《Canadian Experience of
Alternative Dispute Resolution》

Forging A New Judicial Attitude to International Commercial Arbitration in Canada;

the UNCITRAL Model Law in Canadian Courts*

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1. Introduction

As most people know, Canada was the first country to reform its arbitration laws on the basis of the 1986 UNCITRAL Model Law on International Commercial Arbitration(the Model-Law).[1] Since the beginning of the process of implementation of the Model Law in Canada, in 1986, some 17 other

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[1] The Model Law as adopted by the United Nations Commission on International Trade Law on June 21, 1985 by General Assembly Resolution A/40/17, 40 GAOR Supp. No. 53, A/40/53.

countries(and eight U.S. states) have also adopted the Model Law.[2] Of course, none of these adoptions into domestic law of the Model Law has been identical and, along with local judicial decisions, these differences have provided a rich pattern of varying interpretations of the Model Law.

Like most significant and sudden legal change, the Canadian implementation of the Model Law reflected a combination of powerful social and legal forces. Before 1986, Canada had resisted signing treaties and agreements dealing with private law matters because their implementation into Canadian law often required provincial legislation, which the central government could not assume would be forthcoming. In the arbitration field, the pre-eminent example of this problem was Canada not being party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[3] The period during which the Model Law was adopted by Canada also saw Canaca negotiating a free trade agreement with the United States-this agreement led to the North American Free Trade Agreement of 1993 and other more recent trade accords with Chile and Israel. All of these developments were consistent with an increased consciousness in Canada of the world-wide pressures of globalization and the utility of harmonized legal rules in particular.[4]

As far as the Model Law was concerned it has now been adopted in all 13 Canadian jurisdictions-the ten provinces, the two territories and the federal jurisdiction. In 11 of these jurisdictions the Model Law has been adopted in the form of a schedule at the end of a short enactment. Two provinces enacted statutes which incorporate the Model Law into the wording of the Act itself (British Columbia and Quebec). Quebec modified provisions in its Civil Code and Code of Civil Procedure that relate to arbitration.[5]

A similar pattern of implementation occurred in the case of the New York Convention. Canada acceded to the New York Convention on May 12, 1986 and the Convention became binding on Canada on August 10, 1986. The federal Parliament and all the provinces and territories have since implemented the New

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[2] These 17 countries are: Cyprus, Bulgaria, Nigeria, Australia, Hong Kong, Scotland, Peru, Bermuda, Russian Federation, Mexico, Tunisia, Egypt, Ukraine, Bahrain, Singapore, Hungary and New Zealand. The U.S. states whose laws are based on the Model Law are: California, Connecticut, Florida, Georgia, North Carolina, Ohio, Oregon and Texas.

[3] U.N Doc. No E/Conf. 26/9 Rev. 1.

[4] See D.P. Wood, "Regulation in the Single Global Market: From Anarchy to World Federation" (1997) 23 Ohio Northern Univ. Law Rev. 297 and W. Turning, "Globalization and Legal Theory: Some Local Implications" (1996) 49 Current Legal Problems 1.

[5] An Act to amend the Civil Code and the Code of Civil Procedure in respect of arbitration, S.Q. 1986, c. 73.

York Convention in the form of legislation. The format of these implementations varies. Some jurisdictions(such as British Columbia) have separate statutes for the New York Convention and the Model Law. As in the case of the Model Law, however, the New York Convention is usually implemented as a schedule to a short Act. Ontario has implemented the New York Convention and the Model Law in a single statute.[6]

The Canadian arbitration experience is unique in several respects. First, being a federation, Canada has implemented the Model Law and the New York Convention with different modifications in several jurisdictions. Second, by having both civil law and common law jurisdictions, Canada presents a unique instance of how these international codes work in both systems. Finally, due to the constitutional characteristics referred to above, Canada delayed accession to the New York Convention and so had the opportunity to implement it simultaneously with the Model Law.

2. The Application of the Model Law to Domestic Arbitrations

Article 1(1) of the Model Law provides that it "applies to international commercial arbitration..." Paragraphs (3) and (4) of Article 1 define the circumstances in which an arbitration is presumed to be international within the meaning of Article 1(1).[7]

As is the case with much of the Model Law it is possible to find variations in the way Article 1 was adopted by Canadian jurisdictions. Thus, the federal Commercial Arbitration Act applies to both international and domestic arbitrations.[8] All the common law provinces have separate laws for domestic and international arbitrations. The Quebec law (like that of Canada) applies to both domestic and international arbitration. Several provinces also took the opportunity of the introduction of the Model Law to amend their laws relating to domestic arbitration along the lines of the Model Law. These provinces were British Columbia, New Brunswick, Alberta, Saskatchewan and Ontario.[9] The remaining

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[6] International Commercial Arbitration Act, R.S.O. 1990, c. I-9.

[7] For a detailed discussion of the definitional problem, see I.F. Dore, Arbitration and Conciliation Under the UNCITRAL Rules: A Textual Analysis (Nijhoff, 1986), at pp. 90-96.

[8] S.C. 1986, c. 22.

[9] British Columbia was the first province to enact legislation based on the Model Law and applicable to domestic arbitration. The next province to enact legislation applying the Model Law to domestic arbitrations was Alberta. This law was based on the 1988 report of the Alberta Institute of Law Research and Reform entitled Proposals for a New Alberta Arbitration

four common law provinces retain a domestic arbitration statute based on the 1889 English Act.

There is no indication that in drafting the Model Law it was intended that its provisions would apply to domestic as well as international arbitrations. Courts in many countries have rationalized their liberal application of laws based on the Model Law in terms of a policy favouring arbitration over adjudication of international business disputes.[10] Thus, the United States Supreme Court in Mitsubishi Motors v. Solar Chrysler Plymouth said:

> "As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national Courts will need to shake off the old judicial hostility to arbitration'... To this extent, at least, it will be necessary for national Courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration."[11]

At the same time as countries were amending their arbitration laws to incorporate variations on the Model Law, there was growing interest in forms of alternate dispute resolution (such as arbitration) being used to resolve domestic disputes. As the survey of Canadian legislation above illustrates, many Canadian jurisdictions took advantage of the availability of the Model law to enact changes to their laws applicable to domestic, as well as international, disputes. This reform was also driven by a widespread perception that most Canadian domestic arbitration laws (based on the 1889 English Act) were in desperate need of modernization. In addition, the utilization of the Model Law for both international and domestic arbitrations secures a useful level of uniformity and a developing body of judicial interpretation by the courts which is larger than it would be if the Model Law has been restricted to international arbitrations.

An alternative to applying the Model Law to both international and domestic arbitrations is to enact an "opt-in" provision under which parties to what would not otherwise be an international arbitration could agree to be subject to the Model Law. This is the approach adopted by Scotland where the law provides as follows:

Act. In 1991, the Uniform Law Conference of Canada adopted a Uniform Arbitration Act, which used the Model Law as a basis for legislation applicable to domestic arbitrations. Subsequently, Alberta, Ontario, Saskatchewan and New Brunswick adopted the Uniform Act.

[10] See F. Davidson, "International Commercial Arbitration – the United Kingdom and the UNCITRAL Model Law" [1990] Jo. of Business Law 480, at 492-493.

[11] 417 U.S. 614; 87 L.Ed 2d 444, 105 S. Ct. 334 (1985) L.Ed. at 462-463.

> "The parties to an arbitration agreement may, notwithstanding that the arbitration would not be an international commercial arbitration within the meaning of article 1 of the Model Law as set out in Schedule 7 to this Act, agree that the Model Law as set out in that Schedule shall apply, and in such a case the Model Law as so set out shall apply to that arbitration."[12]

The Scottish law is a modification of Article 1(3)(c) of the Model Law which provides an arbitration is "international" if "the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country." This provision was the subject of considerable debate among the Working Group set up to consider the desirability of a Model Law. Despite some concerns about Article 1(3)(c) it was adopted throughout Canada (except in Ontario).[13] One such concern is the artificiality of an agreement turning a purely domestic arbitration agreement between parties in the same country into an "international" arrangement. On the other hand if the parties want the Model Law to govern disputes between them it seems appropriate for them to be able to do so. These problems would be eliminated, however, if the Model Law is adopted for both international and domestic arbitrations.

Any jurisdiction which is considering adopting the Model Law for the purpose of domestic arbitrations needs to consider two important factors. First, the Model Law represented the combined efforts of persons from various jurisdictions, with very different legal traditions. The Model Law, therefore, contains concepts which local courts may not be either familiar or comfortable with.[14] This may be acceptable in the case of arbitrations with a foreign element, but less palatable for purely domestic disputes. Second, the Model Law was specifically designed to override the significance of any one country's solutions to dispute resolution in favour of a set of rules aimed at disputes which are international in character. The reasons favouring arbitration and a reduced role for the Courts in the case of such international disputes may have less weight when the conflict is purely domestic in nature.

The advantages of applying the Model Law to domestic as well as international arbitration were the subject of a discussion paper on arbitration by the New Zealand Law Commission. The report states:

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[12] Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s. 66(4).

[13] The Ontario legislation provides that an arbitration in Ontario between parties carrying on business there is not international only because the parties have expressly agreed that the arbitration agreement refers to more than one country; International Commercial Arbitration Act, S.O. 1988, c. 30, s. 1(3)(c).

[14] An example of such a concept is the principle "Kompetenz-Kompetenz" contained in Article 16 of the Model Law, and see Dore, supra n. 7., at pp. 111-113.

> "However at the time the Model Law was adopted by UNCITRAL it was recognised that its principles could, with adaptation, be extended also to domestic arbitration. This is a view we are inclined to share. There may be both theoretical and practical reasons for drawing the balance between private autonomy and public interest differently in the international case, but this need not result in completely separate laws for international and domestic arbitration. Essentially there is no fundamental distinction between the two: both are based on contract, and both represent an attempt to find an alternative form of dispute resolution which requires a certain degree of autonomy to be truly effective. In the domestic case as well, national law may be of little relevance to the parties' commercial interests. And domestic parties too may have some experience of arbitration. For the sake of conceptual coherence and consistency there are advantages in having the same arbitration law wherever possible. There are also significant practical reasons for not taking a dualistic approach, including the difficulty in defining precisely where the divicing line comes between "international" and "domestic" arbitrations. Thus, the approach that is adopted in Part II of this paper is to consider a new Arbitration Act as being potentially applicable to both domestic and international arbitra-tion but possibly subject to variation for those aspects where separate treatment can be justified."[15]

These comments suggest that while the Model Law may not necessarily be suitable as a code for domestic arbitrations in all states, it does provide a valid alternative to other possible sets of rules.

Whether the Model Law is a useful basis for reforming the law applicable to domestic arbitration may depend on a number of factors. One important element is the overall level of sophistication of the population and the national legal system. The less developed these factors are, the less desirable it may be to reduce the level of judicial control over the resolution of disputes by non-judicial means. Another element which needs to be weighed is the attitude of the judiciary towards arbitration. If there has been a history of judicial hostility towards arbitration, there may be more justification in adopting rules which clarify more unequivocally the extent that private parties can secure resolution of their disagreements outside the courts. Ultimately, the desirability of a country adopting the Model Law for domestic, as well as international, arbitrations depends on a careful assessment of the suitability of the Model Law in terms of the characteristics, priorities and needs of the country concerned.

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[15] See Arbitration: A Discussion Paper (Preliminary Paper No. 7). New Zealand Law Commission, Wellington, 1988, p. 10. A similar approach has been suggested in Canada; see Uniform Law Conference of Canada: Proceedings of the 71st Annual Meeting (Yellowknife, 1989) Appendix B: Domestic Arbitration, 114.

3. The Restriction of the Model Law to Commercial Arbitration

The Model Law applies only to international arbitrations that are commercial in nature.[16] This limitation reflects a distinction sometimes made in civil law countries—but not usually in common law jurisdictions where the term "commercial" has no understood precise legal meaning. The word "commercial" is very widely defined in a footnote to the Model Law, with the intention of expanding the meaning of the term for civil law jurisdictions but, at the same time, ensuring arbitrations involving state interests (and the scope for sovereign immunity) could be excluded.[17]

Most international arbitrations will be commercial in character and the unstated assumption is often that they usually involve parties of relatively equally bargaining strength. This may not however necessarily be the case.

In a recent Canadian case, the plaintiff was employed as a regional sales manager by the defendant German corporation. The employment contract contained an arbitration clause providing for arbitration in the American state of Georgia.[18] This was in anticipation of the corporation establishing a wholly-owned subsidiary in Georgia. Upon the subsidiary corporation being incorporated the contract was assigned to the Georgia corporation, which then terminated the contract. The plaintiff obtained an order restraining the defendants from removing assets from the province of Alberta. The defendants moved for the dispute to be remitted to arbitration in Georgia. The defendants argued that the arbitration was an "international commercial arbitration agreement" within the meaning of the Alberta International Commercial Arbitration Act, which implements the Model Law.[19] The Alberta Court of Queen's Bench concluded that the contract was a contract of employment giving rise to the status of master and servant and was not a contract for services to be performed either by an agent or an independent contractor. Because the relationship was not found to be commercial in nature it was held to be outside the scope of the International Commercial Arbitration Act.

The Borowski case is a useful reminder that there may be significant policy reasons for not applying the Model Law to non-commercial international arbitrations—particularly where the contract of which the arbitration agreement is part, is a contract of adhesion between unequal parties, one of whom may need the additional protection adjudication could afford. It is perhaps these kinds of considerations that led all Canadian jurisdictions (except Quebec) to opt for a

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[16] Article 1(1).

[17] Dore, supra, n. 7, pp. 90-91.

[18] Browski v. Heinrich Fiedler Perforiertechnik GmbH (1994) 158 A.R. 213; (1994) 10 W.W.R. 623.

[19] S.A. 1986, c. 1-6.6.

commercial reservation in respect of foreign awards sought to be enforced under the New York Convention.

A recent decision of the Court of Appeal of British Columbia also raised an interesting fact pattern in relation to consideration of the Model Law. In The Ship "Oceanic Mindora" the plaintiff was a Philippine seaman who was injured during a lifeboat drill on a foreign ship moored in Vancouver harbor.[20] Under his employment contract disputes arising out of his employment contract were to be adjudicated according to a Philippine administrative procedure. The issue was whether the British Columbia courts should stay the Canadian claim on the basis that the employment contract excluded a claim in tort in British Columbia. The Court of Appeal concluded that the terms of the contract bound the plaintiff not to pursue tort claims in British Columbia and stayed the proceedings. In doing so, the Court reasoned that there was no good reason to treat choice of jurisdiction clauses differently from arbitration agreements, citing American and English case law.[21] The Court also referred to Article 8 of the Model Law:

> "Section 8 of British Columbia's International Commercial Arbitration Act, S.B.C. 1986, c. 14 and article 8 of the Commercial Arbitration Code, a schedule to the federal Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.), require Courts, upon application, to stay proceedings brought in relation to a matter intended by the parties to be submitted to arbitration. The mandatory language in these provisions reveals that there is a clear legislative intent to uphold agreements between parties to international contracts that disputes will be resolved in a specific forum. Since forum selection clauses are fundamentally similar to arbitration agreements, as recognized by the authorities above-cited, there is no reason for forum selection clauses not to be treated in a manner consistent with the deference shown to arbitration agreements. Such deference to forum selection clauses achieves greater international commercial certainty, shows respect for the agreements that the parties have signed, and is consistent with the principle of international comity."[22]

While the result in Oceanic Mindora may be correct in terms of the law applicable to choice of forum clauses the judgment is perhaps questionable insofar as it equates international commercial agreements with contracts of employment. Not only may the latter be outside the scope of the Model Law, but it is debatable whether the deference to party autonomy that is a fundamental principle of the

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[20] (1996) 26 B.C.L.R. (3d) (B.C.C.A.).

[21] The cases cited were Scherk v. Alberto-Culver Co., 417 U.S. 506, 41 L.Ed. 270 at 280 (1974) Vimar Seguros Y Reaseturos, S.A. v. Sky Reefer, [1995] A.M.C. 1817, at 1832 (U.S.S.C.) and "Athenee" (The) (Cargo Owners) v. "Athenee" (1992), 11 Lloyd's Rep. 6 at 6 (C.A.)

[22] Supra n. 20, at p. 152

Model Law should apply to arbitration agreements in contracts of employment involving unequal parties.

4. Judicial Consolidation of Arbitrations

Consolidation of arbitrations by court order is not expressly provided for anywhere in the Model Law. Most Canadian legislation implementing the Model Law includes provision for the consolidation of international commercial arbitration. Section 27 of the British Columbia International Commercial Arbitration Act provides as follows:

> (2) If the parties to 2 or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, the Supreme Court may, on application by one party with the consent of all the other parties to those arbitration agreements, do one or more of the following:
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> (a) order the arbitrations to be consolidated on terms the Court considers just and necessary;
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> (b) if all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with section 11(8);
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> (c) if all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.
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> (3) Nothing in this section is to be construed as preventing the parties to 2 or more arbitrations from agreeing to consolidate those arbitrations and taking any steps that are necessary to effect that consolidation.[23]

It is, of course, possible for parties to agree to consolidate their arbitrations without seeking judicial assistance. It is unlikely that any legal system limits this option, which is, of course, compatible with the principle of party autonomy underlying the Model Law. The main purpose of a provision like section 27(2) and (3) is to give a court power to facilitate and perfect a decision to consolidate, through ordering the terms on which consolidation is to occur and other matters.

Any legal system considering a provision for consolidation of arbitrations needs to consider the balance between the efficiency objectives that consolidation may achieve (particularly the avoidance of additional expenses arising from repetition of evidence and arguments) and the risk that consolidation may undermine the likelihood that a particular claim will be effectively pursued (such as through a loss of confidentiality). Obviously, if the parties' consent is required before any consolidation procedure comes into force, there is presumably less risk that any disadvantages arising from consolidation will arise without the parties

[23] These provisions were based on s. 6B of the Hong Kong Arbitration Ordinance.

being aware of them in advance. In the case of international commercial arbitration the parties may be especially reluctant to have to submit to local courts for a determination as to whether consolidation should be ordered. They may not even be willing for an arbitral tribunal to have such jurisdiction.[24] This unwillingness should be less of a factor in domestic arbitrations. Thus the New Zealand Law Commission Report on Arbitration recommended that provisions on consolidation apply to domestic arbitrations (unless opted out of) but not apply to international arbitrations (unless expressly opted into).[25]

The New Zealand consolidation provision is based on the Australian Uniform Commercial Arbitration Act (s. 26) and gives arbitration tribunals the power to rule in favour of consolidation, with recourse to the courts should they fail to do so or if their orders are inconsistent. Consolidation orders can only be made where a common question of law or fact arises in all of the proceedings or the relief claimed arises out of the same transaction or series of transactions, or for some other reason. Not all of the parties need be common to all of the proceedings.

A common problem with consolidation arises when one or more of the parties to two or more arbitration agreements oppose an attempt at consolidation that is supported by another party. The efficacy of the Australian provision is that it prevents any one party frustrating a worthwhile attempt at consolidation by withholding agreement on this issue. By giving the courts only a residual jurisdiction, the autonomy of the arbitration tribunal is preserved to the greatest extent compatible with the efficiency of consolidation.

The most risky aspect of consolidation is that it becomes complicated and costly in terms of the multiplicity of parties and issues involved. There is evidence that court applications for consolidation have been misused as a delaying tactic in the United States.[26] This experience suggests that consolidation should be restricted in international arbitrations to cases where the parties have agreed to it in advance. Whether or not this should be accompanied by judicial supervision (as in British Columbia) ultimately depends on the level of confidence present in the jurisdiction regarding the courts sympathy with facilitating the arbitral process.

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[24] See Supra, n. 15, at p. 39.

[25] See New Zealand Law Commission Report in Arbitration (No. 20) (Wellington, 1991), at pp. 212-218.

[26] See Hascher, "Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration", 1 Jo. of Int. Arb. 127 (1984) and Branson and Wallace, "Court Ordered Consolidated Arbitration in the United States, Recent Authority Assures the Parties a Choice", 5 Jo. of Int. Arb. 91 (1988).

5. The Relationship of the Model Law to Other Domestic Laws

While the Model Law stands alone as an international code for commercial arbitration, any introduction of it into a domestic legal system necessitates consideration of how it both affects and is affected by the other rules of that system. Canadian experience shows how results anticipated under the Model Law can change because of other legislation and rules.

One instance of unanticipated complexity as a result of the interface of the Model Law and other domestic legislation has been a group of cases dealing with builders' liens statutes. The concern in these cases has been the risk that arbitration might undermine the parties' ability to preserve their statutory lien rights. In most of these cases Canadian courts have managed to preserve the arbitration agreement, without compromising the separate protection of statutory lienholders.[27]

A particularly difficult problem has been whether, notwithstanding the Model Law, courts can use their general powers to stay proceedings under the Rules of Court (which govern civil procedure in common law provinces) or the Federal Court Act (in the case of the federal Courts).[28]

There have been two Canadian decisions on this question which have gone in different directions.

First, in Navionics Inc. v. Flota Maritima Mexicana S.A. et al[29] the defendant had filed a statement of defence before requesting a stay of proceedings, based on Article 8 of the Model Law. Because Article 8 does not require a Court to grant a stay after submission by the defendant of his "first statement on the substance of the dispute", the Court refused the stay. It then proceeded, however, to grant one on the basis of its separate discretion under the Federal Court Act.

In another case, Stancroft Trust Ltd. v. Can-Asia Capital Co.[30] the Court of Appeal of British Columbia refused to use the Rules of Court to achieve a similar result. Two of the defendants have entered appearances and, therefore, were precluded from seeking a stay under Article 8. A third defendant had not appeared and was, therefore, granted an Article 8 stay. The first two defendants then sought and obtained a stay under the Supreme Court Rules. On appeal, the Court of Appeal of British Columbia ruled that if a stay under Article 8 of the Model Law was not possible, the Rules of Court could not be used to undermine

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[27] See Kvaerner Enviropower Inc. v. Tannar Industries Ltd. (1994) 157 A.R. 363; [1994] 9 W.W.R. 228 (Alta. Q.B.) and H.C. Alvarez, "Recent Developments in the Area of Commercial Arbitration", (1994) Joint Meeting of the Alternative Dispute Resolution, Business and Civil Litigation Sections; Canadian Bar Association, p. 3.

[28] See Federal Court Act R.S.C. (1985) c.F7, s. 50.

[29] (1989) 26 F.T.R. 148 (T.D.).

[30] (1990) 67 D.L.R. (4th) 131 (B.C.C.A.)

the specificity of the Model Law. There are several reasons for preferring this approach to the decision in Navionics. First, it is a principle of statutory construction that specific statutory provisions(the Model Law) prevail over generally-worded ones(the Rules of Courts). Second, it would undermine the carefully crafted wording of Article 8 to use a parallel provision(not specifically framed with international commercial arbitration in mind) to undermine its policy on staying judicial proceedings.

6. Recent Canadian Decisions on the Model Law

(a) Stays of Judicial Proceedings (Article 8)

As has been the case ever since the enactment of the Model Law, or statutes reflecting provisions of the Model Law, into Canadian arbitration legislation, by far the most numerous judicial rulings have involved applications for stays of proceedings on the basis that the parties have already agreed to arbitrate their differences. The response of the courts to these applications has provided an accurate measure of the extent to which Canadian judges are willing to uphold such agreements to arbitrate.

(i) The Scope of the Arbitration Clause

One of the most problematic issues for Canadian judges has been examining whether an arbitration agreement is wide enough in scope that it precludes resort to the kind of proceedings attempted by the party opposing the stay application. For instance, in Gulf Canada Resources Ltd. v. Arochem International Ltd.[31] the British Columbia Court of Appeal suggests that the court can rule on the issue of what it is that the parties have agreed to submit to arbitration. In so doing the Court may seem to override the jurisdiction provided on this issue that is reserved for the arbitral tribunal by Article 16 of the Model Law.[32]

In Traff v. Evancic[33] the plaintiffs brought proceedings against the defendants for fraud and breach of trust in relation to an investment scheme. Two Bahamian corporations (also served in the action) sought an order staying the proceedings against them. While the proceedings mainly concerned allegations of

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[31] (1992) 66 B.C.L.R. (2d) 113 (B.C.C.A.)

[32] See R.K. Paterson, Implementing the UNCITRAL Model Law: The Canadian Experience", 10 Jo. of Int Arb. 29, at 42, (1993).

[33] Unreported Supreme Court of British Columbia (Saunders J. in Chambers) (9 May, 1995).

fraud, the plaintiff also sought an accounting under agreements relating to the investment scheme and which contained an arbitration agreement. The British Columbia Supreme Court granted a stay, applying Gulf Canada, on the basis that one of the issues before the Court was in respect of a matter agreed to be arbitrated.

Despite the argument that the scope of the arbitration agreement is not a proper concern of the courts, Canadian judges continue to engage in analysis of the scope of the arbitration agreement. Thus, in Crystal Rose Home Ltd. v. Alberta New Home Warranty Program[34] the Alberta Court of Queen's Bench found that an arbitration clause applicable to disputes "relating to a contract" was not necessarily limited to claims for breach of that contract. The plaintiff was a member of the defendant company. The defendant terminated the plaintiff's membership. The contract between both parties provided for arbitration of any dispute "with respect to any matter in relation to this agreement". The Court concluded the arbitration clause was not limited to claims for breach of contract, but would extend, for instance, to a claim in tort for which the existence of the contract was a relevant fact.

Interpretation of the scope of an arbitration agreement by the courts has led to the refusal of stay orders in two recent cases. In McCulloch v. Peat Marwick Thorne-T[35] the Alberta Court of Queen's Bench refused a stay in respect of proceedings for tortious conspiracy and loss of reputation because it found these claims unrelated to a partnership agreement that contained a clause to arbitrate differences arising under it. In T1T2 Limited Partnership v. Canada[36] the Ontario Court of Justice found that an agreement to arbitrate differences except those involving questions of law, excluded the arbitration of claims which would involve the application of legal principles to a set of facts. Even though the claims at issue did not involve "pure law" they included questions of law and, therefore, were outside the scope of the arbitration agreement.

Another decision of the British Columbia Court of Appeal (since Gulf Canada) displays a special sensitivity to the risks of judicial interference with the arbitral process. In The City of Prince George v. A.L. Sims Sons Ltd.[37] Sims entered into a construction contract with Prince George. The contract contained an arbitration clause. Prince George nominated an engineering services company (McElhanney) as a consultant under the contract but there was no arbitration

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[34] Unreported, Alberta Court of Queen's Bench (Master Funduk) (23 Nov., 1994).

[35] [1992] 1 Alta. L.R. 3d 53 (Alberta Ct. of Q.B.). This was the first case under the new Alberta statute applicable to domestic arbitrations, but based on the Model Law; Arbitration Act S.A. 1991, c. A-43.1.

[36] Unreported, Ontario Court of Justice-General Division, Borins J.) (November 10, 1994).

[37] [1995] 9 W.W.R. 503 (B.C.C.A.)

clause in this contract. Prince George then sued Sims and McElhanney and Sims applied for a stay of proceedings.[38] The Court of Appeal found that, as a general principle, the presence of multiple parties and multiple issues which are interrelated and where some, but not all, of the defendants are bound by an arbitration clause, does not mean that that clause cannot be invoked by those party to it.

The Court of Appeal then considered the question of its residual discretion to refuse a stay and cited its earlier decision in Gulf Canada.[39] It criticized the trial court in Prince George for its interpretation of Gulf Canada, which, the appeal court found, only conferred a residual discretion to refuse a stay of proceedings when a party clearly established that it was not privy to an arbitration agreement.[40] The Court of Appeal considered that if it was merely arguable that a party was privy to such an agreement then the court should grant a stay so that the issue could be resolved in the arbitral proceedings themselves. This approach goes some way to reconcile the criticism of Gulf Canada set out above with the reality of the Court's position that, lawfully seized of the issue of whether to grant a stay, it must engage in some sort of interpretation of the arbitration agreement.

In January 1997, the Supreme Court of Canada delivered its first opinion in a case dealing with the new Canadian arbitration legislation. In Canadian National Railway Company v. Burlington Northern Railroad Company, the Supreme Court unanimously adopted the reasons of the dissenting judge (Cumming, J.A.) in the British Columbia Court of Appeal below.[41] The case involved an application for a stay under Article 8 of the Model Law (as enacted in the federal Commercial Arbitration Code). The reasons of Cumming J.A. included a rejection of an argument that the arbitration agreement was inoperative because federal legislation establishing the National Transportation Agency had displaced the parties' ability to agree to arbitrate their disputes. The appeal judge (and the Supreme Court of Canada) rejected the majority opinion of the British Columbia Court of Appeal that the scope of the power of the courts to grant a stay under Article 8 of the Model Law could be expanded by grounds that the parties to the arbitration agreement had separately agreed upon. The Supreme Court agreed that Article 8 was imperative in mandating that a matter agreed to be arbitrated be referred to arbitration, unless the conditions set out in Article 8 itself could be established. The reasons in support of this conclusion included favourable

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[38] Under Commercial Arbitration Act, S.B.C. 1986, c. 3, s. 15. The cite for this statute is now Commercial Arbitration Act R.S.B.C. (1996) c. 55, s. 15.

[39] Supra, n. 31.

[40] [1995] B.C W.L.D. 684 (Parrett J.).

[41] (1995) 7 B.C.L.R. (3d) 80. The cite for the Supreme Court of Canada judgment is [1997] 1 S.C.R. 5.

reference to Automatic Systems Inc. v. Bracknell[42] and BMV Investments Ltd. v. Saskferco Products Inc.[43], as well as Boart Sweden AB v. NYA Strommes AB.[44]

Unfortunately, the Supreme Court of Canada did not issue its own opinion in this case, but the unqualified approval of the opinion of Cumming J.A. in the court below reveals that the court impliedly favours the liberal use of Article 8 to stay court proceedings in all but the most exceptional cases

(ii) Stays of Proceedings and Builders' Liens Legislation

A recent phenomenon in Canadian arbitration law has been a number of cases involving the relationship between arbitration agreements and statutory schemes protecting the construction industry through a system of lien enforcement procedures. Only some of these cases will be discussed here, but they present a useful example of reconciling dual commitments to facilitating parties' choice of arbitration and ensuring the effectiveness of a specific law.

In Kraener Enviropower v. Tanar Industries Ltd.[45] a contractor hired a sub-contractor who provided a performance and labour and material bond, with an insurance company acting as surety. When the subcontractor failed to pay its suppliers, the insurance company paid their claim under the labour and material bond and took an assignment of the rights of other suppliers. The insurance company and the subcontractor registered liens under the Alberta Builders' Lien Act. The contractor then posted security for the liens which were cancelled. The insurance company then sued to enforce its lien rights. The contractor claimed remedies in tort and contract against the other parties and moved for a stay of proceedings and a reference to arbitration in Maryland under the terms of its subcontract with the subcontractor. The Alberta Court of Queen's Bench referred the issues between the contractor and the subcontractor to arbitration. The court refused to refer the issues between the insurance company and the contractor to arbitration but stayed the former's actions pending the result of the arbitration between the contractor and the subcontractor.

The Court held that the arbitration agreement between the contractor and the subcontractor did not disentitle the subcontractor to enforce its statutory lien rights under Alberta law – nor did the lien legislation prevent arbitration of disputes involving builder's liens. The Court of Appeal of Alberta agreed.[46] The Court of Queens' Bench thought that the applicability of the arbitration agreement

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[42] Infra, n. 44.

[43] Infra, n. 43.

[44] (1988) 41 B.L.R. 286 (B.C.S.Ct.).

[45] (1994) 157 A.R. 363; [1994] 9 W.W.R. 228 (Alberta Ct. of Q.B. and Alberta C.A.).

[46] This was a decision consistent with its earlier ruling in Bird Construction Co. v. Tri-City Interiors (unreported) (Alberta Court of Appeal, Edmonton Registry, May 2, 1996).

did not conflict with the separate protection of the statutory lien rights of the subcontractors.

A similar approach was taken by the Saskatchewan Court of Appeal in BMV Investments Ltd. v. Saskferco Products Inc.[47] A large German engineering and construction firm subcontracted with a Canadian firm. The subcontract provided for arbitration of disputes between the parties in Switzerland. Under the Saskatchewan Builders' Lien Act the subcontractor registered a lien against the project property and brought proceedings against the contractor and the owner (Saskferco), seeking relief under the lien statute and at common law. The contractor then sought a stay under Article 8 of the Model Law. The Saskatchewan Court of Appeal concluded that a builder's lien action was not the sole method available to determine the monies owing in relation to contracts where liens have arisen and, further, that there was no inconsistency between the arbitration agreement and the builders' lien legislation. The Court then ordered a stay of proceedings pending the outcome of the arbitration between the German and the Canadian companies.

In Automatic Systems Inc. v. Bracknell Corp.[48] a Missouri corporation (Automatic) contracted with an Ontario corporation (Bracknell) for the installation of a conveyor system at a Chrysler plant in Ontario. The contract contained an arbitration agreement. Bracknell then claimed a statutory builders lien against Automatic who moved for an order staying the proceeding. The Ontario Court of Appeal found that the lien statute did not forbid arbitration but actually contemplated it. The Court found the Ontario International Commercial Arbitration Act applicable and saw nothing in its provisions preventing the arbitration of a lien claim.

The approach in these cases shows that Canadian courts are cognizant of the needs of parties to secure their lien entitlements but at the same time of a legislature commitment to the efficacy of arbitration to resolve commercial disputes. The law in British Columbia is the same as that in Saskatchewan, Alberta and Ontario.[49] The frequent use of arbitration in construction disputes probably explains the relatively high number of construction lien cases in Canada. Any jurisdiction contemplating enacting the Model Law for domestic arbitrations should try and learn from Canadian experience by considering the fields in which arbitration traffic is high and the possibility that pre-existing legislation may need amendment in light of the introduction of the Model Law.

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[47] [1995] 2 W.W.R. 1 (Sask C.A.)

[48] (1994) 18 O.R. (3d) 257 (Ont. C A.).

[49] See Sandbar Construction Ltd. v. Pacific Parkland Properties Inc. (1992) 66 B.C.L.R. (2d) 225 (B.C.S.Ct.)

(iii) Refusal of a Stay Based on the Applicant's Participation in the Court Proceedings

Apart from deciding whether an applicant for a stay of proceedings is party to an arbitration agreement "in respect of a matter agreed to be submitted to arbitration", a number of recent Canadian cases examine whether an applicant is estopped from seeking a stay based on him or her having taken steps in the proceedings within the meaning of Article 8 of the Model Law. A summary of some recent cases follows:

A. NO. 363 DYNAMIC ENDEAVOURS INC. V. 34718 B.C. LTD. (1993) 81 B.C.L.R. (2D) 359 (C.A.)

Action for declaratory and other relief in respect of a joint venture agreement. The plaintiff commenced proceedings and obtained an order freezing certain funds. The defendant moved for a stay of proceedings based on an arbitration agreement. The plaintiff argued the defendant had taken a step in the proceedings and was, therefore, barred from seeking a stay because it had served a demand for discovery of documents in the action.

The application for an order freezing funds was made under the interim protection provision of the Commercial Arbitration Act. Since the discovery application was only a response to that application, it was protected by the Act and could not be regarded as the taking of a step in the proceedings or as incompatible with the arbitration agreement.

B. GLOBE UNION INDUSTRIAL CORP. V. G.A.P. MARKETING CORP. [1995] W.W..R. 696 (B.C.S.CT.).

The plaintiff entered into a distribution agreement with the defendant which granted it a licence to distribute the plaintiff's products in Canada and Mexico. The defendant commenced arbitration proceedings under the terms of the agreement and sought a stay of proceedings by the plaintiff under Article 8 of the Model Law.

Lysyk J. held that the legal proceedings respected a matter the parties had agreed to settle by arbitration. The fact that the defendant had filed an appearance and responded to the plaintiff's motion to enjoin the defendant from proceeding with the arbitration was not a taking of a step in the proceeding so as to justify refusal of a stay.

C. BAB SYSTEMS, INC. V. MCLURG (1994) (ONT. CT. OF JUSTICE, GEN. DIV.) (UNREPORTED)

A party to a franchise agreement sought judicial relief. Within hours of the Court granting certain interlocutory remedies and adjourning the application for further particulars, the applicant advised the respondent of his intention to submit the dispute to arbitration pursuant to an arbitration agreement between the parties. The applicant then sough an order for a stay of the proceedings.

Borins J. found that the waiver (even if a right of unilateral waiver existed), by issuance of the notice of application, had been effectively retracted by reasonable notice.

The Court thought that the word "statement" in Article 8 of the Model Law meant the first statement in the arbitral process (as distinct from the litigation

process). Since the applicant had not submitted its first statement in the arbitral proceedings, its request for a stay was timely.

D. ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH (1994) 21 O.R. (3d) 511 (Ontario Ct. of Justice, General Div.)

The plaintiff made a loan to Diesel (a party to a technology licensing agreement with the defendant). Under the loan agreement it was provided that an additional $5 million in equity would be injected into Diesel and the licensing agreement assigned to the plaintiff. Diesel signed a general assignment of its assets to the plaintiff but although an assignment agreement to which the defendant would be party was prepared, it was never signed. After making the loan, the plaintiff alleged the principal owner of Diesel and the defendant had conspired to deceive the bank about the infusion of capital. The bank sued the defendant for conspiracy and fraud. The defendant sought to stay the proceedings based on an arbitration clause in the licensing agreement

The Court held that the plaintiff was not party to the arbitration agreement between the defendant and Diesel. Nor did the assignment of Diesel's assets to the plaintiff make it a party to the agreement between Diesel and the defendant

Treating the statement of defence as a request for a stay of the proceedings, it was not timely under Article 8 of the Model Law, since in filing its pleading a party cannot simultaneously deny the court's jurisdiction. The correct procedure would have been for the defendant to seek a stay of proceedings, after receiving the statement of claim but before taking any step in the Court action.

E. QUEENSLAND SUGAR CORP. V. "HANJIN JEDDA" (THE) (1995) 6 B C.L.R. (3D) 289 (B.C.S.CT.)

The defendant had shipped a cargo of raw sugar from Australia to Canada for the plaintiff. The latter alleged the cargo was damaged at sea. A charter party referred all disputes between the parties to arbitration. The plaintiffs commenced an action. Two months later the defendants filed a statement of defence which did not refer to arbitration. The case was set for trial almost two years later. Over two years after the action had been commenced, the defendants requested the plaintiffs consent to arbitration.

The Court relied on Gulf Canada, to the effect that a stay of proceeding's should not be granted if it was applied for out of time. By participating in the litigation process from its commencement, the defendants impliedly agreed to the court proceedings and it would prejudice the plaintiffs to refer the matter to arbitration when the litigation process was well under way.

All of the above cases illustrate that Article 8 of the Model Law has proved an effective basis for giving effect to arbitration agreements. Except in very clear cases (like The Hanjin Jedda) the courts have not let minor participation in court proceedings act as a bar to a party seeking a stay.

(b) Interim Measures (Article 9)

Article 9 of the Model Law expresses the principle that a request to a court for an interim measure is not incompatible with the fact that parties have agreed to arbitration. Of course, the arbitral tribunal may also order interim measures under Article 17 of Model Law.

In Delphi Petroleum Inc. v. Derin Shipping and Trading Ltd.[50] the applicant sought an order granting an interim measure of protection pursuant to Article 9 of the Model Law. A sole arbitrator had been appointed to resolve a number of disputes between the parties to a charter party containing an arbitration agreement. The arbitrator issued partial final and final awards. In furtherance of additional claims that it sought to pursue, the applicant sought to secure evidence of a particular individual who was a third party not involved in the dispute between the parties. The Federal Court of Canada referred to the Analytical Commentary on the Draft Text of the Model Law (especially the comments on Article 27 of the Code) and concluded that it had jurisdiction to entertain a motion for an interim measure of protection securing the evidence of the named person. The Court was concerned that, in the application before it, the party seeking the evidence did not have the approval of the arbitrator and, therefore, the situation was one where dilatory tactics on behalf of one party could be involved. The Court also thought that the issue on which the evidence was sought has already been the subject of a final award. The Court expressed a preference for deferring to the arbitrator in matters regarding the securing of appropriate evidence. The case shows considerable deference, on the courts' part, to the jurisdiction of the arbitrator.

Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd.[51] also involved a charter party which contained an arbitration agreement. The case involved an application by the defendant to set aside a garnishing order issued before judgment (as well as a stay of proceedings pending the outcome of the arbitration). The plaintiff agreed that the action by stayed, but argued that the garnishing order remain in place. The British Columbia Supreme Court agreed with the plaintiff. The Court reasoned that the words "interim measure of protection" in Article 9 of the Model Law included the issuance of a garnishing order. Again here, the court referred to the UNCITRAL Working Group on the Model Law. The Working Group had referred to "preaward attachments to secure an eventual award" as being included within the scope of Article 9 of the Model Law. Bauk J. also opined that Article 8 prevails over Article 17 because Article 9 states that it is not incompatible with an arbitration agreement for a party to request protection from the court. Once again, the decision in Trade Fortune is consistent with ensuring the efficacy of the arbitration process while preserving the availability of judicial relief that cannot be provided by the arbitrator.

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[50] (1993) 73 F.T.R. 241 (Fed. Ct. of Canada).

[51] (1994) 89 B.C.L.R. (2d) 132 (B.C.S.Ct.). The case is consistent with the earlier decision of the British Columbia Court of Appeal in No. 363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd. (1993) 81 B.C.L.R. (2d) 359 (summarized above) where an ex parte order freezing certain funds was regarded as a request for an interim measure of protection under Article 9 of the Model Law.

(C) Enforcement of Awards (Articles 35 and 36)

There have been a number of cases dealing with the enforcement of foreign arbitral awards in Canada. The following are three examples.

A. SCHRETER V.GASMAC INC.(1992) 7 O.R.(3D) 608; 6 B.L.R.(2D) 71(ONT. CT. J.)

The American claimants sought recognition and enforcement of an award in Ontario and the Ontario Court granted the application.

The Court reviewed the grounds set out for refusing to recognize and enforce an award, noting that it had no alternative to recognize an award unless the respondent established one of the stated grounds existed. Even then, the Court said it had a residual discretion to enforce the award notwithstanding that one of the stated grounds was proven. The Court held that a foreign judgment confirming an award does not merge the award, which remains independently enforceable Referring to an early Ontario case requiring confirmation, (Stolp & Co. v. W.B. Browne & Co. [1930] 4 D.L.R. 703 (Ont. S.Ct.)), the Court said.

"The decision in the Stolp case denying direct enforcement of a foreign award and requiring a foreign judgment confirming the award, is directly contrary to the Model Law, which in effect overrules it for foreign commercial arbitration awards. There is no basis or reason to give further effect to part of the underlying rationale for that decision, the doctrine of merger of the award in a confirmatory judgment. (at p. 84)

Considering its residual discretion to refuse enforcement and an argument concerning an alleged breach of the rules of natural justice, the Court found that the arbitrator and the Georgia (U.S.) courts had both considered the correctness of the respondents' position under Georgia law and rejected it. Furthermore, the Court did not consider that a failure by the arbitrator to give reasons, though undesirable, was itself a ground to refuse enforcement of an award.

B. KANTO YAKIN KOGYO KABUSHIKI-KAISHA V. CAN-ENG MANUFACTURING LTD. (1992) 7 O.R. (3D) 779; 4 B.L.R. (2D) 108 (ONT. HIGH CT. J.)

The claimant sought recognition and enforcement in Ontario of an award made in Japan. The respondent had been notified of the arbitration proceedings but had not entered an appearance. Furthermore, the respondent opposed the application for recognition and enforcement on several grounds; inter alia, that the dispute was not capable of being settled by arbitration because there had been a fundamental breach by the Japanese claimant that meant the dispute could only be decided by a court of competent jurisdiction and that recognition of the award in favour of a foreign corporation without assets in Ontario would be contrary to public policy, since the respondent could be left without recourse respecting damages it alleged as a consequence of the claimant's fundamental breach

The Court granted the application for recognition and enforcement. It held that the arbitration agreement was a separate and distinct part of the agreement in which it was contained, for the purpose of allowing the tribunal to rule on its own jurisdiction. The respondent had not availed itself of the statutory procedure for challenging the tribunal's jurisdiction and could not apply to have the award set aside three months after its receipt. The Court did not consider

the respondents' separate right to resist the award under Article 36 but the facts did not establish that any such challenge would have had merit. The Court also reiterated the policy in favour of international arbitration in the Model Law and its adoption by Ontario. Such policy mitigated against the application of other rules of law, that otherwise might apply, to justify refusing to recognize and enforce an award.

C. MURMANSK TRAWL FLEET V. BIMMAN REALTY INC. (1994)
ONT. COURT OF JUSTICE, GENERAL DIVISION

A final arbitral award was made in New York pursuant to an arbitration agreement between the parties. The applicant sought to enforce the award in Ontario. This application was made after the right to appeal the award in New York state had expired but the respondent argued the award should not be enforced in Ontario, since no steps to have it confirmed had been taken in New York.

The court found that it was not necessary that the award be confirmed in order to be enforceable in Ontario. It reinforced its conclusion by citing a public policy favouring the avoidance of delays that were dependant on court proceedings and providing a more efficient dispute resolution process when the parties had chosen to resolve their differences by means of arbitration.

The above cases (and others dealing with Articles 35 and 36 of the Model Law) show a determination on the part of Canadian courts to resist all but the most strongly-based arguments against recognition and enforcement of arbitral awards. In none of the above cases was recognition and enforcement denied. The basis for this approach is judicial recognition of a strong Canadian public policy in support of the international arbitration process.

7. Conclusion

This specialized and selective discussion of Canadian experience with the UNCITRAL Model Law provides evidence that Canadian courts have generally been prepared to support the development of the Law's principles in relation to both domestic and international arbitration agreements. Old concerns about the threat arbitration might pose to a judicial monopoly on dispute resolution are now practically non-existent. What makes Canada distinctive in regard to the Model Law is that it has produced by far the largest number of court cases involving interpretations of that law. These decisions mostly show an intelligent interpretation of the Model Law, which is not altogether surprising given that arbitration and adjudication are not as distinct as most lawyers and non-lawyers tend to think.

The question most foreign lawyers ask, however, is not whether Canadian courts are sympathetically interpreting the provisions of the Model Law. More nonCanadians are more curious about whether adoption of the Model Law in Canada has noticeably increased the number of international commercial arbitrations held in this country. At the time the Model Law was enacted across

Canada, arbitration centres were established in Vancouver and Quebec City. The Vancouver centre has had financial problems but has recently reorganized itself and increased its focus on domestic cases.[52] Unofficially, there were 10 international files opened under the Centre's auspices in 1994, compared with 44 domestic commercial arbitration files that same year.[53] One can only speculate about the reasons behind this recent history. The Vancouver Centre, from its inception, faced competition from more established centres in Paris, London and New York. In addition, by 1993 every country from the Pacific Rim region – which the Vancouver Centre saw as its natural source for disputes–had established its own arbitration centre. Lawyers probably tend to over emphasize the Model Law as a basis for increased business support for international commercial arbitration. Business familiarity with the Model Law is still at a fairly low level but it is likely to increase over time. The lesson for others from the Canadian experience is that legal change is never an end in itself and that education, training, financial and other efforts are needed if the overall objective of increasing recourse to arbitration is to be achieved.

[52] P. Grove, "A View from the Centre" (1997) 55 The Advocate 563. The full name of the Vancouver centre is the British Columbia International Commercial Arbitration Centre.

[53] L. Biukovic, "Has the UNCITRAL Model Law Changed Private Parties Behaviour at all?" (forth-coming article in Can. Business Law J.).