending the arbitration.

Thus the court recognized the mandatory nature of Art.8 with respect to referral to arbitration, but negated its effect to some extent by taking a restrictive view of arbitrable subject matter. Also, as many courts did in the years following the Boart Sweden decision, the court dealt with Art.8 in isolation, removed from its context and divorced from the provisions and policies in the other Articles of the Model Law.

2. SUPPORT FOR ARBITRAL AUTONOMY FROM THE BRITISH COLUMBIA COURT OF APPEAL

In 1994, the Saskatchewan Court of Appeal credited the B.C. Court of Appeal's judgment in Quintette Coal Ltd. v. Nippon Steel Corp.⁶³⁴ as "the most forceful statement by a high court in Canada in favour of arbitral autonomy."⁶³⁵ In Quintette, the B.C. Court of Appeal dealt with the first application in B.C. to set aside an

⁶³³ 41 B.L.R. 303.

⁶³⁴ Quintette Coal Ltd. v. Nippon Steel Corp., [1991] 1 W.W.R. 219, 50 B.C.L.R. (2d) 207 (B.C.C.A. Oct. 24, 1990).

⁶³⁵ BWV Investments Ltd. v. Saskferco Products Inc. [1994] S.J. No.629 (Sask. C.A.).

international award under the Model Law. The grounds alleged were that the arbitrators had exceeded their authority. The court first noted that the International Commercial Arbitration Act, S.B.C. 1986 c.14, "severely circumscribes the jurisdiction of the court to intervene with arbitrations to which it applies."⁶³⁶ The court referred to U.S.⁶³⁷ and New Zealand⁶³⁸ precedent, noting a "world-wide trend toward restricting judicial control over international commercial arbitration awards", and adopting the ruling from Mitsubishi to the effect that, if international commercial arbitration is to fulfil its potential for efficient disposition of legal disagreements arising from international commercial relations,

"national courts will need to 'shake off the old judicial hostility to arbitration'...and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration."⁶³⁹

The court noted that, as a matter of policy, it is proper to adopt a standard that seeks to preserve the autonomy of the forum selected by the parties and minimize judicial intervention when

⁶³⁶ 50 B.C.L.R. (2d) 212, per Gibbs, J.A. (Proudfoot, J.A. concurring).

⁶³⁷ U.S.: Mitsubishi Motors v. Soler Chrysler-Plymouth, 43 U.S. 614; Parsons Whittemore Overseas Co. v. RAKTA, 508 F.2d 969; and Mgmt. & Tech. Consultants S.A.v. Parsons-Jurden Int'l Corp., 820 F.2d 1531;

⁶³⁸ CBI NZ Ltd. v. Badger Chiyoda (1989), 2 N.Z.R. 669.

⁶³⁹ 50 B.C.L.R. 215, per Gibbs, J.A.

reviewing awards⁶⁴⁰, and that a mere error by the tribunal in interpreting the contract would not, under the International Act, provide a ground for setting aside the award.⁶⁴¹

GULF CANADA RESOURCES V. AROCHEM INTERNATIONAL

The B.C. Court of Appeal dealt with an appeal from the granting of a stay of proceedings under s.8 of the International Commercial Arbitration Act, which is Art.8 of the Model Law, in Gulf Canada Resources Ltd. v. Arochem Int'l Ltd.⁶⁴² Hinkson, J.A., delivering the court's judgment as to the proper interpretation of Art.8, included references to judicial discretion which can only be considered unfortunate, in the view of this author.

First, the court noted the submission of the appellant that three of the four questions in Heyman v. Darwins⁶⁴³ for the grant of a stay still survived; the effect of s.8 was only to remove the consideration of the fourth. These four questions which the court must address in considering a stay at common law were listed as:

1. What is the precise nature of the dispute;
2. Whether the dispute is one which falls within the terms of the arbitration clause;
3. Whether or not the arbitration clause is duly effective or has been rendered inoperative, and

⁶⁴⁰ 50 B.C.L.R. 217.

⁶⁴¹ 50 B.C.L.R. 218.

⁶⁴² (1992) 66 B.C.L.R. 113 (B.C.C.A. March 10, 1992).

⁶⁴³ [1942] A.C. 356.

4. Having determined the arbitration clause applies, whether there remains sufficient reason of why the matter should be referred to arbitration.⁶⁴⁴

Hinkson J.A. went on:

"The essence of this submission is that when the wording of s.6 of the Arbitration Act [the old Act based upon the English Arbitration Act, 1889] is compared with the wording of s.8(1) of the International Commercial Arbitration Act, it is clear that the only change made by the legislature was to eliminate the discretion contained in s.6 of the Arbitration Act."

This was not an auspicious beginning. Art.8(1) was viewed in isolation from the balance of the Model Law. The court overlooked the differing origins of the new law (in the sphere of international commercial relations) and the old (in the English Arbitration Act, 1889, which had a domestic focus).

Hinkson J.A. noted that s.8(2) is mandatory in its terms and requires the court to grant a stay unless it determines that the arbitration agreement is null and void, inoperative, or incapable of being performed.

"Viewing subs. 8(2) standing by itself, it might be contended that absent those three considerations the court must make an order staying the legal proceedings."⁶⁴⁵

He went on:

32. "However, in my view, it is necessary to have regard to the words contained in subs.8(1). When an application is made pursuant to s.8(1) of the Act seeking to have the court exercise its jurisdiction to grant a stay of the legal

⁶⁴⁴ 66 B.C.L.R. 119.

⁶⁴⁵ Id.

proceedings, the applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement in respect of a matter agreed to be submitted to arbitration. The subsection also contains a time limit for making the application.

33. Before the exercise of its jurisdiction to grant a stay, the court must be satisfied that the applicant has met the requirements set out in subs.(1) of s.8. It is only if the court is satisfied that those matters have been established that it must grant the stay, subject to the provisions of subs.(2).

34. In order to obtain a stay, it will not be enough for an applicant to point to an arbitration agreement and assert that the plaintiff and defendant are parties to that agreement and that the dispute is within the terms of the agreement.

35. The court continues to have some residual jurisdiction to exercise on an application for a stay of proceedings pursuant to s.8 of the Act."

36. Thus if the court concludes that one of the parties named in the legal 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."⁶⁴⁶

Thus, the B.C. Court of Appeal fell back on the warm security of old notions, without regard to international standards or the policies underlying the new legislation. The focus of the court's emphasis shifted from the considerations of the court's discretion as to whether to grant a stay once a valid arbitration agreement was shown to the court, to a consideration of whether the applicant for a stay had established, to the satisfaction of the court, the prerequisites under Art.8(1).

Tetley noted the emphasis placed by the court on the standard the applicant had to meet:

⁶⁴⁶ 66 B.C.L.R. 119-120 (emphasis added).

"Under B.C.'s International Commercial Arbitration Act, s.8(1), the applicant for a stay of proceedings must not merely allege, but must satisfy the court, that: (i) the Plaintiff and Defendant are parties to an arbitration agreement; and (ii) that the applicant for the stay is not time-barred."⁶⁴⁷

In fairness to the court, it went on to note, in para.39 of the judgment, that, in light of s.16 (Art.16 of the Model Law), the court should not make any final determination of the scope of the arbitration agreement or as to whether a party to the legal proceedings is a party to the arbitration agreement, unless these matters were clear to the court. Where these points are "arguable", then a stay should be granted.⁶⁴⁸

In a separate opinion, Southin, J.A. dealt with the situation in which there are alleged competing forms of the parties' contract, one containing and the other not containing, an arbitration agreement. She held that:

"If such thing were to happen...it is my tentative opinion that the defendant could not invoke s.8 until the Supreme Court of British Columbia had decided whether there was, in law, an arbitration agreement within the meaning of s.7."⁶⁴⁹

This gives further support for the retention of the position in Heyman v. Darwins that it is for the court, not the arbitrators, to determine whether there is a valid arbitration agreement, and the scope of the arbitrator's jurisdiction.

⁶⁴⁷ W. Tetley, "Canadian Arbitration Decisions 1986-1992", [1993] 2 Lloyd's M.C.L.Q. 238, 247.

⁶⁴⁸ 66 B.C.L.R. 121, Per Hinkson, J.A.

⁶⁴⁹ 66 B.C.L.R. 124.

Thus, the B.C. Court of Appeal, in Gulf v. Arochem, breathed new life into Heyman v. Darwins and the notion that the court retains some discretion as to whether to stay proceedings in the face of an arbitration agreement, while setting a fairly high standard of proof of the arbitration agreement, and its scope. Heyman v. Darwins was not rendered moribund by the Model Law, it was merely refocused on Art.8(1) as conditions prerequisite to a stay under Art.8(2).

Gulf v. Arochem was cited in some subsequent B.C. decisions as establishing a "threshold test" which the applicant had to show the arbitration agreement passed, in order to obtain a stay. In No.363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd.⁶⁵⁰, the B.C. Court of Appeal, relying on Gulf v. Arochem, ruled:

"In my opinion that clause is open to more than one interpretation and I do not think it can be said that it is clear that the issues and relief sought in the statement of claim fall outside the arbitration clause in the agreement....it is for the arbitrator to decide the issue of jurisdiction and the scope of the arbitration under the arbitration clause."⁶⁵¹

Predictably, a cynic might assert, the restrictive language in Gulf v. Arochem became the focus of the Chambers Courts dealing with stay applications. It came to be understood that, even when the requirements of Art.8 are satisfied, a stay could be refused pursuant to the "residual discretion" of the court. Thus the courts discovered that the full discretionary glory of the

⁶⁵⁰ No.363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd., [1993] B.C.J. No.1622 (B.C.C.A. July 16, 1993).

⁶⁵¹ Per Hollinrake, J.A.

Arbitration Act, 1889 had not disappeared. In Afton Operating Corp. v. C.N.R., Hamilton, J. of the B.C. Supreme Court held that Hinkson, J.A. in Gulf v. Arochem had not "intended that in every case where the applicant had the benefit of an arbitration clause, it would be entitled to a stay." Hamilton, J. noted Justice Hinkson's language with respect to "residual jurisdiction" to refuse a stay, and that a stay should not be granted if there are parties to the Action who are not parties to the arbitration agreement. Since one Defendant was not a party to the arbitration agreement and third party proceedings meant that the issues under the arbitration agreement would be dealt with by the court anyway, the court refused a stay. Thus the mandatory language of Art.8 was abnegated.

The B.C. Court of Appeal granted leave to appeal in Afton, noting the assertion of counsel that only in B.C. "has a residual discretion been permitted to a trial judge to refuse to grant a stay where the provisions of [Art.8] apply."⁶⁵² However, the appeal did not proceed.

Next, in Globe Union Industrial Corp. v. G.A.P. Marketing Corp.⁶⁵³, the B.C. Supreme Court noted that it had residual discretion to refuse a stay, but decided in its discretion to grant a stay.

⁶⁵² Afton Operating Co. v. C.N.R. [1994] B.C.J. No.605, (B.C.C.A. Feb.21, 1994).

⁶⁵³ Globe Union Industrial Corp. v. G.A.P. Marketing Corp., [1995] 2 W.W.R. 696 (B.C.S.C., November 18, 1994).

Apparently emboldened by the residuary discretion to range widely about among the prerequisites to stays under Art.8, Parrett J., in Prince George v. E.A Sims and McElhanney Engineering Services⁶⁵⁴, went further and held that an arbitration agreement was both "inoperative" and "incapable of being performed", since there were parties to the Action who were not parties to the arbitration agreement, and the arbitration agreement thus was incapable of resolving all issues before the court.

The B.C. Court of Appeal⁶⁵⁵ overturned the decision of Parrett J., taking pains this time to consult texts and apply decisions of other courts in Canada, the U.S., and England. The court first construed "inoperative" and "incapable of being performed" as requiring more than mere inconvenience:

"These authorities establish that, as a general principle, the mere fact that there are multiple parties and multiple issues which are inter-related and some, but not all, Defendants are bound by an arbitration clause is not a bar to the right or the Defendants who are parties to the arbitration agreement to invoke the clause."⁶⁵⁶

Cumming, J.A. then quoted the decision of Hinkson, J.A., from which the problems as to "residual jurisdiction" arose and held that the problems arose from "an excessively literal construction" of the language in para.36:

⁶⁵⁴ [1994] B.C.J. No.3072 (B.C.S.C. Chambers, December 30, 1994).

⁶⁵⁵ Prince George (City) v. A.L. Sims & sons Ltd. and McElhanney Engineering Co. Ltd. [1995] B.C.J. No.1474, [1995] 9 W.W.R. 503, (1995) 61 B.C.A.C. 254, (1995) B.C.L.R. (3d) 368 (B.C.C.A. July 4, 1995).

⁶⁵⁶ Per Cumming, J.A.

"It is clear, reading the judgment in Gulf in its entirety, that there is no such discretion as Parrett J. appears to have assumed."

Justice Cumming went on to explain the "residuary jurisdiction" as the jurisdiction of the court to satisfy itself that the prerequisites of s.8 have been met.

Although Prince George v. Sims and McElhanney involved the domestic B.C. Commercial Arbitration Act, the Court of Appeal noted that there is no difference in substance between that Act and the International Commercial Arbitration Act. Thus this decision has application in B.C. under both domestic and international Acts.

While limiting the damage done by the "residual discretion" language in Gulf v. Arochem, and the wide use of "inoperative or incapable of being performed" by the court below, the B.C. Court of Appeal in Prince George v. Sims and McElhanney has not stemmed a growing tide of "prerequisites" arising from the resurrection of Heyman v. Darwins, which will be discussed at greater length below. In Prince George, the B.C. Court of Appeal reiterated the first three questions from Heyman v. Darwins, naming them as "three prerequisites to the application of S.15.⁶⁵⁷", and quoted, without

⁶⁵⁷ The "three prerequisites" under s.15 (Art.8 of the Model Law) are:

- (a) the applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
- (b) the legal proceedings must be in respect of a matter agreed to be submitted to arbitration; and
- (c) the application must be brought timely, i.e. before the applicant takes a step in the proceeding.

disapproval, from the decision of the Alberta Court of Appeal in Kaverit Steel & Crane Ltd. v. Kone Corp.⁶⁵⁸, the quote from which included the paragraph:

"In my view, the proviso about 'null and void, inoperative, and incapable of being enforced [sic]' simply preserves the rule in Heyman v. Darwins Ltd. cited earlier. The arbitrator cannot decide whether the submission is valid. Its validity and enforceability must be pronounced upon before the referring court can enforce it by a reference and stay. It is not valid if it, or the contract in which it is found, is, by operation of domestic law in the referring tribunal, void or unenforceable."

The violence that the above quote works upon the fundamental concept of arbitral autonomy, Kompetenz-Kompetenz, and upon the fundamental concept of separability, is no less than stunning.

Even those judges in Heyman v. Darwins who declared that no general concept such as Kompetenz-Kompetenz exists in English common law, held that the arbitration clause in a contract may survive if the contract becomes unenforceable, and others held that an arbitration clause drafted in sufficiently wide terms could clothe the arbitrators with jurisdiction to determine the existence of the contract⁶⁵⁹ and the scope of the arbitrators' jurisdiction⁶⁶⁰.

APPOINTMENT OF ARBITRATORS AND DEFINITION OF DISPUTES AS PREREQUISITES TO ARTICLE 8

⁶⁵⁸ (1992) 87 D.L.R. (4th) 129, 85 Alta. L.R. (2d) 287.

⁶⁵⁹ Lord Wright at [1942] 1 All E.R. 353.

⁶⁶⁰ Lord Porter at [1942] 1 All E.R. 357.

Another stunning decision is that of the B.C. Court of Appeal in Burlington Northern v. C.N.R.⁶⁶¹, a case under the federal Commercial Arbitration Act and Commercial Arbitration Code. The dispute arose from a 1915 cost-sharing agreement between the two railways with respect to the maintenance of bridges over the Grandview Cut in Vancouver. Rather than continue to incur the cost of maintaining the bridges, Burlington Northern ("B.N.R.") transferred them to the City of Vancouver and paid a one-time lump settlement of \$5.7 Million to the City for a release from future maintenance. A dispute arose between the two railways over how this arrangement was to be accounted for under the Uniform Classification of Accounts rules prescribed by the National Transportation Agency of Canada, and as to how much of the \$5.7 Million should be paid by C.N.R. to B.N.R. B.N.R. sued. Upon the application of the Defendant, the Chambers Judge granted a stay. The B.C. Court of appeal allowed the appeal against the stay.

The arbitration clause was lengthy, and included the provision:

"The party demanding such arbitration shall give to the other party notice of such demand, stating specifically the question to be submitted for decision and nominating a person who has the required qualifications to act as one arbitrator."

These conditions appear to be no more than provisions for the procedure to be followed in instituting the arbitration. Southin, J.A., with whom Carrothers, J.A. concurred, noted that the

⁶⁶¹ Burlington Northern Railroad Co. v. Canadian National Railway Co., [1995] B.C.J. No. 1084, (1995) 59 B.C.A.C. 97, (1995) 7 B.C.L.R. (3d) 80, (1995) 20 B.L.R. (2d) 145, (B.C.C.A. May 18, 1995).

applicant for a stay had not complied fully with this term of the arbitration clause before making application to the court. She ruled that the arbitration agreement was therefore "inoperative", "(A) word which I take to mean, in the absence of authority to the contrary, simply "not in operation""⁶⁶². She went on:

"The point is not free from doubt but I am comforted that, in coming to this conclusion, I have not done violence to the law of arbitration..." She then went on to note that few arbitration agreements have "such exacting requirements" and that there would not likely be anyone one around today with special knowledge useful to the resolution of the issue arising from an agreement made in 1915."

No authority was cited for the majority's reasoning, although Southin, J.A. noted that she had read the dissenting reasons of Cumming, J.A. before giving judgment.

Thus, by Burlington Northern v.C.N.R., the B.C. Court of Appeal has ruled that prerequisites to a referral to arbitration under Art.8(1) include: (i) appointment of arbitrators; (ii) definition of disputes between the parties; and (iii) identification of arbitrators with whatever special qualifications, where these are specified in the arbitration agreement. If any of these prerequisites are not met, then the arbitration agreement is "inoperative" and referral to arbitration will, of course, be refused. More generally, the case can be understood as a ruling that if the arbitration has not been commenced before application is made to the court for a referral to arbitration, the arbitration

⁶⁶² Emphasis added.

agreement is therefore "inoperative" and referral must be refused under Art.8(1).

Cumming, J.A. dissented, quite properly pointing out that nothing in Art.8 required that C.N.R. should have invoked the arbitration agreement by notice to B.N.R. before applying for a stay. Art.8, he said, had two requirements. First, that the Action concern a matter which is the subject of an arbitration agreement. Second, that the application must be made no later than when submitting the first statement on the substance of the dispute. If these are met, a court will refer the matter to arbitration unless the agreement is found to be null and void, inoperative, or incapable of being performed. None of those latter conditions were applicable. With respect to the first requirement, he ruled that Art.8 did not require the arbitration clause be invoked in the manner set out therein, but merely that the dispute be one which the parties have, in the arbitration agreement, agreed to resolve by arbitration.⁶⁶³

With respect, this author submits the ruling of the majority in Burlington Northern v. C.N.R. is completely unsupportable, particularly under the Model Law and New York Convention⁶⁶⁴. However, it is beyond doubt that counsel opposing stay applications will quote the majority's reasons as the latest pronouncement from

⁶⁶³ Cumming J.A., paras.56,57.

⁶⁶⁴ See the discussion of "null and void, inoperative, and incapable of being performed", at fns.56,529,539, & 582, and the discussion as to the existence "disputes" immediately following, and at fn.554.

on high, and it is more than likely that some Chambers judges will find these reasons binding, if not persuasive. Until this error is corrected by the court or by legislation, it appears more than likely to stand in the way of proper implementation of the Model Law in B.C., if not elsewhere.

DEFINITION OF DISPUTES

This problem stems from some dicta in the speech of Lord Macmillan in Heyman v. Darwins⁶⁶⁵ by which he introduced the issue before the court. That issue was as to whether the ending of a contract through frustration or repudiation necessarily deprived an arbitration agreement contained in the contract of effect. Everything else in the case is, at least arguably, dicta, but it is dicta from such a high source that it has achieved respect far beyond its merit or usefulness. The dicta in question is:

"Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer effective. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause and the clause having been found to be still effective, there remains for the court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration."

Lord Macmillan then proceeded to the gravamen of his speech, which was concerned with the effect of repudiation on arbitration

⁶⁶⁵ At [1942] 1 All E.R. 345.

agreements. There was no analysis of the above-highlighted words, nor any precedent noted in their support. None of the other speeches in the case deals with these words. Any doubt as to the real issue before the House, and the ratio of the case, should be erased by the lead-off speech of Viscount Simon, L.C., who gave a lengthy judgment on the effects of repudiation and frustration upon arbitration agreements, and his concluding words said:

"In this summary it is not necessary to deal with...the difficult question whether an arbitration clause covers a dispute as to the ambit of the submission...what I have endeavoured to formulate in this summary is concerned solely with the question whether or not an arbitration clause applies [in the face of alleged repudiation or frustration]. It has nothing to do with the further and quite distinct question whether, where an Action is started in the English courts about a dispute which is within the scope of an arbitration clause, the Action should be stayed..."⁶⁶⁶

Unfortunately, the words of Lord Macmillan, and other dicta from Heyman v. Darwins, divorced from their status as mere dicta, have achieved the status of Holy Writ. This in spite of their obvious context, and their origin in a legal system which does not recognize Kompetenz-Kompetenz⁶⁶⁷ - all questions as to the existence, validity, and scope of the arbitration clause were reserved by the court. It seems obvious that these words are out of place in a jurisdiction which has enacted the Model Law, which seeks to maximize party and arbitral autonomy and to minimize court interference. However, these words have found favour in Canada

⁶⁶⁶ [1942] 1 All E.R. 344.

⁶⁶⁷ See the discussion of Heyman v. Darwins and Modern Buildings v. Limmer, supra.

under the Model Law, and may have influenced the majority of the B.C. Court of Appeal in Burlington Northern v. C.N.R.⁶⁶⁸

In Injector Wrap Corp. v. Agrico Canada Ltd.⁶⁶⁹, the Manitoba Court of Appeal applied the above-quoted paragraph from Heyman v. Darwins in overturning a stay of proceedings. The court ruled that the Defendant had "failed to properly define the 'precise nature of the dispute' which is a necessary prerequisite..." The court ruled that the Defendant's affidavit material which spoke of an alleged failure of the equipment supplied by the Plaintiff to perform as promised was insufficient, even though there was a very broad arbitration clause.

One need not look very far for grounds to criticize the position that precise definition of disputes is a prerequisite to referral to arbitration under Art.8(1). The first is in the wording of Art.8(1) itself, which requires that the application for referral "not later than when submitting his first statement on the substance of the dispute." Numerous cases have held this to be a limitation, the missing of which bars referral.⁶⁷⁰ The filing of

⁶⁶⁸ Discussed supra.

⁶⁶⁹ Injector Wrap Corp. v. Agrico Canada Ltd., 67 Man. R. (2d) 158, [1990] M.J. No.304 (Man.C.A., June 12, 1990).

⁶⁷⁰ A few examples include Stancroft Trust v. Can-Asia Capital Co., (1990) 67 D.L.R. (4th) 131 (B.C.C.A.); Gulf Canada Resources Ltd. v. Arochem International Ltd., (1992) 66 B.C.L.R. (2d) 113 (B.C.C.A.); Prince George (City) v. A.L. Sims & Sons Ltd. & McElhanney Engineering Services Ltd., [1995] 9 W.W.R. 503, (1995) 61 B.C.A.C. 254, (1995) 9 B.C.L.R. (3d) 368 (B.C.C.A.); Navionics Inc. v. Flota Maritima Mexicana S.A., (1989) 26 F.T.R. 148

a Statement of Defence would help to define the matters at issue, but the Model Law does not contemplate the filing of a Statement of Defence before the filing of an application under Art.8, rather it militates against it.⁶⁷¹ The B.C. International Commercial Arbitration Act is even more restrictive in its limitation in s.8, requiring the application to be made "before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceeding". As noted in Wall v. Scott's Hospitality (B.C.) Ltd.⁶⁷², the 1977 B.C. Supreme Court case Fofonoff v. C and C Taxi Service Ltd⁶⁷³ held that a demand for particulars was a "step in the proceedings" which debarred a stay application under the Arbitration Act, R.S.B.C. 1960, the wording of the limitation in which is the same as the 1986 Act. On the point of definition of disputes, Cummings J.A. in his dissent in Prince George v. Sims & McElhanney⁶⁷⁴ noted that:

"While it is true that the issues raised may be refined and defined more precisely in the defence to be filed by Sims in response, that step had not been taken for the simple reason that, if it had been taken, Sims would forego its right to have the matter arbitrated..."

Justice Cummings went on to note that:

(F.C.C.T.Div.); Ruhrkohl Handel Inter GmbH v. Fednav Ltd. (The Federal Calumet), [1992] 3 F.C. 98 (F.C.A.).

⁶⁷¹ Per Cummings, J.A., dissenting in Prince George v. Sims & McElhanney, supra.

⁶⁷² Wall v. Scott's Hospitality (B.C.) Ltd., [1990] B.C.J. No.497 (B.C.S.C. Chambers March 6, 1990).

⁶⁷³ Fofonoff v. C and C Taxi Service Ltd., (1977) 3 B.C.L.R. 159 (B.C.S.C.).

⁶⁷⁴ Supra.

"The very fact that Sims moved for a stay of proceedings leads inexorably to the conclusion that it does not accept but, on the contrary, disputes the claims made against it in the lawsuit..."

As noted above, in Stokes-Stephens v. McNaught⁶⁷⁵, Justice Anglin would have preferred that pleadings be closed and evidence be taken to define the issues, but he accepted the view of two of his brother judges that the question should be resolved on the basis of the cause of action disclosed by the Statement of Claim.⁶⁷⁶ English, Australian, and New Zealand case law on referral applications under Art.II(3) of the New York Convention provides support for a liberal view as to the existence of a dispute, based upon the non-acceptance of the Plaintiff's claims as set out in the Statement of Claim. As noted above in Saunderson v. Caltex and Samsung⁶⁷⁷, the Supreme Court of New South Wales, Admiralty division held that a dispute arose between the parties immediately Caltex served a cross-claim on Samsung, which was at no time willing to accede to the claim.

As noted above, as to the question as to whether the court on a referral application should be embarking on an inquiry into the reality of the alleged dispute and the reality of defences to the Plaintiff's claims, the New Zealand Court of Appeal ruled in Baltimar Aps Ltd. v. Nalder & Biddle Ltd.⁶⁷⁸, that the court, in

⁶⁷⁵ (1918) 57 S.C.R. 549.

⁶⁷⁶ Id., at 553.

⁶⁷⁷ 9 Int'l Arb'n Rep. (1994 No.5) B-1, (1995) 20 Y.C.A. 622.

⁶⁷⁸ (1995) 20 Y.C.A. 755.

doing so, is usurping arbitral jurisdiction and violating the parties' arbitration agreement.

The Saskatchewan Court of Appeal took an approach to definition of disputes consistent with liberal international standards⁶⁷⁹ in BWV Investments Ltd. v. Saskferco Products, Inc.⁶⁸⁰ when it ruled:

"Procedurally, the dispute must be submitted in accordance with the rules of the arbitral forum chosen by the parties. Therefore, the submission must adhere to the Rules of Conciliation and Arbitration of the International Chamber of Commerce [having been chosen by the parties as the applicable rules in this case], but the precise form is the concern of the parties, not the court."⁶⁸¹

3. THE INTER-RELATION OF THE MODEL LAW AND THE NEW YORK CONVENTION, AND THE TIME LIMITATION IN ARTICLE 8(1) OF THE MODEL LAW

UNCITRAL went to great lengths in its consideration of the Model Law to ensure that the Model Law was compatible with and fulfilled the objectives of the New York Convention.⁶⁸² Where both the New York Convention and the Model Law applied (e.g. with respect to recognition and enforcement of awards), UNCITRAL intended that any differences between their provisions would

"be resolved, on the one hand, by Art.1(1) of the Model Law which provides that the applicability of the Model Law is subject to any multilateral or bilateral agreement which has

⁶⁷⁹ See "Existence of Disputes" supra, at fn.554.

⁶⁸⁰ BWV Investments Ltd. v. Saskferco Products, Inc., (1994) 119 D.L.R. (4th) 577, [1995] 2 W.W.R. 1, (1994) 125 Sask.R. 286, [1994] S.J. No.629.

⁶⁸¹ [1994] S.J. No.629, p.46/54 - 47/54.

⁶⁸² See, e.g. Holtzmann & Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary, pp.911-939 (1989), (cited herein as "Holtzmann & Neuhaus") .

effect in the Model Law State, presumably meaning that in case of conflict between the Model Law and the applicable international agreement the latter shall prevail, and, on the other hand, by the 'more favourable right' provision of Art.VII.1 of the New York Convention."⁶⁸³

In the Canadian context, Art.1(1) of the Model Law is not applicable except in the federal context. In the context of the provinces and territories which enacted the provisions of the Model Law and the New York Convention, each such jurisdiction then has two statutes, not a statute and an international or multinational agreement. Thus Art.1(1) does not by its terms serve to avoid any conflict between the two statutes. British Columbia dealt with this problem, as did Saskatchewan and the Yukon, by providing in its statute enacting the provisions of the New York Convention, the Foreign Arbitral Awards Act, that it applies only to awards, and that it prevails in case of conflict between it and any other Act.⁶⁸⁴ Ontario attempted to solve the problem by: (i) repealing its statute which enacted the New York Convention; (ii) stipulating in s.1(3) of the Ontario International Commercial Arbitration Act that in Art.1(1) of the Model Law "an agreement in force between this State and any other State or States" means an agreement between Canada and any other country that is in force in Ontario; and (iii) by adding s.10 to its International Commercial Arbitration Act which applies Arts.35 and 36 to all awards made outside Canada, whether domestic or international. Alberta adopted

⁶⁸³ P. Lalive, "Summary of Chairman" para.30, UNCITRAL's Project for a Model Law on International Commercial Arbitration, 214 (1984).

⁶⁸⁴ Foreign Arbitral Awards Act S.B.C. 1985 c.74, Ss.3,6; Yukon Foreign Arbitral Awards Act S.Y. c.70, Ss.3,5.

both the Model Law and the Convention in one Act, the Alberta International Commercial Arbitration Act, which provides in Part 1 that the Convention applies to both awards and agreements, but does not deal with conflicts between the two.

The federal United Nations Foreign Arbitral Awards Convention Act enacts the Convention with respect to "differences arising out of commercial legal relationships, whether contractual or not" and applies it to arbitral awards and arbitration agreements whether made before or after August 10, 1986, when the Act came into force. S.5 of the Act provides that it prevails over inconsistent provisions in any other law. However, the effect of the Convention is limited to matters within the legislative competence of Parliament under the Constitution Act, 1867. In Compania Maritima Villa Nova S.A. v Northern Sales Co. Ltd.⁶⁸⁵, the Federal Court of Appeal upheld the constitutional validity of the United Nations Foreign Arbitral Awards Convention Act, agreeing with the submission of counsel that s.6 of the Act created a "federal cause of action for the recognition and enforcement of foreign arbitral awards falling within federal legislative competence", i.e. "having a federal character in a constitutional sense."⁶⁸⁶ Thus, the court upheld the recognition and enforcement of an award on a maritime matter, since this would fall within federal powers to legislate with respect to navigation and shipping. It seems clear that the

⁶⁸⁵ Compania Maritima Villa Nova v. Northern Sales Ltd., [1992] 1 F.C. 550, (1992) 137 N.R. 20 (Fed. C.A.).

⁶⁸⁶ [1992] 1 F.C. 561.

provisions in the federal Commercial Arbitration Act⁶⁸⁷ and the United Nations Foreign Arbitral Awards Convention Act⁶⁸⁸ that they apply to arbitration agreements would be held valid within the same restrictions as to federal legislative competence.

In the federal context, by s.5 of the United Nations Foreign Arbitral Awards Convention Act and Art.1(1) of the Commercial Arbitration Code, there would seem to be little potential for conflict between the Convention and the Model Law. The situation is not so clear in the provincial and territorial context, particularly in Alberta.

The courts of Canada have not worked out the relationship of the provincial and territorial statutes enacting the Model Law and the New York Convention. This is of particular interest with respect to the limitation in Art.8(1) of the Model Law, which is not present in Art.II(3) of the Convention. Art.II(3) provides:

"The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of on of the parties, refer the parties to arbitration, unless it finds the said agreement is null and void, inoperative, or incapable of being performed."

Art.8(1) of the Model Law is very similar, it reads:

⁶⁸⁷ S.5(3): "The Code applies to arbitral awards and arbitration agreements whether made before or after the coming into force of this Act."

⁶⁸⁸ S.4(2): "The Convention applies to arbitral awards and arbitration agreements whether made before of after the coming into force of this Act."

"A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed." (emphasis added.)

Thus the major difference introduced by the Model Law with respect to referrals to arbitration is a limitation; the request for a referral to arbitration must not be later than when the first statement on the substance of the dispute is submitted to the court. However, under Part 1 of the Alberta International Commercial Arbitration Act and under the federal United Nations Foreign Arbitral Awards Convention Act, arguably the provision of Art.II(3) of the New York Convention, which has no limitation, over-rides the limitation in Art.8(1) of the Model Law. The author has not found any case decided in Canada in which this issue has been decided. The Saskatchewan Court of Appeal purported to apply both Art.8 (in the Sask. International Commercial Arbitration Act⁶⁸⁹) and Art.II(3) of the Convention (in the Sask. Enforcement of Foreign Arbitral Awards Act⁶⁹⁰ in BWV Investments Ltd. v. Saskferco Products, Inc.⁶⁹¹, when allowing an appeal from a denial of a referral to arbitration. However, it appears that the application of the latter statute, and Art.II(3), was in error,

⁶⁸⁹ S.S. 1988 c.I-10.2.

⁶⁹⁰ S.S. 1986, c.E-9.11, amended by S.S. 1988-89, c.8.

⁶⁹¹ [1993] 4 W.W.R. 553, (1993) 108 Sask.R. 280, (1993) 6 C.L.R. (2d) 201, (1993) 14 C.P.C. (3d) 115, [1993] S.J. No.170 (Sask. Q.B.); (1994) 119 D.L.R. (4th) 577, [1995] 2 W.W.R. 1, (1994) 125 Sask. R. 286, (1994) 17 C.L.R. (2d) 201, (1994) 33 C.P.C. (3d) 158, [1994] S.J. No. 629 (Sask.C.A.).

since s.5 of the Enforcement of Foreign Arbitral Awards Act provides that it applies only to the recognition and enforcement of awards, not to arbitration agreements.⁶⁹²

THE APPLICATION OF THE TIME LIMITATION IN ARTICLE 8(1)

There is some variation in the form of limitation in the various statutes enacting the Model Law and the Convention. The domestic Uniform Arbitration Act enacting a variation of the Model Law, which has been adopted by Alberta, Saskatchewan, and Ontario, contains no limitation as such, only a requirement that the application for a stay be made without "undue delay".⁶⁹³ The federal government and all the provinces and territories adopted Art.8 of the Model Law verbatim, with the exception of B.C., which modified the Art.8(1) limitation to read "before or after entering an appearance and before delivery of any pleadings or taking any step in the proceedings", which is basically a repetition of the limitation in the Arbitration Act, 1889. The B.C. approach has the attraction that there is established case law on the interpretation of this provision, but the disadvantages that it destroys the uniformity of arbitration law across Canada on this point, and that, in apparently inviting the application of old precedent, it would seem to import the common law attitudes hostile to arbitration. The Ontario Foreign Arbitral Awards Act, S.O. 1986

⁶⁹² S.5: "This Act applies only to the recognition and enforcement of awards respecting differences in legal relationships whether contractual or not, which are considered as commercial under the law of Saskatchewan."

⁶⁹³ Uniform Arbitration Act, s.7(2)(d).

c.25, since repealed June 8, 1988, rewrote Art.II(3) of the New York Convention to incorporate the limitation in Art.8(1) of the Model Law.

The limitation in Art.8 has received varying interpretations in Canada. As noted above, the Federal Court in Navionics Inc. v. Flota Maritima Mexicana S.A. et al⁶⁹⁴ acknowledged the Analytical Commentary⁶⁹⁵ which says that, in the opinion of the drafters, once the time limit was missed, Art.8(1) "prevents that party from invoking the agreement during subsequent phases of the court proceedings."⁶⁹⁶ Yet the court ruled that it retained its discretionary powers over stays in s.50 of the Federal Court Act, and granted a stay after the limitation was missed. Thus the court denied the limitation in Art.8(1) any definitive effect. The B.C. Court of Appeal, in Stancroft Trust v. Can-Asia Capital Co. Ltd.⁶⁹⁷ a decision under the B.C. International Commercial Arbitration Act, ruled that two defendants who had filed Statements of Defence before applying for a stay of proceedings were not entitled to a stay under Art.8, nor under the Rule of Court which they had chosen to apply under. The court did not rule, however, that missing the limitation in Art.8 debarred these Defendants from

⁶⁹⁴ (1989) 26 F.T.R., 148.

⁶⁹⁵ Analytical Commentary contained in the Report of the of the Secretary-General to the Eighteenth Session of the United Nations Commission on International Trade Law, reprinted in the Canada Gazette (Vol.1, 1986, No.40, Supplement pp.118-120, Oct.4, 1986).

⁶⁹⁶ Analytical Commentary, UNCITRAL document No.A/CN.9/264, page 24.

⁶⁹⁷ (1990) 67 D.L.R. (4th) 131.

a stay, nor did the court rule that it did not have inherent jurisdiction to otherwise grant the stay.⁶⁹⁸

In Ruhrkohl Handel Inter GmbH v. Fednav Ltd.⁶⁹⁹, the Plaintiff sought a stay after commencing Action, arresting the defendant vessel, and receiving a Statement of Defence and Counterclaim. The stay application was under Art.8 of the Commercial Arbitration Code, but referred only to the Action, not the Counterclaim. The court noted that a request for arbitration made between the parties is irrelevant under Art.8; the request must be made, in timely fashion, to the court. The court stressed that the Statement of Claim failed to make any reference to the arbitration clause, failed to express the intention to arbitrate, and failed to request

⁶⁹⁸ J. Casey wrote in International and Domestic Commercial Arbitration, (1993) at p.4-2 that, in Stancroft Trust v. Can-Asia, "The court ruled that it had no inherent jurisdiction to otherwise grant the stay." With respect to the learned author, the case report contains no such ruling. The successful applicant, Can-Asia, applied "pursuant to section 8 of the International Commercial Arbitration Act, 1986 S.B.C., chapter 14, and the inherent jurisdiction of the court. The motions of the other defendants asked that the proceedings be stayed 'pursuant to Rule 14(6)(c) of the Supreme Court Rules.'" [67 D.L.R. (4th) 133]. The court held that "Can-Asia was, by statute, entitled to an order staying proceedings against it. The other defendants are in a different position for they delivered pleadings and, therefore, have no right to a stay under s.8" [67 D.L.R. (4th) 136]. The court went on to find that Rule 14(6)(c) was intended to eliminate the former cumbersome procedure of conditional appearances for persons who wished to apply to court for an order that the court had no jurisdiction over the person or the cause, or that the court should decline jurisdiction on forum conveniens grounds. [67 D.L.R. (4th) 137]. The court ruled: "In my opinion, these defendants cannot invoke Rule 14(6)(c) upon the footing of the arbitration agreements into which they entered." [67 D.L.R. (4th) 138]. At no point did the court, in its judgment, deal with the question whether it had inherent jurisdiction to grant a stay.

⁶⁹⁹ [1992] 3 F.C. 98, at 102.

arbitration. The Plaintiffs argued that the Statement of Claim was not their "first statement on the substance of the dispute", since it was filed only for the purpose of arresting the vessel and obtaining security. The court, however, ruled that Art.8(1) established "a time frame which is beyond and above the procedural subtleties of the courts of the participating states...it constitutes a very objective standard that must be met in any given jurisdiction."⁷⁰⁰ The court then quoted the Analytical Commentary:

"A time element has been added that the request be made at the latest with or in the first statement on the substance of the dispute. It is submitted that this point in time should be taken literally and applied uniformly in all legal systems, including those which normally regard such a request as a procedural plea to be raised at an earlier stage than any pleadings on substance."⁷⁰¹

The court agreed with the court below that, by failing to mention arbitration in the Statement of Claim and delaying their application until receipt of a Statement of Defence and Counterclaim, the Plaintiffs had missed the limitation and the court "no longer had the imperative duty to refer the matter to arbitration."⁷⁰² The court took comfort, in its decision, from the Analytical Commentary to the effect that once a party failed to invoke the arbitration agreement by a timely request, Art.8(1)

⁷⁰⁰ [1992] 3 F.C.105.

⁷⁰¹ Id.

⁷⁰² [1992] 3 F.C. 106.

prevents that party from raising the arbitration agreement at a later point in the court proceedings.⁷⁰³

A similar ruling was made by the B.C. Supreme Court in Wall v. Scott's Hospitality (B.C.) Inc.⁷⁰⁴. The Defendant applied for a stay under s.15 of the B.C. Commercial Arbitration Act, which section is a combination of Arts.8 & 9 of the Model Law, but uses the same limitation language as the B.C. International Commercial Arbitration Act ("before delivering any pleadings or taking any other step in the action"). The court cited two old chestnuts: Re Arbitration Act; Hudson's Bay Insurance Co.⁷⁰⁵ [1914, B.C.C.A.] in which the court held that where the defendant had filed a defence, the court had jurisdiction to decide all the rights between the parties, notwithstanding the parties' agreement that a portion of the dispute was to be arbitrated; and Fofonoff v. C and C Taxi Service Ltd.⁷⁰⁶ [1977, B.C.S.C.] where the court held that an exchange of letters reflecting a demand for particulars was a step in the proceedings which debarred the defendant's application for a stay.

Noting that pleadings were closed, Discoveries under way, and a trial date set, the court in Wall ruled that the limitation was

⁷⁰³ Id.

⁷⁰⁴ [1990] B.C.J. No. 497, March 6, 1990.

⁷⁰⁵ Re Arbitration Act, Hudson's Bay Insurance Co., (1914) 6 W.W.R. 147 (B.C.C.A.).

⁷⁰⁶ (1977) 3 B.C.L.R. 159 (B.C.S.C.).

passed, and refused a stay. While there can be little argument that the Defendant in Wall had not missed the limitation, the reference to old precedent shows the danger imported by the B.C. Legislature in adopting language from the old statutes referring to a "step in the action", in that courts will be tempted to apply old precedent without consideration of the change in philosophy intended by the adoption of the Model Law.

In a significantly different approach, the B.C. Court of Appeal in No.363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd.⁷⁰⁷ ruled that a demand for discovery of documents made to protect the defendant's rights, in face of an ex parte order obtained by the Plaintiff freezing the defendant's bank account, was not a "step in the proceeding" within s.15(1) of the B.C. Commercial Arbitration Act, but was an action which fell within s.15(4), regarding interim measures of protection (from Art.9 of the Model Law). Hence the Defendant was not debarred from a stay. This case is arguable contrary to the ruling in Ruhrkohl.

Some cases have held that purely defensive measures do not offend the limitation rule in Art.8. In Globe Union v. G.A.P Marketing Corp.⁷⁰⁸ the Defendant applied for a stay. The Plaintiff argued that the Defendant had previously taken a step in the Action by filing an affidavit in response to an injunction application made

⁷⁰⁷ [1993] B.C.J. No.1622 (B.C.C.A. July 16, 1993).

⁷⁰⁸ [1995] 2 W.W.R. 696 (B.C.S.C. Nov.18, 1994).

by the Plaintiff. The court relied on Roussel-Uclaf v. Searle⁷⁰⁹, a decision under the English Arbitration Act, 1975, which contains the same limitation language as the B.C. Acts. In Roussel-Uclaf, the court ruled that defending against an interlocutory application did not disqualify the Defendant from applying for a stay: "The statute is contemplating some positive act by way of offence on the part of the Defendant rather than merely parrying a blow by the Plaintiff..." By this "defence is not offence" rule, G.A.P. was successful in obtaining a stay. Roussel-Uclaf was also cited by the Federal Court, Trial Division, in Navionics Inc. v. Flota Maritima Mexicana S.A.⁷¹⁰, discussed above.

Stretching the "defense is not offence" notion further, the Ontario Court of Justice, in Ottawa Rough Riders Inc. v. Ottawa (City)⁷¹¹, granted a stay under s.7 of the Arbitration Act, 1991, although the Defendant had entered a Statement of Defence and a Counterclaim, apparently without reference to the arbitration agreement. S.7(2)(4) requires the motion to be brought without "undue delay", thus there is not the clearer limitation which is found in Art.8 of the Model Law. After the Plaintiff filed a Reply and Defence to Counterclaim, the Defendant applied for a stay. The Plaintiff argued that the Defendant had waived its reliance on the

⁷⁰⁹ Roussel-Uclaf v Searle, [1978] F.S.R. 95 (Ch.D.).

⁷¹⁰ (1989) 26 F.T.R. 148, 152.

⁷¹¹ Ottawa Rough Riders Inc. v. Ottawa (City), [1995] O.J. No.3797, Dec.1, 1995.

arbitration agreement by participating in the proceedings. The judge disagreed:

"I think there is no merit in this contention. A Statement of Defence is filed in "self-defence", a Counterclaim is an adjunct to the defence. It is not an initiative by the Defendant to commence court proceedings rather than agreed upon arbitration proceedings."

Thus the "defensive" concept is stretched beyond merely parrying interlocutory motions by the Plaintiff, to encompass a general defence to the Action, and the bringing of a counterclaim.

The judge's characterization of a counterclaim is unique; a counterclaim is generally considered to be a separate Action grafted procedurally onto an existing Action.⁷¹²

Even more unique is the decision in Bab Systems, Inc. v. McLurg⁷¹³, a decision of the Ontario Court of Justice. The parties both petitioned the court for relief, then one applied for a stay. The other party argued that the first party had waived the arbitration agreement by instituting court proceedings, and had missed the limitation in Art.8, having made its first statement on the merits of the dispute before applying for a stay. The court granted a stay, ruling that the words "first statement on the merits of the dispute" refer to the first statement of the party in the arbitration proceedings, not in the court proceedings! This reasoning would spell the death-knell of applications to stay court Actions commenced after the arbitration is well under way, unless

⁷¹² See, e.g. Ruhrkohl v. Fednav [1992] 3 F.C. 98,103.

⁷¹³ Bab Systems, Inc. v. McLurg, [1994] O.J. No.3029, Dec.21, 1994.

some ground is found for holding that by participating in the arbitration the Plaintiff has debarred itself from court proceedings.

On the other end of the scale is yet another decision of the Ontario Court of Justice: ABN Amro Bank Canada v. Krupp.⁷¹⁴ Krupp delivered a Statement of Defence which included a pleading that the court was without jurisdiction over the dispute because of an arbitration agreement. Krupp then moved for a referral to arbitration and a stay of the Action, under Art.8(1) of the Model Law. The court denied referral and stay, ruling that Krupp's application was out of time:

"[U]nder Art.8(1), it is a pre-condition to the court referring a matter to arbitration that a party so request not later than when submitting its first statement on the substance of the dispute....Being generous and treating the Statement of Defence as a request, the request is not timely because a request which indicates that a party's position is to deny the court's jurisdiction, cannot be made simultaneously with a pleading. By filing the pleading, the party attorns to the jurisdiction of the court and loses its rights to dispute jurisdiction. The correct procedure would have been to bring a motion for a stay after receiving the Statement of Claim but before taking any step in the Action."

With respect, it appears that the judge here reacted in high dudgeon to the statement that the court was ousted of jurisdiction by the arbitration agreement, and so failed to apply the clear words of Art.8(1); the application is to be made not later than when submitting its first statement on the substance of the dispute. By these words, the application is in time if made before

⁷¹⁴ ABN Amro Bank v. Krupp, 21 O.R. (3d) 511, [1994] O.J. No.3044, Dec.23, 1994.

or at the same time as the first statement on the substance. If the Statement of Defence is treated as a request for referral, clearly it is within time.

Thus, little reliable guidance can be gained from the case law on the limitation in Art.8(1) of the Model Law, except for cases such as Stancroft Trust⁷¹⁵ and Continental Resources Inc. v. East Asiatic Co.⁷¹⁶, which made the trite holding that an application by the Defendant for a stay, made before the filing of a Statement of Defence, is within time. The analysis in ABN Amro Bank seems clearly wrong, but in Navionics, where the court properly analyzed the limitation in Art.8(1) and the Analytical Commentary with respect thereto, the court granted a stay after finding that the limitation had passed.

4. ARTICLE 1(2) OF THE MODEL LAW

In its 18th session commencing June 3, 1985, UNCITRAL had before it the draft Model Law produced by the Working Group, an analytical compilation of the commentary of governments and international organizations on the draft Law, and an Analytical Commentary of the U.N. Secretary-General.⁷¹⁷ The draft Model Law

⁷¹⁵ Supra.

⁷¹⁶ Continental Resources Inc. v. East Asiatic Co., [1994] F.C.J. No.440 (F.C.C Trial Div., March 21, 1994).

⁷¹⁷ General Assembly Official Records: 40th Session, Supplement No.17 (A/40?17), Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, 3-21 June 1985 (cited herein as "Commission Report").

did not contain the present Art.1(2), but the final form adopted just 18 days later on June 21, 1985 did. Art.1(2) reads:

"Article 1. Scope of Application
(2) The provisions of this Law, except articles 8, 9, 35, and 36, apply only if the place of arbitration is in the territory of this State."⁷¹⁸

Art.1(2) was not even considered when UNCITRAL considered Art.1 in its 18th session. Art.1(2) first appears in the Commission Report when UNCITRAL was considering Art.6, which deals with the powers, of the court or other competent authority named by the Model Law State, under Arts.11(3) & 11(4) (appointment of arbitrators by the court when the parties failed to do so), 13(3) (appeal to court from unsuccessful challenge to arbitrator), 14 (termination of the mandate of the arbitrator), 16(3) (review of arbitrator's decision as to arbitral jurisdiction), and 34(2) (setting aside an award).⁷¹⁹ UNCITRAL decided to clarify the territorial application of the Model Law to ensure its conformity with the "strict territorial criterion." The intention was to ensure that the courts of a State would not interfere with arbitrations taking place outside that State.⁷²⁰

However, the Commission was agreed that the basic criterion of the territorial scope of application would not govern Arts.8(1), 9, 35, and 36, which should apply whether the place of the arbitration was

⁷¹⁸ Report, 18th Session, 6,81.

⁷¹⁹ Commission Report, pp.14-17.

⁷²⁰ Commission Report, p.15, paras.72, 73.

in the Model Law State or not.⁷²¹ Some delegates suggested that the court functions in Arts.11, 13, and 14 should also be available to assist arbitrations which were to take place outside the State of the court, and in cases where the place of arbitration was not yet determined.⁷²² In the former case, deliberations were put off until Arts.11, 13, and 14 were dealt with. In the latter case, the prevailing view was that the Model Law should not deal with such court assistance, since there was no agreement on appropriate connecting factors to justify giving such jurisdiction to the court, since its decisions might conflict with the rule of court in the country in which the arbitration was eventually held, and since even without extension of these powers in the Model Law to arbitrations to take place outside the court's State, other laws of that State might provide such assistance.⁷²³ Accordingly, Art.1(2) was adopted.⁷²⁴

The effect of Art.1(2) is to remove the effect of all of the Model Law except Art.s 8, 9, 35 and 36. Of particular interest with respect to applications under Art.8(1), is the disappearance of Art.5 (limits on court interference) and Art.16 (competence of the tribunal to rule on the existence, validity, and scope of the arbitration agreement, and separability of the arbitration agreement from the contract containing it).

⁷²¹ Commission Report, p.16 para. 75.

⁷²² Commission Report, pp.16,17, paras.76, 80.

⁷²³ Commission Report, p.17, para.80.

⁷²⁴ Commission Report, p.17 para.81.

As noted above: (i) The New York Convention, as a convention, is in force only in the federal sphere in Canada, and then only in the areas of federal legislative competence.⁷²⁵ (ii) The provinces and territories all have the provisions of the New York Convention in force by statute, with the exception of Ontario, but in most cases the effect of the Convention provisions is limited to awards. Alberta is the exception, it applies the provisions of the Convention to awards and arbitration agreements. (iii) All the jurisdictions in Canada retained Art.1(2) of the Model law in their statutes on international commercial arbitration.

Thus, a party applying to a Canadian court for a referral to arbitration to take place outside Canada, and wishing the court to take into account the principles of Kompetenz-Kompetenz and separability, or other liberal international principles, must rely upon the New York Convention, or the court's recognition of the existence of the above principles as being mandated by policy underlying the Model Law. Without due regard for liberal international standards and principles, a Canadian court could easily fall back on the English common law, which does not recognize the competence of the arbitral tribunal to determine the existence, validity, and scope of the arbitration agreement. (If the structure of Art.1(2) is not enough ammunition for those who wish to argue that none of the principles reflected elsewhere in the Model Law, by common law rules of statutory construction, the

⁷²⁵ Compania Maritima Villa Nova S.A. v. Northern Sales Co., [1992] 1 F.C. (F.C.A.).

express inclusion of Arts.8(1), 9, 35 and 36 as applicable to arbitrations taking place outside Canada can be taken as an expression of the intention to exclude consideration of any of the principles set out elsewhere in the Model Law, by the principle expressio unis est exclusio alterius⁷²⁶.)

The first, and apparently only, instance in which a court in Canada has dealt expressly with this problem is the 1989 decision of the Ontario District Court in Deco Automotive Inc. v. G.P.A. Gesellschaft.⁷²⁷ At issue was a contract which made reference to standard contract provisions which included a clause requiring arbitration under the auspices of the Economic Commission for Europe, and a submission to arbitration entered into after Deco protested that the arbitrators had no jurisdiction and the parties could not agree as to whether the reference in the contract was effective to incorporate the arbitration clause. The submission required G.P.A. to post security with the arbitrators to cover Deco's counterclaim in the arbitration. Then G.P.A. discovered in its records a letter from Deco which G.P.A. said proved that the contract incorporated the arbitration clause. G.P.A. then took the position that Deco's original protest against the jurisdiction of the arbitrators under the original contract was a misrepresentation, and refused to post the security required by the

⁷²⁶ "Expression of one thing is the exclusion of the other." - Black's Law Dictionary, Revised 4th ed.; and see Driedger, Construction of Statutes, 119 (2nd ed. 1983).

⁷²⁷ Deco Automotive Inc. v. G.P.A. Gesellschaft, [1989] O.J. No.1805, Oct.27, 1989.

submission. Deco took the position that G.P.A. had repudiated the arbitration, and sued. G.P.A. applied for a stay.

The judge in Deco noted the dispute between the parties as to the existence and validity of an arbitration agreement. He considered Art.16 of the Model Law and the principles of Kompetenz-Kompetenz and separability reflected therein, and posed the question:

"The question then arises as to whether the Court should stay an action commenced by one of the parties to await the outcome of the arbitrator's ruling as to his jurisdiction in the pending arbitration."

The court then ruled that Art.1(2) answered the question:

"[W]here the arbitration is in Canada then the matter may proceed as set out in Article 16, but where it is not, then it does not apply and the common law applies. According to the common law, it is the courts that determine whether an arbitration clause applies."⁷²⁸

The court relied exclusively upon English cases⁷²⁹ not decided under the Arbitration Act, 1975⁷³⁰ or the Arbitration Clauses (Protocol) Act, 1924⁷³¹, and pre-1986 Canadian⁷³² case precedent,

⁷²⁸ Emphasis added.

⁷²⁹ Russell v. Russell (1880) 14 Ch.D. 471; Camilla Cotton v. Granadex (1976) 2 Lloyd's Rep. 10; Cunningham-Reid v. Buchanan-Jardine (1988) 1 W.L.R. 678, (C.A.); Modern Buildings Wales v. Limmer (1975) 2 Lloyd's Rep. 318 (C.A.); MacLeod Ross v. Compagnie D'Assurance Generales L'Helvetia (1952) 1 Lloyd's Rep. 12 (C.A.); Duke of Buccleuch v. Metropolitan Board of Works [1870] L.R. 5 Exch, (1872) L.R. 5 H.L. 418; Heyman v. Darwins [1942] A.C. 356.

⁷³⁰ As noted above, the Arbitration Act, 1975 enacts the New York Convention in England.

⁷³¹ As noted above, the Arbitration Clauses (Protocol) Act, 1924 enacted the League of Nations Protocol on Arbitration Clauses, 1923. The provisions of the Act were carried forward into the Arbitration Act, 1950, but were removed from the latter Act upon adoption of the Arbitration Act, 1975. -Halsbury's Statutes.

in dealing with this issue and with the other issues in the case, which included a consideration of whether an allegation of fraud was inarbitrable, and whether the arbitration agreement was incorporated by reference. No reference whatsoever was made to the policies underlying Canada's adoption of the New York Convention and the Model Law, or to liberal international treatment of arbitration clauses. The application for a referral to arbitration and a stay of proceedings was refused.

Thus, the court failed to consider whether any change had occurred in Canadian arbitration law since 1985, and failed to consider any case precedent decided under an international commercial arbitration convention. What Deco Automotive best illustrates, however, is that it is insufficient to trust to the courts of Canada to recognize that liberal international standards should be applied to international arbitration agreements in the absence of express statutory provisions requiring them to do so. It is far too easy for the courts to apply the old familiar precedents and attitudes which are restrictive of, and hostile to, arbitration.

The decision in Deco Automotive has not been reported and a search of the QuickLaw databases turns up no case which has cited it. Other courts have dealt with applications to stay Canadian court Actions and refer the parties to arbitration outside Canada, but

⁷³² Canadian Motion Picture Production Ltd. v. Maynard Film Distributing Co. Ltd. (1949) 4 D.L.R. 458, Lamont v. Wright (1943) O.W.N. 11.

none have made it a point to refer to Art.1(2) or discuss its effect.

Kaverit v. Kone⁷³³, a decision of the Alberta Court of Appeal, is noted for its recognition that Art.8(1) has extinguished the discretion as to referrals to arbitration formerly exercised by the courts. In coming to this recognition, the court relied upon the very liberal decision of the U.S. Supreme Court in Scherk v. Alberto-Culver.⁷³⁴ However, it is to be noted that the Court of Appeal did not extend the notions of liberality to the prerequisites to the application of Art.8(1), only to its effect once all the prerequisites were met under English common law. In Kaverit v. Kone, the Alberta Court of Appeal allowed a referral to arbitration in Stockholm. In doing so, the court embarked on a detailed analysis of the scope of the arbitration agreement. The court was referred to international precedent, Government of New Zealand v. Mobil Oil New Zealand⁷³⁵ in which the New Zealand High Court held that, under an arbitration clause arguably narrower than that in Kaverit, the issues of the validity and enforceability of the contract were matters for arbitration. However, the court in Kaverit retreated to the familiar comfort of the common law - relying on Heyman v. Darwins⁷³⁶, the court ruled that it was for

⁷³³ (1992) 87 D.L.R. (4th) 130 (Alberta C.A.).

⁷³⁴ (1974) 417 U.S. 506, discussed above.

⁷³⁵ Government of New Zealand v. Mobil Oil New Zealand, (1987) 13 Y.C.A. 638 (N.Z.H.C.).

⁷³⁶ [1942] A.C. 356 (H.L.).

the courts, not the arbitrators, to determine the existence and validity of the arbitration agreement and the jurisdiction of the arbitrators. With regard to the scope of the arbitration clause and whether tort claims were arbitrable, the court was referred to Lonrho Ltd. v. Shell Petroleum Co. (U.K.)⁷³⁷ in which the court referred all allegations to arbitration notwithstanding that the claims sounded in tort and branches of the law other than contract, including treason. However, the court in Kaverit, while acknowledging that tort claims connected with a contract may be included within the scope of a clause calling for arbitration of "Any dispute arising out of or in connection with this Agreement"⁷³⁸, took a restrictive view of the scope and ruled that claims of interference with competition not based upon the existence of the contract could proceed in court.⁷³⁹ The derivative claims made by the shareholders of the Plaintiff corporation were not stayed, nor were claims made against subsidiaries of the Defendant Kone Corp., the court taking a narrow view of the scope of the clause again, and noting that the Model Law does not include persons "claiming through or under" as the English statutes do. The court noted that this last omission is perhaps to be regretted.⁷⁴⁰

⁷³⁷ Lonrho Ltd. v. Shell Petroleum Co. (U.K.), (1979) 4 Y.C.A. 320 (Ch.D.).

⁷³⁸ 87 D.L.R. (4th) 130.

⁷³⁹ 87 D.L.R. (4th) 138.

⁷⁴⁰ 87 D.L.R. (4th) 132.

The court in Kaverit also denied the concept of separability, as noted above, ruling that the arbitration agreement is not valid if it, or the contract containing it, is, by operation of domestic law in the referring tribunal, either void or unenforceable.⁷⁴¹ Not only does this deny separability, contrary even to Heyman v. Darwins, but it denies, without analysis, the application of the proper law of the arbitration agreement to questions of its existence and validity.

Thus the Alberta Court of Appeal in Kaverit v. Kone took the same approach as the court in Deco Automotive, applying the full restrictive vigours of the common law to arbitration agreements calling for arbitration outside Canada.

The Federal Court of Appeal dealt with an arbitration clause calling for arbitration in England, in Nanisivik Mines Ltd. & Zinc Corp. v. Canarctic Shipping Co. Ltd.⁷⁴² The arbitration clause clearly applied to Nanisivik, but it was arguable whether it applied to Zinc Corp. The judge below referred both Plaintiffs to arbitration, and stayed all of the Action. The Federal Court of Appeal, relying on the ruling in Kaverit v. Kone as to the mandatory nature of Art.8(1), nevertheless applied English case law to the issue of the incorporation of the arbitration clause by reference in a Bill of Lading, and overturned the stay as against Zinc Corp. Thus, without discussion of the principle of Kompetenz-

⁷⁴¹ 87 D.L.R. (4th) 139-140.

⁷⁴² [1994] 2 F.C. 662 (F.C.A.).

Kompetenz, the court assumed the role of determining the existence and scope of the arbitration clause. Further, the court apparently overlooked Art.1(2), as shown by the court's citation of Arts.5, 7, 8, and 9 of the Commercial Arbitration Code. However, it did not cite Art.16.

Perhaps the court in Deco Automotive can be excused for not referring to the New York Convention and decisions of the courts of other nations under it, since Ontario repealed its Foreign Arbitral Awards Act, 1986, which enacted the provisions of the Convention, in 1988. However, the Alberta International Commercial Arbitration Act enacts both the Model Law and the provisions of the Convention, and applies the Convention to both awards and arbitration agreements.⁷⁴³ Thus in Kaverit v. Kone, the Alberta Court of Appeal arguably should have considered case precedents decided under the Convention. The Federal Court of Appeal was in the same position in Nanisivik: The New York Convention is in full force in the federal sphere with respect to navigation and shipping. The failure of the appeal courts in Kaverit v. Kone and Nanisivik to consider and apply liberal international standards and case law decided under the Convention is particularly disappointing.

The Saskatchewan Court of Appeal dealt with an application for referral to arbitration in Switzerland, in BWV Investments Ltd. v.

⁷⁴³ See discussion, supra.

Saskferco Products Inc.⁷⁴⁴ This was the first such application made in Saskatchewan under the Model Law. The court took a liberal policy approach, citing U.S., New Zealand, and Canadian precedents, and referring to "increasing judicial deference shown toward arbitration", "very strong public policy" that the parties should be held to their arbitration agreement, "a world-wide trend toward restricting judicial control over international commercial arbitration awards", and "national courts will need to shake off the old judicial hostility to arbitration." The court went on to rule that both the Model Law in the International Commercial Arbitration Act⁷⁴⁵ and the Enforcement of Foreign Arbitral Awards Act⁷⁴⁶ applied to this application, and cited Art.5 of the Model Law. The Court was in error in that Art.1(2) of the Saskatchewan International Commercial Arbitration Act excludes all but Arts.8, 9, 35, and 36 in this case, and by s.5 of the Foreign Arbitral Awards Act, that Act and the provisions of the New York Convention apply only to awards, not arbitration agreements (as noted above). The court, in spite of the quotations of liberal international policy, went on to apply, purportedly, Art. 8(1) of the Model Law and Art.II(3) of the Convention but ruled that the duty to refer the parties to arbitration arose only after the court found a valid arbitration agreement.⁷⁴⁷ Since there was doubt as to the

⁷⁴⁴ (1994) 119 D.L.R. (4th) 577, [1995] 2 W.W.R. 1, [1994] S.J. No. 629 (Sask C.A. Nov.25, 1994).

⁷⁴⁵ S.S. 1988 c.I-10.2.

⁷⁴⁶ S.S. 1986 c.E9.11.

⁷⁴⁷ [1994] S.J. No.629 p.40/54.

existence of an arbitration agreement with respect to some of the parties, the court refused those parties a referral to arbitration, without consideration of the principle that the court should defer, in first instance, to the arbitrator's decision on the existence of the arbitration agreement.⁷⁴⁸ Thus the Saskatchewan Court of Appeal failed to come to grips with Art.1(2), and failed fully apply liberal international standards in that it failed to give full recognition to the principle of Kompetenz-Kompetenz.

In Harper v. Kvaerner Fjellstrand Shipping A.S.⁷⁴⁹, a 1991 decision of the B.C. Supreme Court, the Plaintiff was a B.C. businessman and the Defendant a Norwegian company. They were interested in starting a high-speed ferry service between Vancouver and Victoria. They entered into a Letter of Intent, and then a Framework Agreement for the joint venture, both containing clauses calling for arbitration of disputes in London. The Plaintiff was unable to provide the funding necessary to satisfy a "subject clause" in the Framework Agreement, and the Defendant refused to deal further with him. The Plaintiff sued, claiming damages for breach of confidence and unjust enrichment, alleging the Defendant was profiting from efforts and expenditures made by the Plaintiff. The Defendant applied for a stay under s.8 of the B.C. International Commercial Arbitration Act ("ICCAA") and Art.II(3) of the B.C. Foreign Arbitral Awards Act ("FAAA"). The

⁷⁴⁸ [1994] S.J. No. 629, p.48/54.

⁷⁴⁹ Harper v. Kvaerner Fjellstrand Shipping A.S., [1991] B.C.J. No.2654 (B.C.S.C. Sept.13, 1991).

court made no express reference to Art.1(2) of the Model Law (s.1(2) of the ICCAA), nor to s.3 of the FAAA which states that the FAAA applies only to awards, not to arbitration agreements. In answer to the Plaintiff's argument that his failure to meet the condition precedent in the subject clause ended the contract and the arbitration agreement, the court replied that the arbitration agreement was separable from the contract - the parties are released from further obligation to proceed with the joint venture, but the arbitration clause remains in effect to deal with disputes arising from it. With respect, the decision of the court on this point seems entirely correct. The court, in reaching this conclusion, relied upon De La Garge v. Worsnop & Co. (1927) All E.R. 673, and Prima Paint v. Flood & Conklin (U.S. Supreme Court), and Bremer Vulkan v. South India Shipping.⁷⁵⁰ The court also referred to Art.16 as confirmation that the B.C. Legislature accepts the doctrine of separability. In fairness, the court in referring to Art.16 noted that it "applies to arbitrations to be held in British Columbia", so it would appear the Court had Art.1(2) in mind. However, the court did not deal with the effect of Art.1(2) and its express exclusion of all but Arts.8, 9, 35 and 36, so the Deco Automotive issue was left to another day.

The situation caused by Art.1(2), which largely removes statutory provisions which could be used to counteract the old common law approaches being taken by the courts on applications for referral outside of Canada, is particularly unfortunate in a jurisdiction

⁷⁵⁰ (1981) 1 Lloyd's Rep. 253.

such as Canada which has a heritage so restrictive of, and even hostile to, referrals to arbitration. This is a most anomalous situation under a law which is intended to foster easy access to international commercial arbitration and curb court interference, while promoting party and arbitral autonomy. The author suggests that legislative reform is necessary to instruct courts that, particularly when dealing with applications to refer parties to arbitration abroad and to stay Actions commenced in Canadian courts, liberal regard should be paid to the principles of party autonomy and arbitral autonomy, particularly the principle of Kompetenz-Kompetenz which is reflected in arbitral autonomy.

5. TORTS, ARBITRABILITY, AND THE SCOPE OF ARBITRATION AGREEMENTS

This topic relates to the scope of the provisions of the Model Law and the New York Convention, which delineate the scope of their application and the outer boundaries of subject-matter arbitrability; and the scope of the arbitration agreement entered into by the parties. Subject to the limits in the Model Law and the Convention, and the limits on subject-matter arbitrability in domestic law, the parties are free to narrow or widen the ambit of their arbitration agreement as they see fit, and still claim the benefits of the Model Law and the Convention.⁷⁵¹

Arbitrability, strictly speaking, is concerned with the question of whether a dispute is capable of settlement by arbitration under the applicable law, it should not be confused with the question of

⁷⁵¹ Redfern & Hunter, 104, 128,129.

whether the particular dispute falls within the scope of the arbitration agreement. However in some countries, particularly the United States, "arbitrability" is sometimes used to refer to both questions.⁷⁵² Strictly speaking, the concept of arbitrability is a public policy limitation upon the scope of arbitration as a means of dispute settlement. Art.1(5) expressly preserves the limits of arbitrability in the domestic laws of the State adopting the Model Law.⁷⁵³ Under Art.34 of the Model Law, an award may be set aside if the subject matter of the award is not arbitrable. The Convention is less explicit as to the sources of the rules of inarbitrability, requiring each Contracting State to recognize arbitration agreements concerning "a subject matter capable of settlement by arbitration."⁷⁵⁴ When dealing with applications for recognition and enforcement of awards, subject-matter inarbitrability in the State in which such application is made is a defence, both under the Model Law (Art.36(1)(b)(i)) and the Convention (Art.V(2)(a)).

Both the Model Law and the New York Convention use their definition of an arbitration agreement to define what sorts of disputes are covered. In Art.7(1) of the Model Law, an "Arbitration Agreement" is defined as "an agreement by the parties to submit to arbitration

⁷⁵² Redfern & Hunter, 105.

⁷⁵³ Art.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 or may be submitted to arbitration only according to provisions other than those of this Law."

⁷⁵⁴ New York Convention Art.II(1).

all or certain disputes which may or have arisen between them in respect of a defined legal relationship, whether contractual or not.⁷⁵⁵"

The New York Convention is similar, Art.II(1) provides: "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

Thus, if the wording of the arbitration agreement is wide enough, disputes or differences between the parties may fall within the scope of the arbitration agreement even where the cause of action is not founded upon a contractual relation.⁷⁵⁶

The Canadian courts have had difficulty coming to grips with these concepts, particularly when tort allegations are included with breach of contract claims. Since the courts have not clearly delineated their deliberations between consideration of the scope of the arbitration clause and subject-matter arbitrability, these matters will be dealt with together. Any confusion this may cause likely will be no greater than the confusion reflected in the cases themselves.

⁷⁵⁵ Emphasis added.

⁷⁵⁶ Redfern & Hunter, 104.

First, in Boart Sweden⁷⁵⁷, discussed above, the court dealt with claims for breach of an international contract, tort claims (conspiracy to breach the contract, inducing breach of contract, and unlawful interference in contractual relations), and an allegation of an oral contract and a claim for damages for its breach. The arbitration clause was wide in ambit, reading:

"Any dispute ensuing from the interpretation or implementation of this Agreement or the legal relationships entailed by it shall be settled by arbitrators" under the Swedish Arbitration Act, 1929, with the arbitration to be in Sweden.

Arbitration had already been commenced in Sweden at the time of the Defendant's application to the Ontario court for a referral to arbitration and a stay of proceedings.

The court noted that:

"The factual basis of all the issues in the Ontario action has to do with the conduct of the parties under the international agreement which is the subject of arbitration."⁷⁵⁸

And:

"[T]he question of the existence of the alleged Canadian oral contract is inextricably bound up with matters central to the international agreement which is being arbitrated."⁷⁵⁹

And:

"The matters in dispute in the Ontario action are inextricably bound up with the matters which the parties agreed to arbitrate."⁷⁶⁰

⁷⁵⁷ Boart Sweden AB v. NYA Stromnes AB (1989) 41 B.L.R. 295.

⁷⁵⁸ (1989) 41 B.L.R. 304.

⁷⁵⁹ (1989) 41 B.L.R. 304.

⁷⁶⁰ (1989) 41 B.L.R. 305.

However, the court referred only the breach of contract claims to arbitration, ruling:

"The tort claim and the oral contract claim can only be dealt with in the Court here because they depend on causes of action unknown to the law of Sweden. And they cannot be arbitrated because they involve additional issues and parties outside the four corners of the agreement."⁷⁶¹

In one short passage, the court manages to offend: (i) the concept of Kompetenz-Kompetenz and thus arbitral autonomy, by reserving the determination of the scope of the arbitration agreement to the court; (ii) liberal international standards as to the scope of arbitration clauses; (iii) party autonomy, by refusing to allow the proper law of the contract to determine the rights between the parties; and (iv) the spirit, if not the letter, of Art.II(1) of the New York Convention which applies, as noted above, to "any differences which have arisen...in respect of a defined legal relationship, whether contractual or not."⁷⁶²

The court noted the strong public policy in favour of holding the parties to their arbitration agreement, and the "clear direction to defer to the arbitrators even more than under the previous law of international arbitration."⁷⁶³ However, the court applied these policy considerations only to the issue as to whether to stay the remaining parts of the Ontario Action pending the outcome of

⁷⁶¹ (1989) 41 B.L.R. 305.

⁷⁶² On June 8, 1988, by s.14 of the International Commercial Arbitration Act S.O. 1988 c.30, Ontario repealed its Foreign Arbitral Awards Act S.O. 1986 c.25, which had enacted the provisions of New York Convention.

⁷⁶³ (1989) 41 B.L.R. 303.

the arbitration, not to issues of arbitrability or scope of the arbitration clause.

The Alberta Court of Appeal dealt with the application of the Model Law and New York Convention to claims in tort, in Kaverit v. Kone.⁷⁶⁴ The court appears to have mixed the considerations of arbitrability and scope of the arbitration clause:

"I now turn to the question whether some issues raised in the statement of claim are arbitrable....The extra claims also include allegations against all the defendants of conspiracy to harm all plaintiffs...this pleading relies on tort, not contract, and offers two alternatives: conspiracy to harm by unlawful acts and conspiracy to harm by lawful acts. Are either caught by the submission?"⁷⁶⁵

The court went on to note that s.2 of the Alberta International Commercial Arbitration Act applies to "...differences arising out of commercial legal relationships, whether contractual or not" and that this provision is consistent with the New York Convention.⁷⁶⁶ The court thus concluded that the Act and the Convention apply to torts so long as the relationship that creates liability can be fairly described as "commercial." A claim that a corporation conspired to cause harm therefore raises a dispute "arising out of a commercial relationship, whether contractual or not."

The court then went on to consider various forms of wording in arbitration clause, such as "arising under", "in relation to" or

⁷⁶⁴ (1992) 87 D.L.R. (4th) 129.

⁷⁶⁵ 87 D.L.R. (4th) 133.

⁷⁶⁶ Id., 134.

"in connection with" the contract.⁷⁶⁷ The clause in Kaverit covered "Any dispute arising out of or in connection with this Agreement..."⁷⁶⁸ The court concluded that this latter form was wider than those other forms considered, and ruled:

"In my view, this submission extends beyond the rights and duties created by the contract. A dispute meets the test set by the submission if either claimant or defendant relies on the existence of a contractual obligation as a necessary element to create the claim, or to defeat it. Thus, the pleading here that relies upon a claim of conspiracy by unlawful means to harm the distributor meets the test. This is because a breach of the contract is relied upon as a source of the "unlawfulness".⁷⁶⁹

The court then proceeded to "split a very fine hair", so to speak, ruling that the claim of wrongful competition by means not unlawful, i.e. conspiracy to harm by means not unlawful, did not fall within the arbitration clause:

"I cannot say that a dispute arises out of or in connection with a contract unless the existence of the contract is germane either to the claim or the defence. It is not enough to say that the events that give rise to the claim also give rise to a claim for breach of contract. One must be able to say that the other claim relies on the existence of the contractual obligation."⁷⁷⁰

This conclusion was reached in spite of the court's expression of doubts about the matter and the submission of Defendant's counsel that in cases of doubt the issue of the scope of the arbitration

⁷⁶⁷ Id., 134, 135.

⁷⁶⁸ Id. 130.

⁷⁶⁹ Id., 135.

⁷⁷⁰ Id., 136-137.

clause should be referred to the arbitrators. The court's reply was short: "The court must do its work."⁷⁷¹

The court then went on to commit the same errors as the court in Boart Sweden; (i) failing to consider whether the validity and effect of the arbitration clause should be decided in accordance with its proper law, not the law of the forum, and (ii) ignoring the principal of Kompetenz-Kompetenz - the courts reserved to themselves all determination of the scope of the arbitration agreement.⁷⁷²

The refusal of the court in Boart Sweden to refer claims unknown to Swedish law ignores a number of issues: (i) Could the tribunal in Sweden take cognizance of claims under Canadian tort law under the provisions of the Arbitration Act of Sweden? (ii) Would the laws of Sweden take cognizance of claims under Canadian tort law pursuant to Swedish private international law rules? (iii) Is there some over-riding Canadian policy interest, or some mandatorily applicable Canadian law which dictates that it should be applied in spite of the proper law chosen by the parties? (iv) Did the choice of Swedish law as the proper law of the contract negate claims unknown to Swedish law? (v) Does some provision of the Model Law justify the court in determining the existence,

⁷⁷¹ Id., 136.

⁷⁷² The court stated: "Its validity and enforceability must be pronounced upon before the referring court can enforce it by a reference and a stay. It is not valid if it, or the contract in which it is found, is, by operation of domestic law in the referring tribunal, either void or unenforceable." - Id., 140.

validity, and scope of the arbitration agreement, and the arbitrability of disputes under that agreement, all pursuant to Canadian law, and to the exclusion of the tribunal and Swedish curial and substantive law?⁷⁷³

The New York Convention and the Model Law embody the "localization" or "seat" theory of arbitration law, which theory assigns primary control over arbitration to the courts and law of the place of the arbitration. This is consistent with the "jurisdictional" conception of arbitration which maintains that arbitration is governed by the law, and subject to the controls, of the State where the arbitration takes place.⁷⁷⁴ The opposing conception is the "contractualist" conception which seeks to minimize local court control.⁷⁷⁵ Awards are assigned a "nationality" under the New York Convention, the nationality of the place of the arbitration, and enforcement under the Convention depends on the award being

⁷⁷³ These questions are complex. See Naón, Choice of Law Problems in International Commercial Arbitration (1992); Day & Griffin, The Law of International Trade, 174 (1993); C. Croff, "The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?", [1983] The International Lawyer, 613; and G. Delaume, "Party Autonomy and Express Stipulations of Applicable Law", in Transnational Contracts Applicable Law and Settlement of Disputes (1989). Generally speaking, party choice of substantive and curial law will be respected, subject to laws which, for reasons of public policy considerations, apply mandatorily and over-ride party choice of law, and subject to limitations on party choice of law that such choices must be "reasonable", bona fide, "not fraudulent" and "legitimate". - Naón, 216.

⁷⁷⁴ Naón, 221.

⁷⁷⁵ Naón, 221.

"foreign" or "non-domestic"⁷⁷⁶. The Model Law applies mandatorily to arbitrations taking place in a Model Law State.⁷⁷⁷ In the absence of party choice of applicable law, the law of the place of arbitration applies under Art.V of the Convention and Arts.34 and 36 of the Model Law (recognition and enforcement of awards and setting aside of awards) to the issue of the validity of the arbitration agreement.⁷⁷⁸ Art.34(2)(a)(iv) provides that the composition of the arbitral tribunal and the arbitral procedure must be in accord with mandatory provisions of the Model Law, even where the parties have purported to choose otherwise, and in the absence of party choice on these matters the Model Law provisions apply.⁷⁷⁹

Given the great importance of the place of arbitration and of the law of the place of arbitration, and the general practice of determining the validity of arbitration agreements under the law of the place of arbitration or the law chosen by the parties⁷⁸⁰, this author submits that it is improper practice for Canadian

⁷⁷⁶ New York Convention, Art.1(1).

⁷⁷⁷ Tetley, "Arbitration and the Choice of Law", 13, Tenth International Congress of Maritime Arbitrators, 1991.

⁷⁷⁸ New York Convention, Arts.V(1)(a) & (c); Model Law Arts.34(2)(a)(i), 36(1)(a)(i) & (iv).

⁷⁷⁹ There is conflict between the Model Law and the New York Convention on this point. Under Art.V(1)(d) of the Convention, enforcement of an award may be refused if the composition of the tribunal is not in accord with the agreement of the parties; the law of the place of the arbitration is allowed to have effect only in the absence of party agreement. - Holtzmann & Neuhaus, 1060.

⁷⁸⁰ Naón, chapter III.

courts to decide such issues as the existence, validity, and scope of arbitration agreements and arbitrability of disputes thereunder pursuant to Canadian substantive law, when the arbitration clearly will be conducted under the curial and substantive law of another country. As Naón has written, there may be competition for control over arbitration procedure, determination of the validity of the arbitration agreement, and validity of the award, among the courts of different States:

"This compelling reality is reflected by different theories concerning the law applicable to arbitration. It has been for instance contended that an arbitration is governed by the law applicable to the arbitral agreement as designated by the private international law of the place where the arbitration takes place or where recognition or enforcement of the award is sought or (even before any arbitral proceedings have been started) of the place where the judge is called to make a decision on the validity of the arbitral agreement."⁷⁸¹

As noted above, Art.1(2) was added to the Model Law to ensure that the "strict territorial principle" would be maintained, i.e. to ensure that the courts of a State would not interfere in any arbitration taking place or to take place in another State.⁷⁸² The approach of the courts in Boart Sweden, Kaverit v. Kone, and Deco Automotive appears to be in blatant breach of this principle.

With respect to English arbitration law and practice, Naón said:

⁷⁸¹ Naón, *supra*, 221-222.

⁷⁸² United Nations General Assembly, Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, June 3-21, 1985, Supplement No.17, (A/40/17), paras.72-81; "The Commission decided that, for reasons stated in support of the strict territorial criterion, (see para.73), the applicability of the Model Law should depend exclusively on the place of arbitration as defined in the Model Law." - para.80.

"[T]here is a long and well-settled pattern in United Kingdom law, expressed through many court decisions, that arbitral tribunals sitting in the United Kingdom apply that country's procedural and private international law even if the arbitration or the transaction has a foreign element."⁷⁸³

This author submits that, at a minimum, the Canadian courts must consider the extent to which the adoption of the New York Convention and the Model Law represents a break from this English approach to arbitration, and provide reasoned analysis of its decisions on this point. By considering the theoretical underpinnings of their analyses, judges would be more likely to apply reasoned analysis to their decisions, and to understand the policy considerations and options underlying the laws.

6. THE SUBSTANTIVE EFFECTS OF CHOICE OF LAW

In Drew Brown Ltd. v. The Orient Trader⁷⁸⁴, the Supreme Court of Canada dealt with a claim for loss of cargo in a ship fire which occurred in Toronto. The contract of carriage provided that it was governed by U.S. law. Under Canadian law, the Plaintiff would recover, but not under U.S. law. The court ruled that all questions of substantive law pertaining to a breach of contract are governed by the law of the contract. As the parties gave legal force to their agreement in accordance with U.S. law, that is the proper law of the contract. Under U.S. law, the Defendant could not be held liable. The Plaintiff lost.

⁷⁸³ Naón, 227.

⁷⁸⁴ Drew Brown Ltd. v. The Orient Trader, [1974] S.C.R. 1286.

The issue of the substantive effect of a choice of the law of a contract was dealt with by the U.S. Court of Appeals, 2nd Circuit, in Roby Names v. Corp. of Lloyd's (UK) et al.⁷⁸⁵ Roby and other U.S. residents sued Lloyd's over losses sustained as "Names" investing in Lloyd's Syndicates, alleging, inter alia, violations of U.S. securities laws. The Defendants moved for a stay, the Plaintiffs argued that the subject matter was inarbitrable, and that they were not parties to the arbitration agreements between Lloyd's and the Members' Agents and Syndicates. The latter point was quickly disposed of, since in U.S. law those protected by a contract and the beneficiaries of a contract are caught by any arbitration clause therein.⁷⁸⁶ As to the claims under the U.S. securities laws, the court noted: (i) that these laws contained provisions that any agreement to waive them was void; and (ii) that the contracts in question were governed by the laws of England. An English lawyer had given evidence that neither an English court nor an English arbitrator would apply the U.S. securities laws, because English conflicts of laws rules do not permit recognition of foreign tort or statutory law. Thus, the Roby Names argued, the arbitration clauses which work to waive compliance with U.S. securities laws are void in U.S. law.

⁷⁸⁵ Roby Names v. Corp of Lloyd's (UK) et al., (1993) F.2d 1353, (1995) 20 Y.C.A. 864.

⁷⁸⁶ 20 Y.C.A. 867.

This very issue had been met in the U.S. Court of Appeals for the 10th Circuit in Riley v. Kingsley Underwriting Agencies Ltd.⁷⁸⁷, where the court ruled that

"when an agreement is truly international as here, and reflects numerous contacts with the foreign forum, the Supreme Court has quite clearly held that the parties' choice of law and forum selection provisions will be given effect."⁷⁸⁸

The court in Roby Names ruled that:

It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff would simply have to allege violations of his country's tort law or his country's statutory law or his country's property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading. In the absence of other considerations, the agreement to submit to arbitration or the jurisdiction of the English courts must be enforced even if that agreement tacitly includes the forfeiture of some claims that could be brought in a different forum."⁷⁸⁹

When compared with the reasoning in these cases, the court in Boart Sweden erred in refusing to stay the claims which were unknown to Swedish law. At a minimum, these should have been left to the arbitrators to determine in accordance with the applicable curial and substantive law.

7. THE ARBITRABILITY OF STATUTORY CLAIMS

⁷⁸⁷ Riley v. Kingsley Underwriting Agencies Ltd., (1992) 969 F. 2d 584, cert. denied 113 S.Ct. 658.

⁷⁸⁸ 969 F.2d 957.

⁷⁸⁹ 20 Y.C.A. 870.

The U.S. Supreme Court in Mitsubishi⁷⁹⁰ ruled in favour of international arbitrability of claims under U.S. antitrust laws which U.S. public policy held to be non-arbitrable in the domestic context, holding that if recognition and enforcement of the award were sought in the U.S., the courts could review the award to see that the U.S. antitrust laws were taken into account.⁷⁹¹ The court refused to find subject-matter exemptions to Art.II(1) of the New York Convention in the absence of a specific direction from Congress.⁷⁹²

The Courts of Appeal of Saskatchewan and Ontario, after initial rulings by Chambers judges that claims under their respective Builders' Liens Acts were not arbitrable, have ruled that the

⁷⁹⁰ (1985) 473 U.S. 614.

⁷⁹¹ Should the award fail to address the claimant's federal statutory rights, the award would be against U.S. public policy - Mitsubishi, 473 U.S. 637 fn.19. This part of the decision in Mitsubishi has been criticized as contrary to the express provisions in the parties' agreement calling for arbitration in Japan and providing that the proper law of the contract was Swiss law, contrary to the rules of the ICC, and contrary to international arbitration practice. The restraints of trade claimed by Soler under their antitrust claims are not illegal per se under Swiss law. "[W]e have here a magnificent example of an attempt to export U.S. substantive laws where they had no place up to now: in international arbitration proceedings held outside the U.S. under an arbitration agreement providing for a non-U.S. law as law governing the dispute. If the price for Mitsubishi is this dilution of parties' freedom and extension of U.S. substantive laws operated in tandem, I doubt that the users of international arbitration can afford to pay it." - J. Werner, "A Swiss Comment on Mitsubishi", 3 Jo. Int'l Arb. 81.

⁷⁹² 473 U.S. 639.

arbitration of quantum issues under lien claims is permissible⁷⁹³. The Court of Queens Bench in Alberta held quantum determinations of builders' lien claims to be arbitrable, which decision was upheld by the Alberta Court of Appeal.⁷⁹⁴ The same decision has been reached in B.C. Supreme Court.⁷⁹⁵ This doctrine is narrower than that in the U.S., which allows full arbitrability of builders lien claims.⁷⁹⁶

8. INCONSISTENT TREATMENT OF LIMITATIONS QUESTIONS

In B.C. Navigation v. Canpotex⁷⁹⁷, the Plaintiff apparently resisted a stay application on the basis that the time limitation for arbitration had passed, thus the Plaintiff's claim was lost if referred to arbitration. The Plaintiff therefore argued that the passing of the limitation meant that the arbitration clause was "inoperative". The court ruled that the statute required a referral to arbitration unless the arbitration agreement was "null and void, inoperative, or incapable of being performed". The passing of the right to arbitration was no reason to say that the arbitration agreement was "inoperative". The Action was stayed.

⁷⁹³ BWV v. Saskferco, (1994) 119 D.L.R. (4th) 577 (Sask. C.A.); Automatic Systems Inc. v. Bracknell Corp. (1994) 18 O.R. 257 (Ont. C.A.).

⁷⁹⁴ Kvaerner Enviropower v. Tanar Industries Ltd. 157 A.R. 363, [1994] 9 W.W.R. 228.

⁷⁹⁵ Sandbar Construction v. Pacific Parkland Properties Inc. (1992) 66 B.C.L.R. (2d) 225.

⁷⁹⁶ Moses H. Cone Memorial Hospital v. Mercury Construction (1983) 460 U.S. 1.

⁷⁹⁷ (1987) 16 F.T.R. 79 (F.C.C. Trial Div.).

In contrast is the decision of the Federal Court in Continental Resources Inc. v. East Asiatic Co. (Canada).⁷⁹⁸ The court agreed with the Defendant that the court had no choice but to honour the arbitration clause and refer the parties to arbitration in New York. The Plaintiff had raised the concern that it might be open to the Defendants to raise a defence of delay or prescription in the arbitral proceedings in New York. The court therefore granted a stay on condition that the Defendant not raise any prescription or delay defense in the arbitration.

This latter course appears to be an unwarranted interference by the court in the rights of the Defendant to claim a limitation or laches defence. In contrast to Continental Resources is the decision of the Privy Council in K.H. Enterprises v. The Pioneer Container⁷⁹⁹, a case commenced in Hong Kong. The case involved a claim on a bill of lading which provided that Chinese law applied, and the courts of Taiwan had exclusive jurisdiction. The Plaintiff had waited until after the Taiwan limitation passed, then commenced Action in Hong Kong. The Defendant sought a stay. The Privy Council held that the Plaintiff had deliberately ignored the time limitation and had gambled on the chances of the Hong Kong courts denying a stay. The Action was stayed unconditionally, thus erasing the Plaintiff's claim.

⁷⁹⁸ [1994] F.C.J. No. 440.

⁷⁹⁹ K.H. Enterprises v. The Pioneer Container, [1994] J.C.J. No.10.(P.C.).

There are a number of English precedents for the granting of a stay of proceedings even though the time limit for commencing arbitration has passed.⁸⁰⁰ Claims covered by an arbitration agreement will be subject to any time bar in that agreement.⁸⁰¹ An English court has no power to impose terms as a condition of the grant of a mandatory stay under s.1 of the Arbitration Act, 1975.⁸⁰² Thus the decision to require the Defendant to forego any potential limitation defense as a condition of obtaining a stay appears to be contrary to international precedent, and arguably contrary to the terms of the Canadian Commercial Arbitration Code⁸⁰³ and the United Nations Foreign Arbitral Awards Convention Act⁸⁰⁴.

9. SCOPE OF ARBITRATION CLAUSES AND FRAUD ALLEGATIONS

INTERNATIONAL PRECEDENTS

As to arguments as to the scope of the arbitration agreement, the court in Roby Names v. Corp. of Lloyd's⁸⁰⁵ relied upon

⁸⁰⁰ W. Bruce Ltd. v. Strong, [1951] 2 K.B. 447 (C.A.); The Merak, [1965] 1 All E.R. 230 (C.A.); The Jemrix, [1981] 2 Lloyd's Rep. 544; Halsbury's Laws of England, 4th ed. Reissue (1991) paras. 635, 637.

⁸⁰¹ The Astrea, [1971] 2 Lloyd's Rep. 494; approved by the House of Lords in The Evje, [1974] 2 Lloyd's Rep. 57.

⁸⁰² The Rena K, [1979] 1 All E.R. 397 at 412-13; The World Star, [1986] 2 Lloyd's Rep. 274, 275.

⁸⁰³ Art.8(1).

⁸⁰⁴ Art.II(3).

⁸⁰⁵ (1995) 20 Y.C.A. 864 at 867,869.

Mitsubishi⁸⁰⁶, The Bremen⁸⁰⁷, and U.S.W.A. v. Warrior & Gulf Navigation Co.⁸⁰⁸ to rule that:

"[A]n order to arbitrate should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

U.S. courts have also stated:

"If the allegations underlying the claims 'touch matters' covered by the contract at issue, then those matters must be arbitrated, whatever the legal labels attached to them."⁸⁰⁹

And, as noted before:

"[T]he clear weight of authority holds that the most minimal indication of the parties' intent to arbitrate must be given full effect, especially for international disputes."⁸¹⁰

"The scope of the [arbitration] clause must be...interpreted liberally."⁸¹¹

Dealing with allegations of fraud in breach of U.S. securities laws:

"Indeed, viewed practically, the complaint was essentially a breach of contract action masquerading as a statutory misrepresentation claim."⁸¹²

⁸⁰⁶ (1985) 473 U.S. 614.

⁸⁰⁷ (1972) 407 U.S. 1.

⁸⁰⁸ U.S.W.A. v. Warrior & Gulf Navigation Co., (1960) 363 U.S. 574.

⁸⁰⁹ Genesco, Inc. v. T. Kakiuchi & Co., (1987) 815 F.2d 840, 846, 20 Y.C.A. 853 para. 28.

⁸¹⁰ Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 478 (9th Cir., 1991).

⁸¹¹ Id.

⁸¹² Scherk v. Alberto-Culver (1974) 417 U.S. 506.

As to an allegation that the contract containing the arbitration agreement was induced by fraud, the U.S. Supreme Court ruled in Prima Paint Corp. v. Flood & Conklin⁸¹³ that: (i) S.2 of the Federal Arbitration Act makes an arbitration agreement in a contract "evidencing a transaction involving commerce" valid, irrevocable and enforceable, except on such grounds as exist at law and in equity for the revocation of any contract, and the coverage of s.2 is to be given wide scope; (ii) S.4 of the same Act which provides for the enforcement of arbitration agreements by compelling arbitration, instructs the federal courts to order arbitration to proceed once it is satisfied that "the making of the agreement for arbitration or the failure to comply therewith is not in issue". Thus the court may proceed to adjudicate a claim of fraud in the inducement of the arbitration clause itself, but the court may not consider claims of fraud in the inducement of the contract generally, which claims must be referred to the arbitrators; and (iii) The same considerations apply when courts are dealing with the mandatory stay of proceedings provision in s.3 of the Act - the court may delve into allegations that the arbitration agreement was induced by fraud, but not allegations that the contract containing the arbitration agreement was induced by fraud.

CANADIAN COURT DECISIONS

⁸¹³ 388 US 395, 18 L ed 2d 1270 (1967).

Would that these same standards were applied by Canadian courts. The record is consistent in its inconsistency. Some examples follow.

In Fraser River Pile & Dredge Ltd. v. Victoria (City)⁸¹⁴, the court refused a stay on the grounds, inter alia, that allegations of fraud moved the dispute out of the commercial scope of the arbitration clause.

In McCulloch v. Peat Marwick Thorne⁸¹⁵, the Plaintiff sued his former partners in an accounting firm, claiming breach of the partnership agreement, damages for conspiracy to unlawfully remove him from the partnership, an accounting⁸¹⁶, etc. The Defendants sought a stay on the basis of a wide arbitration clause in the partnership agreement. The court ruled that the arbitration clause was grounded in the partnership agreement and the Plaintiff's tort claims fell outside its scope. Mixing considerations of arbitrability of subject matter and questions of scope of the arbitration clause, the court said:

⁸¹⁴ Fraser River Pile & Dredge Ltd. v. Victoria (City), (1989) 34 C.L.R. 262 (B.C. Co. Ct.). This decision was rendered under s.15 of the domestic B.C. Commercial Arbitration Act. The form of s.15 in force until August, 1988, provided that allegations of fraud were a consideration upon which a court could refuse a stay of proceedings. It is not clear, however, that the court was correct in ruling that the allegation of fraud moved the matter outside the scope of "commercial" matters. The alleged fraud in this case occurred within the parties' commercial relationship.

⁸¹⁵ McCulloch v. Peat Marwick Thorne, (1991) 124 A.R. 267, 1 C.P.C. (3d) 149, [1991] A.J. No. 1062 (Alberta Q.B.).

⁸¹⁶ The Plaintiff was an accountant, of course.

"The action must be allowed to proceed simply because, in my view, the allegations against reputation and the allegations of conspiracy take the matter being disputed outside the arbitration agreement and therefore the dispute is not capable of being the subject of arbitration under Alberta law."⁸¹⁷

The court held that the presence of some non-arbitrable claims with the arbitrable matters meant that nothing was arbitrable.⁸¹⁸

In Crystal Rose Home v. Alberta New Home Warranty Program⁸¹⁹, another case in the Alberta Queen's Bench under the Alberta form of the Uniform Arbitration Act, which modifies the Model Law for application to domestic arbitration, the court refused to follow McCulloch v. Peat Marwick, and ruled that all the Plaintiff's claims in tort were "in relation to" the contract, and hence within the scope of the arbitration clause.

In Canada Packers Inc. v. Terra Nova Tankers Inc.⁸²⁰, the court dealt with an application for a stay pursuant to an arbitration clause in a voyage charter-party. The Plaintiff had made claims in contract and in tort. The court found that the tort claims were grounded in the contract: "In respect of all these tort allegations...the genesis would appear to come from the contract

⁸¹⁷ [1991] A.J. No.1062 p.10/12.

⁸¹⁸ Id.

⁸¹⁹ Crystal Rose Home v. Alberta New Home Warranty Program, [1994] A.J. No.897.

⁸²⁰ Canada Packers Inc. v. Terra Nova Tankers Inc. (1992) 11 O.R. (3d) 382, [1992] O.J. No.2035 (Ont. Court (Gen. Div.), Oct.1, 1992).

itself." The court ruled that the International Commercial Arbitration Act of Ontario extends to both contractual and non-contractual matters arising out of a commercial legal relationship and that a claim sounding in tort does not exclude arbitration. A stay was granted.

In Traff v. Evancic⁸²¹, the Plaintiff alleged fraud, breach of trust, and breach of fiduciary duty arising out of an investment scheme introduced to the Plaintiff by one of the Defendants. The investment agreement contained an arbitration clause. The court refused to stay any of the tort claims. The Defendants sought leave to appeal. In Court of Appeal Chambers, Macfarlane J.A. refused leave to appeal⁸²², ruling:

"Regarding section 8(1) of the International Commercial Arbitration Act the question was whether a fraud claim could be a matter that could be agreed to be submitted to arbitration. It was not contractual in nature and the claim in this action was not a claim under contract. The accounting claim was properly stayed but it was not appropriate to stay the fraud claim."

Thus the B.C. Court of Appeal has ruled that fraud claims are not arbitrable subject-matter in B.C. This supports the view that artful pleading of claims, avoiding claims directly based upon contract, will allow the Plaintiff to avoid an arbitration agreement. This ruling appears to be contrary to Art.7(1) of the Model Law and Art.II(1) of the New York Convention, which are set out above, in the text, at footnote 749. Further, Canadian,

⁸²¹ Traff v. Evancic, [1995] B.C.J. No.1437 (B.C.S.C. Chambers, June 28, 1995).

⁸²² [1995] B.C.J. No. 2296 (Oct.18, 1995).

English, and U.S. cases have held allegations of fraud to be arbitrable unless the allegation is of fraudulent inducement of the arbitration agreement itself, not merely fraudulent inducement of the contract containing the arbitration clause.⁸²³

These cases show a wide range of attitudes to the scope to be given to arbitration clauses, particularly when tort claims are in issue. They do show, however, that the courts do not hesitate to embark upon determinations of the scope of the arbitration clauses, to the exclusion of the arbitrators. Liberal international standards are not being followed with respect to these issues.

10. ARTICLE 7: IN WRITING SIGNED BY THE PARTIES, AND INCORPORATION OF ARBITRATION CLAUSES BY REFERENCE

By Art.7(1) of the Model Law, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

By Art.7(2), the arbitration agreement must be in writing. It provides:

⁸²³ Heyman v. Darwins [1942] 1 All E.R. 337, 353: (per Lord Wright) "If the question is whether the alleged contract was void for illegality, or, being voidable, was avoided because induced by fraud or misrepresentation, or on the ground of mistake, it depends on the terms of the submission whether the dispute falls within the arbitrator's jurisdiction."
Lamont v. Wright [1943] O.W.N. 11; Prima Paint v. Flood & Conklin 388 U.S. 395 (1967); Harbour Assurance Co. v. Kansa et al. [1993] 3 W.L.R. 42, (1995) Y.C.A. 771: "[T]he question of initial illegality of a contract, not directly impeaching the arbitration clause, was capable of being within the jurisdiction of the arbitrator."

"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 the agreement is alleged by one party and not denied by the other."

It then provides a rule for incorporation of arbitration clauses by reference:

"The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

It is common in Bills of Lading to include a term intended to incorporate the terms of a charterparty under which the bill of lading is issued.⁸²⁴ Bills of Lading are signed by the master of the vessel or his agent. They are not usually signed by the shipper or consignee of the goods shipped. A long line of English authorities, adopted into Canadian law by Agro Canada v. The Regal Scout,⁸²⁵ has established that, where a charterparty contains an arbitration clause providing for arbitration of disputes arising under it, general words in a Bill of Lading incorporating the terms of the charterparty (but making no specific reference to an arbitration clause) are insufficient to incorporate the arbitration clause so as to make its provisions applicable to disputes arising under the Bill of Lading. However, if the arbitration clause in the Bill of Lading provides for arbitration of disputes arising not only under the charterparty but also under any Bill of Lading issued pursuant to it, then general words of incorporation in the

⁸²⁴ See The Rena K [1978] 1 Lloyd's Rep. 545, and the cases cited therein.

⁸²⁵ Agro Canada v. The Regal Scout, [1984] 2 F.C. 851 (T.D.).

Bill of Lading are effective to incorporate the arbitration clause. In any case, a clause in the Bill of Lading which makes express reference to the incorporation an arbitration clause is effective to incorporate the arbitration clause, and the terms of the arbitration clause will be manipulated as necessary to make it effective as between the parties to the Bill of Lading, who are not the same as the parties to the charterparty.⁸²⁶ Thus a consignee of goods under a Bill of Lading can be sure that an arbitration clause applies if the Bill of Lading makes express reference to the incorporation of an arbitration clause, but if there is only a general clause incorporating the terms of a charter-party, the consignee will not know whether he or she is bound by an arbitration clause unless he or she obtains the charterparty and studies the form of arbitration clause therein.⁸²⁷

The rationale behind these rules is that general words of incorporation in a Bill of Lading incorporate only those terms of the charterparty directly germane to the contract of carriage. The rule developed long ago that an arbitration clause was not directly germane to a contract of carriage.⁸²⁸ It is felt too well established to change the rules now.⁸²⁹ These rules are also justified on the basis that Bills of Lading are negotiable

⁸²⁶ The Rena K [1978] 1 Lloyd's Rep. 545, 550; Nanisivik Mines & Zinc Corp. v. Canarctic Shipping [1994] 2 F.C. 662 (F.C.A.).

⁸²⁷ Id.

⁸²⁸ The Annefield [1971] 1 Lloyd's Rep.1 (C.A.).

⁸²⁹ Agro Canada v. The Regal Scout, supra.

instruments and there is a commercial necessity for certainty which would be upset if courts started changing the rules to more rational ones.⁸³⁰ How certainty is served by a rule which says a general clause in a Bill of Lading may or may not incorporate an arbitration clause depending upon the form of the arbitration clause in a charterparty not produced to the consignee of goods is an interesting quandary.

INCORPORATION BY REFERENCE

In Nanisivik Mines Ltd. and Zinc Corp of America v. Canarctic Shipping Co. Ltd⁸³¹, which involved the issue, among others, as to whether to stay the action as against parties who were not parties to the arbitration agreement and thus not entitled to relief under Art.8. The Court held that Zinc Corp. was not a party to the arbitration agreement. The decision that Zinc Corp was not a party to the arbitration agreement in the charterparty depended upon the interpretation of the Bill of Lading issued to Zinc, which stated:

"All terms and conditions, liberties, and exceptions of the charter party are hereby incorporated."⁸³²

The Court of Appeal decided the issue of its incorporation on the basis of a the line of English cases noted above. It was held that such reference was ineffective to include the arbitration clause,

⁸³⁰ Siderurgica Mendes Jr. v. The Ice Pearl, unreported, B.C.S.C. January 31, 1996.

⁸³¹ [1994] 2 F.C. 662. (Federal Court Of Appeal).

⁸³² 59 F.T.R. 276 (the Federal Court Trial Division report).

since it was of a type that required a specific reference to the arbitration clause, and no such reference was made.

The Court quoted Article 7(2) of the Code. In the Analytical Commentary, it is made clear that the last sentence of Art.7(2) is intended to do away with the requirement to refer specifically to the arbitration clause. The paragraph reads, in part:

"8...As the text clearly states, the reference need only be to the document; thus no explicit reference to the arbitration clause contained therein is required."

Alas, if only this were apparent from the English text of the Model Law. The last sentence of art. 7(2) of the Code reads:

"The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

With all due respect to the drafters of the Model Law, this wording falls squarely into the trap of the English common law on the incorporation of clauses as requiring specific reference to the inclusion of arbitration clauses of certain types of wording. It would be difficult to construe art.7(2) to mean what the Analytical Commentary claims "the text clearly states." It does not, to put the matter very simply.

The Mustill Report⁸³³ raised this point about the definition of "arbitration agreement" in Article 7 and its effect on Bills of

⁸³³ A New Arbitration Act? The Response of the Departmental Advisory Committee to the Uncitral Model Law on International Commercial Arbitration, (1990) 6 Int. Comm. Arb., 3 (cited herein as the "Mustill Report").

Lading. The Report noted that Article 7 requirement that the agreement be signed by the parties. The Report reads in part:

"This could leave most bills of lading, many broker's contract notes, and other important categories of contracts outside the scope of the Model Law."⁸³⁴

Edward Gray, commenting on Hong Kong's adoption of the Model Law⁸³⁵, noted that not only are Bills of Lading not signed, but it is common in his experience that many charterparties are not formally executed. Referring to the provision in Art.7(2) for the formation of a contract by an exchange of communications, he remarked:

"If this provision does not cover fixture exchanges leading to a charterparty, however, then it will often be the case that there is not an arbitration agreement [within the definition in Art.7]....But even if charterparties are covered, what about Bills of Lading."

The rules as to the incorporation of arbitration clause from charterparties into Bills of Lading is another example of how things can go wrong in the first stage of the Art.8 process.

In this way, the common law again has the effect of removing a matter from the operation of Art.8.

This problem did not escape the notice of the drafters of the Model Law, who realized that Art.7(2) would present problems with regard to Bills of Lading.⁸³⁶ Various proposals were made to alleviate

⁸³⁴ Mustill Report, 54.

⁸³⁵ Gray, E., "Hong Kong Arbitration and the Model Law", Tenth International Congress of Maritime Arbitrators, 1991.

⁸³⁶ Holtzmann & Neuhaus, 261.

the problem but the drafters were concerned that any relaxation of the requirement that the agreement be signed by both parties would offend Art.II(2) of the New York Convention.⁸³⁷ A U.S. court has come up with a creative construction of Art.II(2). In Sphere Drake Insurance PLC v. Marine Towing, Inc.⁸³⁸, the U.S. Court of Appeals, 5th Circuit, construed definition of "agreement in writing" in the Convention as including either:

1. an arbitral clause in a contract or
- 2 an arbitration agreement
 - (a) signed by the parties or
 - (b) contained in an exchange of letters or telegrams.

In Sphere Drake, the court was concerned with an arbitration clause in an insurance contract which had been sent, but not received, before the occurrence of loss. The policy holder wished to claim under the policy, but to escape the arbitration clause. The insurance company was successful in obtaining a stay, the court holding that here there was "an arbitration clause in a contract".

In Kaverit v. Kone⁸³⁹, the Alberta Court of Appeal, in this its first case dealing with the International Commercial Arbitration

⁸³⁷ Id., pp.287, 292-301; Art.II(2): "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

⁸³⁸ (1994) 16 F.3d 666, (1995) 20 Y.C.A. 937 (U.S.C.A. 5th Cir. Mar.23, 1994).

⁸³⁹ 87 D.L.R. (4th) 131.

Act of Alberta⁸⁴⁰, noted that some of the parties to the action who were not parties to the arbitration agreement were making "derivative" claims, in other words they relied on the rights of a corporation of which they were shareholders. Unlike the U.K. statute, which permits a reference for all those claiming "through or under"⁸⁴¹ the parties to the arbitration agreement, the Model Law and the Alberta Act do not include this provision. Hence it was not possible, the court held, to bring these "derivative" parties and claims into the arbitration. Counsel had referred the court to Germain v. Dow Chemical France⁸⁴² as a case in the international arena in which Germain was not a party to an arbitration agreement with all the plaintiff companies, only some of them. The Plaintiff companies were all related. In spite of this lack of comprehensive coverage of the arbitration agreement, the tribunal in Germain ruled that the issues amongst all the parties and Germain were arbitrable, on the ground that it was the mutual intent of the parties that all those for whose benefit the contracts were entered into should be covered by the arbitration agreements. The tribunal also supported this ruling as being "sensible and practical." The Alberta court declined to apply this case. Rather, the court took a strict, cautious, and

⁸⁴⁰ S.A. 1986, c.1-6.6. This Act enacts both the New York Convention and the Model Law, the latter with some minor refinements.

⁸⁴¹ The English Arbitration Act, 1950 and Arbitration Act, 1975 (which enacts the New York Convention in England) both include, as parties, those "claiming through or under" a party, whether claimant or respondent.

⁸⁴² Germain v. Dow Chemical France, (1984), IX Yearbook 131, J.D.I. 899.

legalistic approach typical of domestic law situations. Since the derivative parties were not named parties to the arbitration, their claims were not caught by the clause. The court ruled that "parties" are the "parties signatory" and that parties "claiming through or under" are not "parties" in the Model Law or New York Convention.⁸⁴³

The same approach can be seen in other Canadian cases. For example, the Ontario Court in ABN Amro Bank v. Krupp, Diesel Ltd. et al.⁸⁴⁴ dealt with an application for a stay of proceedings on the basis of an arbitration agreement contained in a technology licensing agreement between Krupp and Diesel, which had been assigned to the bank by Diesel. The court held that the bank was not a signatory to the Technology Licensing Agreement which contained the arbitration clause and declined to hold it bound as assignee. The court adopted the same definition of "party" as "party signatory", and the same ruling that parties "claiming through or under" are not "parties" under the Model Law or New York Convention as adopted in Canada. As Justice Kerans remarked in Kaverit v. Kone, perhaps the Canadian omission of "claiming through or under" is to be regretted.⁸⁴⁵

⁸⁴³ 87 D.L.R. (4th) 132.

⁸⁴⁴ 21 O.R. (3d) 511, [1994] O.J. No. 3044. See also Boart Sweden, *supra*.

⁸⁴⁵ 87 D.L.R. (4th) 132.

U.S. law is much more creative in the area of persons "claiming through or under" than is Canadian arbitration law. See Sphere Drake Insurance PLC v. Marine Towing, Inc., discussed above. In J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.⁸⁴⁶, the U.S. Court of Appeals, 5th Circuit, held that a nonsignatory parent corporation may arbitrate a claim if its subsidiary is a signatory to the arbitration agreement and the claims against the parent and subsidiary involve inherently inseparable facts.

In Arnold v. Arnold Corp.⁸⁴⁷, the U.S. Court of Appeals for the 6th Circuit ruled that nonsignatories or arbitration agreements may benefit from arbitration clauses on ordinary contract and agency principles, thus corporate officers and agents have the benefit of arbitration clauses executed by the corporation.

In Cheshire Place Associates v. The West England Ship Owners Mutual Insurance Association (Luxembourg)⁸⁴⁸, the U.S District Court held that Plaintiffs were bound by arbitration clauses if they acquired rights under a contract as agents, intended third-party beneficiaries, or assignees. The Plaintiff had signed an insurance application containing the clause: "If this application for insurance is accepted by the Association the applicant Owner will

⁸⁴⁶ J.J. Ryan & Sons v. Rhone Poulenc Textile S.A., 863 F.2d 315 (1988).

⁸⁴⁷ Arnold v. Arnold Corp., 920 F.2d 1269 (1990).

⁸⁴⁸ Cheshire Place Associates v. The West England Ship Owners Mutual Insurance Association (Luxembourg), 815 F. Supp. 593 (E.D.N.Y. 1993), 20 Y.C.A. 847.

be bound by the Constitution and the Rules of the Association." These contained an arbitration agreement. The Plaintiff opposed a stay application on the ground that it had no notice of the arbitration agreement. This was greeted with scorn by the court: "Presumably Frank reads and understands English. Even if he does not, failure to read or investigate the terms of the contract one signs is not a defense to enforcement of the contract." This rule applies even if the signer was ignorant of the presence of an arbitration clause and it was written in a language the signer could not read.⁸⁴⁹

The High Court of Hong Kong has shown a similar creative bent in finding arbitration agreements in the absence of contracts signed by the parties, although the record is not completely consistent.

1. In Pacific International Lines Ltd. v. Tsinlien Metals and Minerals Co. Ltd.⁸⁵⁰, the court held that although the charterparty had not been signed by the parties, pre-voyage communications and part payment under the charterparty proved its existence. The court held that Art.7 of the Model Law had been complied with, the arbitration clause in the charterparty form was effective.

⁸⁴⁹ 20 Y.C.A. 852, para.24.

⁸⁵⁰ Pacific International Lines Ltd. v. Tsinlien Metals and Minerals Co. Ltd., [1992] Hong Kong Law Digest G5, 4 Arb & Dis Res. L. Jo. 240 (Dec.1992), Kaplan J.

2. In Hissan Trading Co. Ltd. v. Orkin Shipping Corp.⁸⁵¹, the claim was under a Bill of Lading subject to Japanese law, which incorporated an arbitration clause from a charterparty to which neither Plaintiff nor Defendant were parties. The Bill of Lading was not signed by both parties. The Bill of Lading also contained a clause giving the Tokyo District Court exclusive jurisdiction over disputes. The court refused to rely upon communications made after the date of the Bill of Lading as proof of the arbitration agreement. Since the Bill of Lading was not signed by both parties, the court held that there was no arbitration agreement under Art.7. The court also held that, even if there were an arbitration agreement under Art.7, it could not be applied because it was not clear whether the parties had agreed to arbitrate or litigate.

3. Kaplan J. refused to follow Mayo J.'s decision in Hissan Trading, in William Company v. Chu Kong Agency Co. Ltd. et al.⁸⁵² In the latter case, there was a Bill of Lading containing an arbitration clause, which provided for arbitration in China under Chinese law and an exclusive jurisdiction clause in favour of China's courts. Kaplan J. held that although the Bill of Lading, not signed by both parties, could not qualify as an arbitration agreement under Art.7 of the Model Law, yet material addressed by one party to another after the conclusion of the agreement to

⁸⁵¹ Hissan Trading Co. Ltd. v. Orkin Shipping Corp., [1992] Hong Kong Law Digest H8, (Mayo J.).

⁸⁵² William Company v. Chu Kong Agency Co. Ltd. et al., [1993] Hong Kong Law Digest B7 (Kaplan J.)

arbitrate could provide a record of the agreement! As to the contradiction in the Bill of Lading as to arbitration and court, Kaplan J. held that the claimant had an option between the two.

This last case presents some interesting judicial footwork, but raises an interesting question: If one party seeks arbitration under the Bill of Lading, and the other at the same time seeks litigation under the same Bill of Lading, and each has an express term allowing such proceedings, the court's reasoning (that the presence of both arbitration and litigation clauses is not contradictory) breaks down.

4. In Oonc Lines Ltd. v. Sino-American Trade Advancement Co. Ltd.⁸⁵³, another judgment of Kaplan J., there was again a charterparty which had not been signed by the parties. Nonetheless, the court found an arbitration agreement within the definition in Art.7 of the Model Law, on the basis that communications exchanged between the parties provided a sufficient record in writing of their agreement to arbitrate.

Canadian arbitration advocates can only gaze upon the above cases with misty eyes and wishful hearts.

Sensing a weakening of the strict Canadian rules of privity of contract by the decision of the Supreme Court of Canada in London

⁸⁵³ Oonc Lines Ltd. v. Sino-American Trade Advancement Co. Ltd., Unreported, High Court of Hong Kong, Feb.2, 1994, Kaplan J.

Drugs Ltd. v. Kuehne & Nagel Int'l Ltd.⁸⁵⁴, a sub-contractor sought to take advantage of an arbitration clause in a head construction contract, to force arbitration of a claim against the owner of the project, in Thunder Mountain Drilling Ltd. v. Denmark Equipment Rentals Ltd.⁸⁵⁵. The Plaintiff asked the court to extend the doctrine by a "modest step" but the court refused, calling it a "leap of olympian proportions".

LEGISLATIVE REFORM TO ARTICLE 7?

England is now considering enacting the Model Law, but is seeking a definition of "arbitration agreement" which avoids the above-noted problems. The draft English Arbitration Act relaxes the Model Law requirements of signing, and even adopts oral agreements that incorporate written arbitration agreements.⁸⁵⁶ This would

⁸⁵⁴ London Drugs Ltd. v. Kuehne & Nagel Ltd., (1992) 73 B.C.L.R. (2d) 1 (S.C.C.).

⁸⁵⁵ Thunder Mountain Drilling Ltd. v. Denmark Equipment Rentals Ltd., [1993] B.C.J. No. 2263 (B.C.S.C. Nov.5, 1993).

⁸⁵⁶ In the November 24, 1995 draft of the English Arbitration Act, the definition of "Arbitration agreement" in s.6 does not require that it be in writing. S.5 deals with the writing requirement:

"5(1) Reference in this part to an agreement in writing shall be construed as follows.

- (2) There is an agreement in writing
 - (a) if the agreement is made in writing (whether or 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.
- (3) Where parties agree otherwise than in writing by reference to terms that are in writing, they make an agreement 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

bring the Model Law into agreement with present English law; the requirements of writing in English law are satisfied where there is a document which recognizes, incorporates, or confirms the existence of an agreement to arbitrate. The document does not need to be signed by either party, and the assent of the parties to the arbitration term may be given orally or by conduct.⁸⁵⁷ The requirement of signing was omitted from the definition of "arbitration agreement" in the Arbitration Act, 1975 and the Arbitration Act, 1950.⁸⁵⁸

11. IMPROPER MOTIVE FOR INVOKING ARBITRATION AGREEMENT

of the parties to the agreement.

- (5) An exchange of written submissions in arbitral or other legal proceedings in which the existence of an agreement is alleged by one party against another party and not denied by the other party in his response constitutes

as

between those parties an agreement in writing to the effect alleged."

- As reported by Chiasson, E., "A Precipice Avoided: Judicial Stays and Party Autonomy in International Arbitration", Vol.54:1 The Advocate 63 at 70 (January, 1996). Chiasson notes that this definition of "arbitration agreement" may cause difficulties with respect to compliance with the New York Convention Art.II(2), but that Art.VII(1) of the Convention may provide some comfort.

⁸⁵⁷ Halsbury's Laws of England, 4th ed. Reissue (1991) para.609.

⁸⁵⁸ Arbitration Act, 1975, s.7, defines "arbitration agreement" as "an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences capable of settlement by arbitration." In the Arbitration Act, 1950, "arbitration agreement" was defined as "a written agreement to submit present or future disputes to arbitration".

This notion arose in Deluce Holdings Inc. v. Air Canada⁸⁵⁹, which involved a dispute over the buying out of the Plaintiff's shares in a regional airline by the Defendant. The Plaintiff was the former owner of the airline, and apparently had sold 75% of the shares to the Defendant. The Defendant triggered a buy-out provision and an arbitration clause in the contract, to acquire the Plaintiff's shares and to set their price. The Plaintiff argued that the Defendant's actions amounted to oppression under the Canada Business Corporations Act, and sought an order staying the arbitration, the Defendant sought to stay the Action. The court accepted the Plaintiff's argument, and refused to stay the Action, despite the apparent mandatory nature of the Act and the clear applicability of the arbitration agreement. The court held that the prima facie oppressive conduct would destroy the underpinnings of the arbitration's structure, thus taking the subject of the dispute out of the matters submitted to arbitration. "The issue is not the validity or invalidity of the agreement to arbitrate, itself, but the validity or invalidity of the exercise of its terms."⁸⁶⁰ "The majority ought not to be entitled to rely upon that mechanism to effect its wrongful objective."⁸⁶¹

⁸⁵⁹ Deluce Holdings Inc. v. Air Canada, (1993) 98 D.L.R. (4th) 509 (Ont. Ct. Gen. Div.).

⁸⁶⁰ 98 D.L.R. (4th) 526.

⁸⁶¹ 98 D.L.R. (4th) 99.

Thus the court asserts that it has a discretion to refuse to enforce valid arbitration agreements if such agreements are being exercised for what the court sees as wrongful objectives.

This doctrine has been recognized in two subsequent arbitration cases, T1T2 Limited Partnership v. The Queen in Right of Canada⁸⁶² and Seel v Seel⁸⁶³. The theoretical underpinnings of this exception to the enforcement of an arbitration agreement are not entirely clear - is it a matter of refusal to enforce the agreement for improper motives, a finding that the agreement does not cover the impugned behaviour, or a finding that the oppressive conduct impairs the underpinnings of the arbitration agreement so that it loses its coverage of the dispute? In T1T2, the court treated the doctrine as one of preserving judicial discretion over stays when matters in dispute are outside the arbitration agreement. Thus T1T2 treated it as a matter of scope. By that analysis, it appears that the improper motive or improper conduct of the party invoking the arbitration clause causes the clause to lose coverage of the subject matter. In Seel, the court analyzed Deluce as a case in which the court found that the bona fides of the party seeking to arbitrate were suspect and therefore the court Action went ahead to ensure the full panoply of rights of minority shareholders in oppression Actions were available.

⁸⁶² T1T2 Limited Partnership v. The Queen in Right of Canada, 23 O.R. (3d) 66 (Ont Ct. Gen. Div.).

⁸⁶³ Seel v. Seel, [1995] B.C.J. No.863 (B.C.S.C. Chambers, Apr.24, 1995).

As noted above, in 1977 the House of Lords ruled that under s.1 of the Arbitration Act, 1975, the respondents having shown an arbitration agreement between the parties:

"no discretion enters into the matter, and the unknown merits of the respondents or demerits of the appellants are irrelevant."⁸⁶⁴

All three of Deluce Holdings, T1T2 and Seel are domestic in nature, not international, but decided under various forms of the Model Law. It would be naive to assume that no attempt will be made, by counsel opposing arbitrations, to apply them to international arbitration cases. The injection of a consideration by the court of the motives, conduct, or bona fides of the party seeking to enforce an arbitration agreement would no doubt be fertile ground for those wishing to sprout entanglements for arbitration.

12. THE RESURRECTION OF OLD COMMON LAW DOCTRINES

A review of a pre-1986 text on commercial arbitration, and a comparison of the rules it contains with the rules applied by Canadian courts under the Model Law and New York Convention, shows the carrying forward of many old rules which are contrary to the letter and spirit of the Model Law and the Convention. The chosen text is McLaren & Palmer, The Law and Practice of Commercial Arbitration, a Canadian publication of 1982. The references to the text will be by page number.

⁸⁶⁴ Nova Knit v. Kamngarn (Lord Wilberforce), [1977] 2 All E.R. 463, 467.

Page 23. Per Heyman v. Darwins⁸⁶⁵, a stay of an Action in favour of arbitration will be refused if one party alleges that the contract containing the arbitration clause is void ab initio, or if it is alleged that the contract was never entered into at all. In Kaverit v. Kone⁸⁶⁶, the Alberta Court of Appeal adopted these rules.

Page 23. Separability is not recognized except in the narrow sense that an arbitration agreement can survive frustration or repudiation of a contract. - Kaverit v. Kone⁸⁶⁷, Deco Automotive⁸⁶⁸, .

Page 23. It is for the court, not the arbitral tribunal, to construe the contract for existence, validity, and scope of the arbitration agreement. - Kaverit v. Kone⁸⁶⁹, International Semi-Tech Microelectronics v. Provigo⁸⁷⁰, Boart Sweden⁸⁷¹, ODC v. Lee⁸⁷², Deco Automotive⁸⁷³.

⁸⁶⁵ [1942] A.C. 356.

⁸⁶⁶ (1992) 87 D.L.R. (4th) 129.

⁸⁶⁷ Supra.

⁸⁶⁸ Deco Automotive Inc. v. G.P.A. Gesellschaft, [1989] O.J. No.1805, Oct.27, 1989.

⁸⁶⁹ Supra.

⁸⁷⁰ International Semi-Tech Microelectronics v. Provigo, 75 O.R.(2d) 724, [1990] O.J. No.2102.

⁸⁷¹ Boart Sweden AB et al. v. NYA Stromnes AB et al., (1989) 41 B.L.R. 295 (Ont. S.C. Dec.21, 1988).

⁸⁷² ODC Exhibit Systems v. Lee, (1988) 41 B.L.R. 286 (B.C.S.C.).

Page 25. Scope: Per Heyman v. Darwins⁸⁷⁴, the parties must clearly and adequately define their dispute, so the arbitrators know the limits of their jurisdiction. (This confuses the scope of the arbitration clause and the definition of the dispute). - Burlington Northern v. C.N.R.⁸⁷⁵, B.C. Court of Appeal, Injector Wrap v. Agrico Canada⁸⁷⁶, Manitoba Court of Appeal.

Page 33. If arbitrable and non-arbitrable issues overlap, a stay of Action in favour of arbitration will be refused. - Afton v. C.N.R., B.C. Supreme Court⁸⁷⁷, Prince George v. McElhanney Engineering, B.C. Supreme Court⁸⁷⁸, Kaverit v. Kone⁸⁷⁹, Queens Bench, McCulloch v. Peat Marwick.⁸⁸⁰

⁸⁷³ Supra.

⁸⁷⁴ Supra.

⁸⁷⁵ Burlington Northern Railroad v. Canadian National Railway Co., [1995] B.C.J. No. 1084, (1995) 59 B.C.A.C. 97, (1995) 7 B.C.L.R. (3d) 80 (B.C.C.A. May 18, 1995).

⁸⁷⁶ Injector Wrap Corp. v. Agrico Canada Ltd., (1990) 67 Man. R. (2d) 158, [1990] M.J. No.304 (Man. C.A. June 12, 1990).

⁸⁷⁷ Afton Operating Co. v. C.N.R., [1994] B.C.J. No.45 (B.C.S.C. Chambers, Hamilton J.).

⁸⁷⁸ Prince George (City) v. A.L. Sims & Sons Ltd. & McElhanney Engineering Services Ltd., [1994] B.C.J. No.3072 (B.C.S.C. Chambers, Parrett J.).

⁸⁷⁹ Supra.

⁸⁸⁰ McCulloch v. Peat Marwick Thorne, (1991) 124 A.R. 267, 1 C.P.C. (3d) 149, [1991] A.J. No.1062 (Alberta Queen's Bench).

Page 33. If the Action involves a party who is not a party to the arbitration agreement, a stay will be refused. - Gulf v Arochem⁸⁸¹, Prince George v. Sims & McElhanney Engineering, B.C. Supreme Court⁸⁸², 347202 B.C. Ltd. v. CIBC⁸⁸³.

Page 33. Voluntary submission to court jurisdiction means loss of arbitration rights. - ABN Amro Bank v. Krupp⁸⁸⁴, Queensland Sugar v. The Hanjin Jedda⁸⁸⁵.

Page 33. The court has a broad discretion over whether to stay Actions in favour of valid arbitration agreements. - McCulloch v. Peat Marwick⁸⁸⁶.

Page 34. Where validity of the contract is in issue, the matter must go to trial. - Kaverit v. Kone⁸⁸⁷.

Page 34. Where a reference to arbitration would not settle all issues, so issues would still have to be heard by the court, a stay

⁸⁸¹ Gulf Canada Resources Ltd. v. Arochem International Ltd., (1992) 66 B.C.L.R. (2d) 113, 120 (B.C.C.A.).

⁸⁸² Supra.

⁸⁸³ 347202 B.C. Ltd. v. CIBC, [1995] B.C.J. No. 449 (B.C.S.C. Chambers, March 1, 1995).

⁸⁸⁴ 21 O.R. (3d) 511, [1994] O.J. No.3044.

⁸⁸⁵ Queensland Sugar v. The Hanjin Jedda, [1995] B.C.J. No. 624 (B.C.S.C.).

⁸⁸⁶ Supra.

⁸⁸⁷ Supra.

will be refused. - Prince George v. Sims & McElhanney Engineering, B.C. Supreme Court⁸⁸⁸, Afton Operating Co. v. C.N.R., B.C. Supreme Court⁸⁸⁹, McCulloch v Peat Marwick⁸⁹⁰.

Page 34. A stay will be refused where the court thinks the arbitrator is unfit or incompetent. - Burlington Northern v. C.N.R.⁸⁹¹, B.C. Court of Appeal.

Page 36. A prima facie case of fraud may be a sufficient reason for refusing a stay. - Deco Automotive⁸⁹², Traff v. Evancic⁸⁹³.

Page 37. A party's failure to follow procedural requirements of the contract is sufficient reason to say that the party has lost the right to arbitrate. - Burlington Northern v. C.N.R.⁸⁹⁴.

Page 37. An application to refer a Mechanic's Lien Claim to arbitration may be properly denied. - BWV v. Saskferco, Queens

⁸⁸⁸ Supra.

⁸⁸⁹ Supra.

⁸⁹⁰ Supra.

⁸⁹¹ Supra.

⁸⁹² Supra.

⁸⁹³ Traff v. Evancic, [1995] B.C.J. No.1437 (B.C.S.C. Chambers, June 28, 1995).

⁸⁹⁴ Supra.

Bench⁸⁹⁵, Automatic Systems v. Bracknell, Queen's Bench⁸⁹⁶,
Automatic Systems v. E.S. Fox⁸⁹⁷

13. THE REFOCUSSED ATTENTION OF THE COURTS

As noted above, the process of establishing the right to a referral to arbitration is a two-stage process. The first stage involves a number of findings by the court, each of which presents an opportunity for the party opposing the referral to arbitration. The Canadian cases reviewed above present the following menu of prerequisites to a referral:

1. The existence of an arbitration agreement;
2. That the arbitration agreement is valid and subsisting;
3. That the arbitration agreement applies to the parties to the action;
4. That there is a dispute between the parties to the agreement;
5. That the dispute is the subject of the arbitration agreement;
6. That the request for referral to arbitration has been made not later than when the requestor submitted its first statement on the substance of the dispute; and
7. That the agreement is not "null and void, inoperative or incapable of being performed."

⁸⁹⁵ [1993] 4 W.W.R. 553, (1993) 108 Sask. R. 280 (Sask. Q.B.).

⁸⁹⁶ Automatic Systems v. Bracknell, [1993] O.J. No. 3060 (Queen's Bench).

⁸⁹⁷ Automatic Systems v. E.S. Fox, [1993] O.J. No. 3054 (Ont Ct. of J., Gen. Div.).

8. That the dispute is one which is arbitrable under the proper law on the merits, otherwise the clause may be "incapable of being performed." In Boart Sweden⁸⁹⁸, the court declined to refer some issues to arbitration in Sweden because they were "unknown to Swedish law."

9. That the parties have defined the dispute with precision.

10. That the parties have fulfilled all procedural requirements to institute the arbitration, otherwise it is "inoperative" i.e. "not in operation".

11. That there are available arbitrators with the qualifications required by the arbitration agreement.

12. That the arbitration clause has not been invoked for an improper motive.

13. That the arbitration agreement, or the contract containing it, is not tainted by fraud.

14. That there are no inarbitrable issues and no parties to the Action who are not parties to the arbitration agreement, such that the court will not see the arbitration agreement as "null and void, inoperative, or incapable of being performed."

If the arbitration agreement passes Stage 1, then the court has no discretion as to the grant of a referral to arbitration; the referral ("stay" in B.C.) is mandatory. However, the court still has discretion over whether to stay the Action, except perhaps in B.C. This discretion, exercised wisely, can be used to avoid

⁸⁹⁸ Boart Sweden AB et al. v. NYA Stromnes AB et al., (1989) 41 B.L.R. 295 (Ont. S.C.).

unnecessary duplication of efforts and expense, by staying non-referred claims and parties pending the conclusion of the arbitration.

14. CAN THE MODEL LAW OVERCOME JUDICIAL CONSERVATISM?

The effect of the adoption of the Model Law and New York Convention has not been the removal of court obstruction of arbitrations. With the possible exception of the unfortunate Art.1(2), the Model Law and the New York Convention provide the necessary framework for the creation of a liberal regime for international commercial arbitration. What is largely missing, so far, is the appreciation by the courts of the policies behind the reforms to the arbitration laws, and of the necessity of applying liberal international standards under these laws. The laws cannot do the job all on their own, the judges must do their part by eschewing old attitudes and refusing to fall back on old precedents like Heyman v. Darwins⁸⁹⁹, which remains firmly rooted in the arbitration law firmament and the judicial mindset.

If one needs an illustration of the importance of judicial attitude outweighing the importance of the provisions of the law applied, one need only contrast the decisions of the P.E.I. Supreme Court in Tweedy v. Ross⁹⁰⁰ and of the Alberta Court of Queen's Bench in

⁸⁹⁹ [1942] A.C. 356 (H.L.).

⁹⁰⁰ Tweedy v. Ross, 86 Nfld. & P.E.I.R. 164, [1990] P.E.I.J. No. 123.

McCulloch v. Peat Marwick.⁹⁰¹ Both involved suits commenced against former partners and claims in contract and in tort.

In Tweedy v. Ross⁹⁰², the law applied was the Arbitration Act, 1889 form of domestic arbitration statute, filled with judicial discretion as to whether to stay proceedings in favour of arbitration. The Plaintiff was a lawyer suing his former partners. The Defendants applied for a stay in favour of arbitration on the strength of the arbitration clause in the partnership agreement. The court was met with a barrage of reasons from the Plaintiff intended to show why it would not be proper to stay the Action. Virtually no stone was unturned in a search of such reasons. The court relied on Heyman v. Darwins⁹⁰³ and Stokes-Stephens v. McNaught⁹⁰⁴, analyzing these cases not for restrictions on arbitrability and arbitral jurisdiction, but for support for the principle of Kompetenz-Kompetenz and liberal notions of arbitrability. The court concluded that all the Plaintiff's allegations were arguably within the arbitration agreement, and willingly deferred to the arbitrator's jurisdiction to construe the existence, validity, and scope of the arbitration clause. The Action was stayed.

⁹⁰¹ 124 A.R. 267, 1 C.P.C. (3d) 149, [1991] A.J. No.1062.

⁹⁰² Supra.

⁹⁰³ Supra.

⁹⁰⁴ Stokes-Stephens Oil Co. v. McNaught, (1918) 57 S.C.R. 549.

In McCulloch v. Peat Marwick⁹⁰⁵, the court had the benefit of the Model Law in the form of the Uniform Arbitration Act adopted as the Alberta Arbitration Act, 1991. The Plaintiff and Defendants were chartered accountants. The suit alleged contract and tort claims. The Defendants responded by applying for a referral to arbitration. The court treated the Uniform Arbitration Act as an amalgam of the worst features of the Arbitration Act, 1889 and the worst of the common law. The court ruled that referrals to arbitration were not mandatory, but discretionary. The court construed the arbitration agreement narrowly, and ruled that the tort claims were outside its scope, confusing the questions of arbitrability and scope of the arbitration clause in the process. The court then ruled that the presence of non-arbitrable claims meant that nothing could go to arbitration. In this last ruling, the court lumped together all the Plaintiff's claims as one dispute, and ruled:

"The allegations of conspiracy take the matter being disputed outside the arbitration agreement and therefore the dispute is not capable of being the subject of arbitration under Alberta law."

S.7⁹⁰⁶ of the new Act was analyzed as reflecting the criteria in

⁹⁰⁵ Supra.

⁹⁰⁶ S.7 of the Alberta Arbitration Act, 1991 reads, in part:

7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter in dispute to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

(2) The court may refuse to stay the proceeding in only the following cases:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid;

(c) the subject-matter of the dispute is not capable of being the subject of arbitration under Alberta law;

Heyman v Darwins⁹⁰⁷ as to prerequisites to the court finding a valid arbitration agreement covering the matters in dispute, and as to judicial discretion as to a stay once the applicable arbitration agreement was found. The court concluded by stating that it was undesirable to split the matter between the court and the arbitrators, "It makes much more sense to have a dispute between the parties settled by one mechanism..." The referral to arbitration was refused.

Thus, under the 1889 form there is an enlightened decision deferring to arbitral jurisdiction, while under the Model Law there is a blast from the past. The Model Law could not save the arbitration agreement in McCulloch v. Peat Marwick⁹⁰⁸ when faced with a judge determined to apply all the old notions hostile to arbitration. The difference between the two cases was judicial attitude.

15. KUDOS AMONG THE BRICKBATS

Some cases show admirable recognition, and regard for, arbitral autonomy, in considering applications for referral to arbitration. In Rio Algom v. Sammi Steel Co.⁹⁰⁹, Rio Algom applied for an order staying arbitration until the court determined arbitral

(d) the motion was brought with undue delay;
(e) the matter is a proper one for default or summary judgment.

⁹⁰⁷ Supra.

⁹⁰⁸ Supra.

⁹⁰⁹ Rio Algom v. Sammi Steel Co., (1991) 47 C.P.C. (2d) 251.

jurisdiction. Justice Kane in the court of first instance ruled that only the court could determine what the parties had agreed to submit to arbitration, and any other issues of law, and stayed the arbitration while referring issues of law to trial. Justice Henry of The Ontario Court of Justice, General Division, granted leave to appeal. In doing so, Justice Henry defined the issue before the court as whether issues defining the scope of the arbitration agreement, which raise matters of contract interpretation, ought to be resolved by the courts before the arbitration proceeds, or by the arbitrator in the first instance before resort to the courts. Rio Algom argued a classical Heyman v. Darwins⁹¹⁰ position reflected in M. Loeb Ltd., v. Harzena Holdings Ltd.⁹¹¹; that questions of law and a dispute involving a question of contract interpretation going to the arbitrator's jurisdiction can be determined only by the court, and Justice Kane had accepted and applied that argument.

Justice Henry reviewed Arts.5, 8, and 16 of the Model Law and said:

"What appears to me to be of significance is that the Model Law reflects an emphasis in favour of arbitration in the first instance in international commercial arbitration....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 [under Art.16(3) or 34]. The role of the court before arbitration appears to be confined to

⁹¹⁰ Supra.

⁹¹¹ (1980) 18 C.P.C. 245 (Ont. H.C.) which was discussed at the beginning of the Canadian law section of this thesis as an excellent example of the restrictive approach to arbitration taken by the Canadian courts under the Arbitration Act, 1889 form of provincial arbitration statute.

determining whether the arbitration clause is null and void, inoperative, or incapable of being performed (Article 8) - if not it is mandatory to send the parties to arbitration....It seems to me at least arguable that the matters referred to trial are not matters that permit the intervention of the court in light of Article 5."⁹¹²

Unfortunately, there is no record of the appeal having proceeded. If it had, there exists the chance that the Ontario Court of Appeal would have firmly corked the evil genie of Heyman v. Darwins⁹¹³ within its historic bottle.

Another example of an exemplary judgment on a referral application is that in Arbrella S.A. v. The Aghia Markella.⁹¹⁴ The Plaintiff sued for breach of a charterparty. The Defendant ship had failed to appear in time to load a cargo as required, because the vessel had been detained by the Canadian Coast Guard for alleged breaches of safety regulations. The Defendant applied for a referral to arbitration in London under an arbitration clause in the charterparty. The Plaintiff argued that the arbitration agreement was inoperative because the parties

"did not contemplate, nor could they contemplate, that arbitrators in London could be seized with a dispute relating to whether the Canadian Coast Guard had complied with Canada's treaty obligations and domestic law."

The Plaintiff argued that the determination of such questions was reserved to the Canadian courts. The Plaintiff also relied upon

⁹¹² Rio Algom v. Sammi Steel Co., (1991) 47 C.P.C. (2d) 251, Henry J.

⁹¹³ *Supra*.

⁹¹⁴ Arbrella S.A. v. The Aghia Markella, (1995) F.T.R. 229, [1995] F.C.J. No.723 (Fed. Ct. Trial Div., Apr.28, 1995).

affidavit material containing information obtained from the Coast Guard officers justifying the detention of the vessel.

The court replied with a ruling that it must refer the parties to arbitration unless it found that the arbitration agreement was "null and void, inoperative, or incapable of being performed", the court had no discretion as the terms of Art.8 were indisputably mandatory. The court refused to become involved in considering the bona fides of the Defendant's defenses, or in defining the exact dispute. The court was obviously of the opinion that the fact that the London arbitrators might be called upon to decide upon the propriety of the Canadian Coast Guards interpretation and application of Canadian law did not render the arbitration agreement "inoperative":

"In my view, the issue which the arbitrators in London have to decide is whether the Defendants are in breach of their charter party obligations....Whether the Defendants invoke the alleged unlawful activities of the Canadian Coast Guard or an earthquake, is irrelevant insofar as this application is concerned."⁹¹⁵

Finding a dispute arising out of the charter party agreement, the court referred the parties to arbitration in London.

IX. THE QUEBEC RESPONSE

As noted above⁹¹⁶, Quebec amended its Code of Civil Procedure in 1965, to recognize clauses compromissoires,⁹¹⁷ which had previously

⁹¹⁵ Emphasis added.

⁹¹⁶ Supra, p.131.

⁹¹⁷ Supra, p.130.

been held void as contrary to public policy.⁹¹⁸ The initial response of the Quebec courts to the 1965 amendment was to maintain the "void" rule, since the Quebec Civil Code had not been amended to the same effect.⁹¹⁹

The Quebec Civil Code and Code of Civil Procedure were amended in 1986 to adopt most of the Model Law provisions, with some modifications, and to apply the provisions of the New York Convention to awards.⁹²⁰ Quebec applies no "commercial" or "international" requirement for the recognition of awards. Quebec's laws on arbitration have been hailed as the most enlightened in Canada:

"Quebec has by far the most integrated and visionary arbitration law...Quebec alone of all the provinces recognizes and enforces all awards rendered in any province of Canada and not merely awards of an international nature."⁹²¹

Under Quebec law, the invocation of a clause compromissoire divests the court of jurisdiction. Thus there is no question of the court retaining any discretion as to whether to refer the parties to arbitration or to stay its Action - the court is rendered incompetent to hear the suit. On proof of a valid and applicable

⁹¹⁸ Supra, fn.423.

⁹¹⁹ Supra, fn.429.

⁹²⁰ L. Kos-Rabcewicz-Zubkowski, "Canada", in Int'l Handbook on Commercial Arbitration, Suppl. 10, June, 1989. The Model Law provisions appear in Civil Code, Title XIII A, Arts.1926.1-1926.6; Code of Civil Procedure Book VII, Title 1, Arts.940-947.4. The New York Convention provisions appear in Code of Civil Procedure Book VII, Title II, Arts.948-951.2, in force November 11, 1986.

⁹²¹ Tetley, "Arbitration and Choice of Law", III Tenth International Conference of Maritime Arbitrators, 1991, 9.

clause compromissoire, the court will dismiss its Action outright.⁹²²

The courts of Quebec have not been ousted willingly. Before and after 1986, they have applied strict tests to clauses compromissoires, before ruling them valid. The courts, since 1986, have continued to rely on a 1983 Supreme Court of Canada decision, Zodiak c. Polish,⁹²³ which stands for the proposition that for a clause compromissoire to be valid, it must meet the definition:

"A complete ["parfaite", which imports not only completeness, but implies also "perfect" and "faultless"⁹²⁴] undertaking to arbitrate, described variously as true, real, or formal, is that by which the parties undertake in advance to submit to arbitration any disputes which may arise regarding their contract, and which specifies that the award will be final and binding on the parties."⁹²⁵

The strictness with which the courts have applied this test is evident by a number of decisions of the Quebec Court of Appeal in which the court, since 1986, has refused to recognize arbitration

⁹²² Guilbert c. Empresa de Turismo Nacional & Internacional (Cubatur), [1992] A.Q. No.1835 (Que C.A. Oct.9, 1992).

⁹²³ Zodiak International Productions Inc. v. Polish People's Republic, [1983] 1 S.C.R. 533.

⁹²⁴ Robert-Collins Dictionnaire Francais-Anglais Anglais-Francais, nouvelle edition, 1987.

⁹²⁵ Importations Cimel Ltée c. Pier Augé Produits de Beauté, 9 Q.A.C. 198, [1987] A.Q. No.1876 (Que. C.A. Oct.27, 1987). The case includes a quotation from the judgement of Chouinard J. of the Supreme Court of Canada: "Selon la jurisprudence et les auteurs déjà cités, la notion d'irrevocabilité doit etre clairement exprimé dans la clause pour qu'elle devienne une clause compromissoire parfaite." In Importations Cimel Ltée, "irrevocabilité" is translated into English as "finality", but a perusal of Robert-Collins Dictionnaire Francais-Anglais indicates that "irrevocabilité" imports not only "finality" but "irrevocablity" in English.

which the court, since 1986, has refused to recognize arbitration agreements as clauses compromissoires.⁹²⁶ If the notion of finality is not sufficiently expressed, the arbitration clause will be seen as a mere clause "d'election de for" [forum selection clause], invalidated by s.68 of the Code of Civil Procedure as intended to take away the jurisdiction the Quebec court.⁹²⁷ A clause giving a choice between Cuban courts and arbitration in Cuba was held invalid on this ground.⁹²⁸

Thus, the courts of Quebec do not appear to have seen the 1986 amendments as a complete break from prior practice in recognizing and enforcing arbitration agreements. The restrictive rule in Zodiak v. Polish⁹²⁹ continues to be applied.

X. CONCLUSIONS

⁹²⁶ E.g.: Constuctions et Renovations Willico Inc. (Re), [1993] A.Q. No.75 (Que. C.A. Jan.22, 1993): Although the clause referred to arbitration, it was not "un pacte compromissoire parfait."; Gauthier v. Charny Holdings Inc. [1987] Q.J. No.1807 (Que C.A. Oct.1, 1987); Importations Cimel Ltée c. Pier Augé Produits de Beauté, 9 Q.A.C. (Que C.A. Oct.27, 1987): The clause did not come within the definition of a complete undertaking to arbitrate. The notion of finality had to be expressed for the clause to become a complete undertaking to arbitrate. The clause in question was a clause "d'election de for" [forum selection clause]. S.68 invalidates a clause "d'election de for" whose purpose is to take away the jurisdiction of the Quebec Court.; Guilbert c. Empresa de Turismo Nacional & Internacional (Cubatur), [1992] A.Q. No.1835 (Que C.A.).

⁹²⁷ Importations Cimel Ltée c. Pier Augé Produits de Beauté, 9 Q.A.C. 198 (Que C.A. Oct.27, 1987).

⁹²⁸ Guilbert c. Empresa de Turismo Nacional & Internacional (Cubatur), [1992] A.Q. No.1835 (Que C.A.).

⁹²⁹ Supra.

It has been almost ten years since all the jurisdictions in Canada adopted the Model Law and New York Convention. Their adoption has not resulted in the wholesale rejection of the old regime, which was recognized as hostile to arbitration, in favour of a new regime giving liberal recognition of party and arbitral autonomy in accordance with international standards, as the drafters of the new laws had hoped. The continued application of old attitudes hostile to arbitration, and case precedent reflecting such attitudes, has frustrated those hopes, and in some cases has been contrary to the express provisions of the Model Law. The wealth of international case precedent has been largely ignored, so the decisions of Canadian courts continue to diverge from accepted international norms. Where party choice of law has received any recognition at all, it has not been respected as binding on the parties or the courts. Thus there is no indication, so far, that the courts of Canada will permit the Model Law to be used to give recognition to any supranational system of trade usages or rules of law such as *lex mercatoria*. International commercial arbitration in Canada remains firmly tied to the firmament of municipal choice of law in the judicial mindset.

Not all the decisions of Canadian courts have been dismal failures. Rio Algom v. Sammi Steel Co.⁹³⁰ and Arbrella v. The Aghia Markella⁹³¹ are outstanding examples of courts deferring to arbitral jurisdiction to determine the existence, validity, and

⁹³⁰ *Supra*.

⁹³¹ *Supra*.

scope of arbitration agreements, and to determine whether the parties' disputes fall within the arbitration agreement. The Saskatchewan Court of Appeal recognized, in BWV Investments v. Saskferco⁹³², that the court is not to concern itself with the form of the submission on a referral application. This can be taken to mean the precise definition of disputes and other details of the arbitral scope and procedure are not the concern of the referring court. Appeal courts have, on occasion, overturned denials of referrals and stays⁹³³ and given liberal pronouncements in favour of arbitral autonomy⁹³⁴, but in others they have overturned referrals⁹³⁵ and injected old common-law restrictions on the referral process⁹³⁶. The continued endorsement of Heyman

⁹³² BWV Investments Ltd. v. Saskferco Products Inc., (1994) 119 D.L.R. (4th) 577, [1994] 2 W.W.R. 1 (Sask C.A.).

⁹³³ E.g. The B.C. Court of Appeal in Prince George v. McElhanney Engineering, the Alberta Court of Appeal in Kaverit v. Kone, The Saskatchewan Court of Appeal in BWV Investments v. Saskferco., The Ontario Court of Appeal in Automatic Systems v. Bracknell.

⁹³⁴ E.g. the B.C. Court of Appeal in Quintette, No.363 Dynamic Endeavours v. 34718 B.C. Ltd., and Gulf v. Arochem; The Ontario Court of Appeal in Automatic Systems v. Bracknell, the Federal Court of Appeal in Nanisivik Mines v. Canarctic and Zinc Corp..

⁹³⁵ E.g. the B.C. Court of Appeal in Stancroft Trust v. Can-Asia Capital, and the Federal Court of Appeal in Nanisivik Mines v. Canarctic and Zinc Corp..

⁹³⁶ E.g. the adoption of the interpretation of Heyman v. Darwins as a rejection of Kompetenz-Kompetenz at the stage of referral, in Kaverit v. Kone, Gulf v. Arochem, and Prince George v. McElhanney; the adoption from Heyman v. Darwins of the dicta requiring precise definition of disputes and applying this as a strict prerequisite to entitlement to a referral under Art.8 of the Model Law, in Burlington Northern v. C.N.R., and in Injector Wrap v. Agrico Canada (Man C.A.).

v. Darwins⁹³⁷, particularly its more restrictive dicta relating to precise definition of disputes and its negation of Kompetenz-Kompetenz, is most unfortunate, since the Model Law and New York Convention are based upon a philosophy entirely contrary to that in which Heyman v. Darwins⁹³⁸ is situated. The failure to eschew the restrictive approach reflected in Heyman v. Darwins represents the failure to embrace the present international trend toward viewing international commercial arbitration as an autonomous regime of dispute settlement in which there is to be minimal court involvement, except when enforcing awards.

Worse, the very involvement of the Appeal Courts is undesirable in a regime intended to give easy access to arbitration and automatic enforcement of arbitration agreements. Multiple court proceedings would appear to be the last thing expected or desired by parties entering into arbitration agreements, yet Canada shows at least one example of no less than four court proceedings, spread over a period of more than one year, before a referral to arbitration was gained, and that in a case in which counsel were clever in applying for a referral by way of petition instead of by motion, so that when their application for referral was denied they could appeal as of right and thus avoid an application for leave to appeal.⁹³⁹

⁹³⁷ [1942] A.C. 356 (H.L.).

⁹³⁸ *Supra*.

⁹³⁹ In Automatic Systems v. Bracknell, the court proceedings were as follows: 1. Application for referral to arbitration (denied); 2. Motion by Plaintiff-Respondent to quash appeal since no leave to appeal obtained (Motion denied); 3. The Ontario Court of Appeal allowed the appeal, and referred the matter back to the

Parties to international agreements could be forgiven for looking at the overall record in Canada and deciding that the Model Law as applied in Canada is not a model of success.

XI. SUGGESTIONS FOR REFORM

The author suggests that the most important reforms which should be considered, aside from a reform of judicial attitudes, are with respect to Arts.8, 1(2) and 7(2) of the Model Law.

Consideration should be given to amending Art.8 to ensure that courts give due recognition to the principles of arbitral autonomy and separability when considering applications for referrals to arbitration. A stipulation could be added requiring the court to refer the parties to arbitration where it is arguable that there exists a valid arbitration agreement and that there exists a dispute which falls within that agreement, so that in first instance the arbitral tribunal and not the court: (i) decides upon the existence, validity, and scope of the arbitration agreement; (ii) defines the disputes between the parties; and (iii) determines whether the disputes as found fall within the jurisdiction of the arbitral tribunal. The court would then await its turn to review these matters under Arts.16(3), 34, and 36, if any of the parties

court of first instance to determine whether there was an arbitration agreement and whether the dispute fell within it; and 4. The Ontario Court (General Division) entered into a long judgment construing the arbitration agreement and investigating the nature of the disputes to determine that referral was justified. It would appear that at least one application to court to settle matters of costs might be necessary in the lower court, and perhaps another in the Court of Appeal.

saw fit to argue that the arbitral tribunal had acted in excess of its jurisdiction. Such amendment to Art.8 would lessen the chance that courts would not refer the parties to arbitration, and thus lessen the temptation, to those who wish to avoid arbitration agreements, to commence court proceedings and dare the Defendant to take its chances on an application for a referral to arbitration.

As to appeals from applications for referrals or stays, the U.S. federal Arbitration Act⁹⁴⁰ has a very useful and interesting provision which gives clear support for arbitration. S.16 of the Act provides that an appeal may be taken from a refusal to stay an Action in favour of arbitration or from a refusal of a petition to compel arbitration, but no appeal shall be taken from an order staying an Action in favour of arbitration or from an order compelling arbitration. A provision to the same effect would be desirable in Canadian arbitration law, in the opinion of this author.

Art.1(2) has been used to remove all consideration of the principle of Kompetenz-Kompetenz and to justify the unmitigated application of all the restrictions on arbitration present in the old common law.⁹⁴¹ At a minimum, Art.1(2) should be amended to include Art.5 and Art.16(1) among those provisions which are applicable if the arbitration is to be outside Canada or if the place of arbitration

⁹⁴⁰ 9 U.S.C.S.

⁹⁴¹ Deco Automotive.

is not yet determined. Consideration should be given to including Arts.11-15 (appointment, challenge to, and replacement of arbitrators), 19 (choice of rules of procedure by parties or tribunal), 20 (party choice of place of arbitration), 21 (definition of date of commencement of arbitration), and 28 (choice of rules of law applicable to the dispute) as applicable when: (i) the place of arbitration has not yet been determined; (ii) there is no designation of an institution such as the International Chamber of Commerce which has the power under its rules to decide the place of arbitration; and (iii) there is no other court which appears to be better situated to assist in the enforcement of the arbitration agreement. The inclusion of these latter rules would permit the courts of Canada to assist in the enforcement of the arbitration agreement where no other court assistance is available. It also seems desirable that Art.27 (court assistance in obtaining evidence) be made available to arbitrations taking place outside Canada. Art.16(3) (court review of interim arbitral findings as to jurisdiction) should not be made applicable to any arbitration taking place outside Canada, such reviews should be left to the courts of the place of arbitration. Art.34 (application to set aside an award) should not be applicable by the courts of Canada unless the arbitration has taken place in Canada or, perhaps, if the arbitration took place under the curial laws of Canada, in keeping with Art.V(1)(e) of the New York Convention. However, in the case of an award from an arbitration which took place outside Canada under Canadian curial law, if (i) the parties have chosen a place of arbitration such as Belgium, in which no court will

entertain an application to set aside an award not involving a Belgian; (ii) a setting aside procedure is available in the place where the arbitration took place; (iii) a setting aside procedure has been commenced or completed elsewhere; or (iv) the parties have expressly agreed that there is to be no application to set aside any award rendered pursuant to their arbitration agreement, the author suggests the Canadian courts should not have the jurisdiction to entertain an application to set aside the award.

Art.7(2) could usefully be amended in accordance with the draft English Bill⁹⁴² so that it would include written arbitration agreements incorporated by reference into forms of contracts not signed by both parties, such as Bills of Lading and insurance contracts, and even contracts formed by electronic exchanges not signed by any party, and contracts by parol. This would leave the requirement of a written arbitration agreement for proof to the court, and to the arbitrators, of its existence and terms, but remove the anomalous situation of contracts recognized as valid in law not being recognized as giving validity to arbitration clauses contained therein, or incorporated by reference. Arguably, the strict requirement that the arbitration agreement, or the contract containing it, be signed by the parties is an unduly restrictive interpretation of Art.7(2) of the Model Law and Art.II(2) of the New York Convention.

⁹⁴² See fn.856, *supra*.

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