Université de Montréal

The Influence of ICC Arbitral Decisions on Canadian Law

Comparative Study between Civil Law and Common Law Jurisdictions

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a été évalué par un jury composé des personnes suivantes :

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Résumé

L'objectif de cette recherche est de démontrer que les décisions arbitrales de la Chambre de commerce internationale peuvent être considérées comme une source potentielle de droit au Canada. Il existe actuellement une incertitude quant au droit matériel utilisé en arbitrage international pour résoudre les différends commerciaux. Bien que l'utilisation de la *lex mercatoria* pour résoudre un litige soit une option, elle se heurte à de nombreuses incertitudes terminologiques et conceptuelles. L'utilisation d'une approche méthodologique de la *lex mercatoria* permettrait une classification de ses sources en deux branches: (1) le droit statutaire international et (2) le *stare decisis* des tribunaux d'arbitrage commercial international. Une telle approche méthodologique conférerait plus de certitude quant à l'application d'un droit uniforme. De plus, elle faciliterait l'étude de l'interlégalité entre les règles de la *lex mercatoria* et le droit matériel interne. Plus particulièrement, elle permet de comparer les similitudes et les différences des règles du droit matériel entre les décisions arbitrales internationales, le droit statutaire international et les juridictions canadiennes de common law et de droit civil. Cette comparaison rend possible une évaluation de l'influence potentielle des décisions arbitrales de la Chambre de commerce internationale sur le droit matériel canadien et si cette influence est plus importante en droit civil ou en common law.

Mots-clés: décisions arbitrales, CCI, common law, droit civil, *lex mercatoria*, droit commercial transnational, approche méthodologique, interlégalité

Abstract

This paper's objective is to demonstrate that the International Chamber of Commerce's arbitral awards may be considered as a potential source of law in Canada. There currently exists an uncertainty as to the substantive law used in international commercial arbitration. While the use of *lex mercatoria* to solve commercial disputes is often referred to, several terminological and conceptual uncertainties undermine its credibility. The use of a methodological approach to *lex mercatoria* allows for a twofold classification of its sources through: (1) international legislation and (2) *stare decisis* from international arbitral tribunals. This methodological approach provides a greater certainty for the application of a uniform law which, in turn, allows for the study of interlegality between rules of *lex mercatoria* and substantive domestic law. Furthermore, this methodological approach facilitates the demonstration of the similarities and differences between international arbitral decisions, international legislation as well as Canadian common law and civil law jurisdictions. This comparative analysis will allow the study of the potential influence of the arbitral decisions of the International Chamber of Commerce on substantive Canadian law and whether this influence is more important in civil law or common law.

Keywords: arbitral decisions, ICC, common law, civil law, *lex mercatoria*, transnational commercial law, methodological approach, interlegality

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List of Abbreviations

2012 ICC Arbitration Rules: *2012 ICC Arbitration and ADR Rules*, International Court of Arbitration, International Chamber of Commerce

Annual Statistical Reports 2003-2010:	"ICC 2010 Statistical Report"; "ICC 2009 Statistical Report"; "ICC 2008 Statistical Report"; "ICC 2007 Statistical Report"; "ICC 2006 Statistical Report"; "ICC 2005 Statistical Report"; "ICC 2004 Statistical Report"; "ICC 2003 Statistical Report"
CCP:	Code of Civil Procedure of Quebec
CCQ:	Civil Code of Quebec
CISG:	United Nations Convention on Contracts for the International Sale of Goods
Hague-Visby Rules:	Rules embodied in the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, concluded at Brussels on August 25, 1924, in the *Protocol* concluded at Brussels on February 23, 1968, and in the additional *Protocol* concluded at Brussels on December 21, 1979 (set out in Schedule 3 of *The Marine Liability Act*, SC 2001, c 6)
ICC:	International Chamber of Commerce
ICCCA:	Court of Arbitration of the International Chamber of Commerce
ICC Bull:	International Court of Arbitration Bulletin
New York Convention:	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Model Law:	Model Law on International Commercial Arbitration of the

	United Nations Commission on International Trade Law adopted in 1985
Model Law 2006:	Model Law including 2006 amendments (Annex 1 of *Report of the United Nations Commission on International Trade Law on the Work of its Thirty-Ninth Session*)
UNCITRAL:	United Nations Commission on International Trade Law
UNIDROIT:	International Institute for the Unification of Private Law
UNIDROIT Principles:	*Principles of International Commercial Contracts* in general (1994, 2004 & 2010 editions)
UNIDROIT Principles 1994:	*Principles of International Commercial Contracts*, 1st ed
UNIDROIT Principles 2004:	*Principles of International Commercial Contracts*, 2d ed
UNIDROIT Principles 2010:	*Principles of International Commercial Contracts*, 3d ed

To my parents.

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Introduction

In an era of globalization, the increase in the number of complex transborder transactions in turn raises the number of international commercial disputes. The tools, both judicial and non-judicial, to resolve these conflicts lag behind those designed by states to govern national disputes.[1] This is largely because the applicable law governing international commerce is unclear, and may involve elements of international law (both private and public), commercial law, comparative law, and others[2], and it is at times difficult to ascertain which applies.[3] Since international courts rarely specialize in commercial disputes resolution, parties often will resort, reluctantly, to domestic courts, to assert their rights and interests.[4]

This reluctance stems from reasons such as choice of law issues, lack of trust in the impartiality of the domestic court and enforceability of any judgement outside the domestic court's jurisdiction.[5] Hence why international commercial arbitration was developed in the

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[1] Christian Bühring-Uhle, Lars Kirchhoff & Gabriele Scherer, *Arbitration and Mediation in International Business*, 2d ed (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2006) at 5-10; Fabian P Sosa, "Cross-Border Dispute Resolution from the Perspective of Mid-sized Law Firms: The Example of International Commercial Arbitration" in Volkmar Gessner, ed, *Contractual Certainty in International Trade: Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges* (Portland, Or: Hart Publishing, 2009) 107 at 107-08.

[2] Stéphane Chatillon, *Droit du commerce international* (Paris: Vuibert, 1999) at 3, 9.

[3] See section 1.3, below, for more on this topic.

[4] Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* (The Hague: Kluwer Law International, 2003) at 77. The International Court of Justice, OHADA and the Court of Justice of the European Union may hear cases on commercial disputes but it is not their main jurisdiction.

[5] The recognition and enforcement of a foreign court's judgment must not be confused with the enforcement of arbitral awards discussed at 2-3, below. Gary B Born, *International Commercial Arbitration* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2009) vol 1 at 65; Bühring-Uhle, Kirchhoff & Scherer, *supra* note 1 at 12-27.

first place, namely as an alternative conflict resolution mechanism, aiming to address these issues and to resolve with efficiency and fairness disputes arising from transnational commerce.[6] It has enjoyed a good reputation since the end of World War II, in large part because it provides a neutral forum where parties can select the procedure to follow to resolve a dispute.[7] The flexibility and neutrality of this procedure has attracted, among others, merchants who do not want to be burdened by the complexities of a state's judicial process.[8]

This increasing popularity of international arbitration may be measured by the proliferation of international instruments introduced in the last decades. In particular, the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[9] [*New York Convention*] and the *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*[10] [*Model Law*] have harmonized arbitral procedures, namely

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[6] *Ibid*.

[7] Tibor Várady, John J Barceló III & Arthur Taylor Von Mehren, *International Commercial Arbitration: A Transnational Perspective*, 4th revised ed (St Paul, Minn: Thomson/West, 2009) at 23; Paolo Contini, "International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1959) 8:3 Am J Comp L 283 at 284.

[8] This is not meant to denigrate the usefulness and important work performed by domestic courts but rather to put forth the position that they may not be the system best suited to the needs of international commerce. Joël Rideau, *L'arbitrage international (public et commercial)* (Paris: Librairie Armand Colin, 1969) at 17; Wioletta Konradi, "The Role of *Lex Mercatoria* in Supporting Globalised Transactions: An Empirical Insight into the Governance Structure of the Timber Industry" in Gessner, *supra* note 1, 49 at 64-65, 75ff.

[9] 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) [*New York Convention*]. The *New York Convention* is the main convention on international arbitration (ratified by over 145 States). Its objective is to promote access to international commercial arbitration by imposing on courts of each state that has incorporated the convention, the obligation to recognize the validity of written arbitration conventions and to recognize and execute foreign arbitral awards. See generally Erik Schäfer, Herman Verbist & Christophe Imhoos, *L'arbitrage de la Chambre de commerce internationale (CCI) en pratique* (The Hague: Kluwer Law International, 2002).

[10] *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session*, UNCITRALOR, 18th Sess, Supp No 17, UN Doc A/40/17 (Annex I) (1985), online: UNCITRAL Texts and Status <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf> [*Model*

by recognizing the validity of arbitration agreements and arbitral awards. The incorporation of the *New York Convention* and the *Model Law* in the domestic laws of many states, including Canada, demonstrates states' acceptance for such an alternative mode of conflict resolution.[11]

These instruments, it should be noted, are not generally concerned with the substantive law applicable to the merits of a dispute, focusing mostly on procedural aspects, such as choice of law issues.[12] For instance, the *Model Law* only states that the law governing a dispute must be chosen by the parties involved in the dispute or by the arbitral tribunal.[13] At the same time, the flexibility in allowing the parties to apply a specific domestic law to the merits of a dispute is not a panacea. Even if modern international arbitration guarantees that certain procedures will be respected (such as due process), it cannot guarantee the "correct" application of the substantive law chosen by the parties, in particular if the arbitral tribunal is not well versed in the nuances, complexities and subtleties of the rules selected. This

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Law]. The UN General Assembly recognized the importance of the *Model Law* in its following resolution: *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*, GA Res 40/72, UNGAOR, 40th Sess, UN Doc A/Res/40/72 (1985). The *Model Law* is the result of many years of drafting efforts from the United Nations Commission on International Trade Law [UNCITRAL], which was created by the United Nations General Assembly. UNCITRAL's mandate is to progressively harmonize and unify international commercial law. See *Establishment of the United Nations Commission on International Trade Law*, GA Res 2205(XXI), UNGAOR, 21th Sess, UN Doc A/RES/2205 (1966).

[11] René David, *Le droit du commerce international: réflexions d'un comparatiste sur le droit international privé* (Paris: Economica, 1987) at para 110 [David, *Commerce international*]. The *Model Law* is not a law in itself but was adopted verbatim by several domestic laws (Canada, Cyprus, Bulgaria, Nigeria, Australia, Hong Kong, Peru, Bermudas, Russia, Mexico, Tunisia, New Zealand, Germany, etc.). See Laurence Craig, William W Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, 3d ed (New York: Oceana Publications, 2000) at 679. For further analysis of the *Model Law* and the *New York Convention* in Canada, see section 3.2, below.

[12] Born, *supra* note 5 at 2108ff (vol 2). See section 1.3, below, for more on this topic.

[13] *Model Law*, art 28.

potential uncertainty is however outweighed by the flexibility of being able to select the applicable law, which is one of the critical elements that makes international commercial arbitration so attractive to international businessmen.

Nevertheless, over the years, several solutions have been proposed to eliminate the uncertainty associated with the application of a substantive law in international commercial disputes. One is the use, subject to the parties' agreement, of a uniform transnational commercial law, known as *lex mercatoria*.[14] Some legal scholars claim that *lex mercatoria* -an amalgam of general principles, customs and international conventions[15]- is best suited to the international business reality.[16] However, terminology issues and the debate on the legal nature of *lex mercatoria* have prevented its widespread use in international commercial law.[17] In this paper, a methodological approach to transnational law is applied to *lex mercatoria*, which, in turn, allows systematization and which ultimately may increase its use in transborder transactions.[18] A methodological approach also facilitates the study of interlegality, in particular the relationship between state normative systems (Canadian law)

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[14] Thomas E Carbonneau, "Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions" (1984-85) 23 Colum J Transnat'l L 580 at 614 [Carbonneau, "Arbitral Awards"]. The premise that uniformity equals certainty of law is questioned today because of the 2008 economic world crisis. This paper will use the premise that uniformity of applicable law equals stability.

[15] *Statute of the International Court of Justice*, art 38, online: International Court of Justice Website <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

[16] *Lex mercatoria* can be considered a "most common [expression] of transnational law" in Andrew Tweedale & Keren Tweedale, *Arbitration of Commercial Disputes: International and English Law and Practice* (Oxford: Oxford University Press, 2005) at para 6.34; Abdul FM Maniruzzaman, "The *Lex Mercatoria* and International Contracts: A Challenge for International Commercial Arbitration?" (1998-99) 14:3 Am U Int'l L Rev 657 at 666; Philippe Kahn, "La *lex mercatoria*: point de vue français après quarante ans de controverses" (1992) 37 McGill LJ 413 at 420 refers to very specific rules in particular areas of law.

[17] Can the *lex mercatoria* be considered an autonomous legal system of law or does it fail to meet the criteria of a legal order? See chapter 2, below, for more on this topic.

[18] Gralf-Peter Calliess & Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Portland, Or: Hart Publishing, 2010) at 28-32. See chapter 2, below, for more on this topic.

and non-state normative systems (*lex mercatoria*).[19] The objective of this paper is to assess to what extent there is an impact of international arbitral decisions on Canadian law, even if merely indirect.

This methodological approach consists of classifying the various sources of *lex mercatoria* (i.e. arbitral decisions, international instruments, etc.) in a comprehensive manner. This classification will make *lex mercatoria* a more certain and predictable "law" that can be applied by international arbitral tribunals. The proposed methodological approach of transnational law will provide the classification of *lex mercatoria* sources using (1) a legislative approach and (2) an adjudicatory approach.[20] Then, in turn, this classification will provide the framework for a comparative law approach to study the interlegality between international arbitral awards and Canadian law, both in civil and common law jurisdictions.

(1) Legislative Approach: Written Component of *Lex Mercatoria*

Fixed legislative rules are written rules adopted in international instruments. They constitute the written component of the *lex mercatoria* through a legislative approach, reminiscent of the approach used in civil law.[21] Two examples[22] will be discussed herein:

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[19] Robert Wai, "Interlegality of Transnational Private Law" (2008) 71 Law & Contemp Probs 107 at 108-09 [Wai, "Interlegality"].
[20] Calliess & Zumbansen, *supra* note 18 at 119. Interestingly, Thomas E Carbonneau & Marc S Firestone, "Transnational Law-making: Assessing the Impact of the Vienna Convention and the Viability of Arbitral Adjudication" (1986-87) 1 Emory Int'l L Rev 51 discusses a similar classification of the sources of a uniform law of sales in legislative and adjudicatory components.
[21] *Ibid* at 55.

the *United Nations Convention on Contracts for the International Sale of Goods*[23] [*CISG*] and the *Principles of International Commercial Contracts*[24] [*UNIDROIT Principles*]. *CISG* is a multilateral treaty that strives to adopt:

> Uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems [...] [The adoption of the *CISG*] would contribute to the removal of legal barriers in international trade and promote the development of international trade.[25]

CISG promotes the removal of legal barriers primarily by respecting trade usages widely accepted in particular areas of international trade (or transnational law).[26] This makes *CISG* a central element of transborder commerce.[27]

UNIDROIT Principles were elaborated by the International Institute for the Unification of Private Law [UNIDROIT], an independent intergovernmental organization, whose purpose is "to study needs and methods for modernising, harmonising and co-ordinating private and

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[22] Élise Charpentier, "Les *Principes* d'Unidroit: une codification de la *lex mercatoria*?" (2005) 46 C de D 193 [Charpentier, "Codification"]; Hans van Houtte, *The Law of International Trade*, 2d ed (London, UK: Sweet & Maxwell, 2002) at paras 1.33, 4.05.

[23] 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) [*CISG*].

[24] 1st ed (Rome: UNIDROIT, 1994) [*UNIDROIT Principles 1994*]. A second edition was published in 2004 (Rome: UNIDROIT, 2004) [*UNIDROIT Principles 2004*] and a third edition, in 2010 (Rome: UNIDROIT, 2010) [*UNIDROIT Principles 2010*]. In this paper, the articles studied are identical in all three editions (see Annex I *Force majeure*, Hardship and Mitigation of Damages in *UNIDROIT PRINCIPLES 1994*, *2004* & *2010*, below). As such, unless specified, when discussing *UNIDROIT Principles*, this paper refers to all three editions generally [*UNIDROIT Principles*].

[25] *CISG*, Preamble. It must be noted that *CISG* applies in cases involving international sales of law.

[26] *Ibid*, art 9. Transnational law and international trade are sometimes differentiated but in this paper, they will be used as synonyms.

[27] It must be noted that parties may opt to exclude *CISG*'s application (*CISG*, art 6); *2012 ICC Arbitration and ADR Rules*, art 21, online: Court of Arbitration of the International Chamber of Commerce [ICCCA], <http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf> [*2012 ICC Arbitration Rules*] (formerly *1998 ICC Arbitration Rules*, ICCCA, art 17). See Emmanuel S Darankoum, "L'application de la Convention des Nations Unies sur les contrats de vente internationale de marchandises par les arbitres de la Chambre de commerce internationale en dehors de la volonté des parties est-elle prévisible?" (2004) 17:2 RQDI 1 [Darankoum, "Volonté des parties"]. *CISG* may also apply through its incorporation within domestic law. See chapter 3, below, for more on this topic.

in particular commercial law as between States and groups of States".[28] The *UNIDROIT Principles* were drafted "to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied."[29] Both *CISG* and *UNIDROIT Principles* were elaborated as a legislative attempt to harmonize transnational commercial law, taking into account different legal traditions and varied socio-economic contexts.[30] International arbitral tribunals use both these instruments when attempting to solve various disputes.[31] In fact, *CISG* and *UNIDROIT Principles* have been recognized to a certain extent, albeit differently, in Canadian law, both in civil law and common law jurisdictions.[32]

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[28] *UNIDROIT: An Overview*, online: UNIDROIT <http://www.unidroit.org/dynasite.cfm?dsmid=84219>.
[29] "Introduction", online: *UNIDROIT Principles 1994* <http://www.unidroit.org/english/principles/contracts/principles1994/1994fulltext-english.pdf> at viii ["Introduction to *UNIDROIT Principles 1994*"].
[30] Charpentier, "Codification", *supra* note 22 at 199; "Explanatory Note by the UNCITRAL Secretariat on the CISG", online: UNCITRAL <http://www.uncitral.org/pdf/english/texts/sales/*CISG*/V1056997-*CISG*-e-book.pdf> 23.
[31] See e.g. Case No 8420 (1995), (1999) 10:2 ICCCA Bull 60 (ICC); Case No 9078 (2001), *UNIDROIT Principles: New Developments and Applications*, [2005] ICCCA Bull (Special Supplement) 73 (ICC); Darankoum, "Volonté des parties", *supra* note 27 at 18-22; Emmanuel S Darankoum, "L'application des Principes d'UNIDROIT par les arbitres internationaux et par les juges étatiques" (2002) 36 RJT 421 [Darankoum, "Application des Principes UNIDROIT"].
[32] See e.g. *Mansonville Plastics (B.C.) Ltd v Kurtz GmbH*, 2003 BCSC 1298 (available on QL) [*Mansonville*]; *Unique Labelling Inc v Gerling Canada* (2008), 67 CCLI (4th) 105 (available on QL) (Ont Sup Ct) [*Unique Labelling*]; Élise Charpentier, "L'émergence d'un ordre public... privé: présentation des Principes d'UNIDROIT" (2002) 36 RJT 355 at 369; Alain Prujiner, "Comment utiliser les Principes d'UNIDROIT dans la pratique contractuelle" (2002) 36 RJT 561 [Prujiner, "Pratique contractuelle"]; RW Riegert & RJ Lane, "Canadian Production in and to American Markets: Bilateral Trading Issues" (1994) 32 Alta L Rev 284; Louise Rolland, "Les Principes d'UNIDROIT et le Code civil du Québec: variations et mutations" (2002) 36 RJT 583; Jeffrey A Talpis, "Retour vers le futur: application en droit québécois des Principes d'UNIDROIT au lieu d'une loi nationale" (2002) 36 RJT 609 [Talpis, "Retour vers le futur"]. It must be noted that despite being two international instruments, *CISG* and *UNIDROIT Principles* are received differently in Canadian law. See chapter 3, below, for more on this topic.

(2) Adjudicatory Approach: Unwritten Component of *Lex Mercatoria*

By contrast, the adjudicatory approach advocates the elaboration of a transnational commercial law based on the decisions of international arbitral tribunals (i.e. a case by case approach). It therefore follows the *stare decisis* principle usually associated with common law.[33] The arbitral tribunal refers to past published decisions to render a judgment. Parties can take comfort in the predictability created by previous awards discussing similar issues.[34] The advantage of the adjudicatory approach is the harmonization of *lex mercatoria* which arises from different sources (international instruments, trade usages, etc.).[35] Arbitral tribunals thus play a key role in elaborating transnational principles.

Moreover, the elaboration of this adjudicatory approach assumes that published arbitral awards are readily available.[36] Unfortunately, many leading arbitral institutions specialized in the resolution of international commercial disputes, such as the London Court of Arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce do not publish and, in fact, deny access to decisions on the basis of confidentiality.[37]

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[33] Thomas E Carbonneau, "Arbitral Law-Making" (2003-04) 25 Mich J Int'l L 1183 at 1204 [Carbonneau, "Arbitral Law-Making"]. See chapter 2, below, for further discussion on this topic.
[34] Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" (2007) 23:3 Arb Int'l 357 [Kaufmann-Kohler, "Arbitral Dream"].
[35] Christopher R Drahozal, "Commercial Norms, Commercial Codes, and International Commercial Arbitration" (2000) 33 Vand J Transnat'l L 79 [Drahozal, "Commercial Norms"].
[36] *Ibid* at 93.
[37] See e.g. *LCIA Arbitration Rules*, art 30, online: London Court of International Arbitration <http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article30>; *Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, art 46, online: Arbitration Institute of the Stockholm Chamber of Commerce <http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedoms regler%20eng%20ARB%20TRYCK_1_100927.pdf>.

One of the main institutions providing partial access to its decisions is the International Chamber of Commerce [ICC].[38] As such, the ICC is crucial to the development of an international *stare decisis* aiming to harmonize *lex mercatoria*.[39] It is also one of the most prominent arbitral institutions, where approximately 800 cases are filed per year.[40] By studying some of these published cases, arbitral tribunals justify their reasoning and legal scholars elaborate trends in international commerce.[41]

Indeed, some legal scholars consider the harmonization[42] of *lex mercatoria* by an adjudicatory approach crucial to a uniform transnational commercial law.[43] Unfortunately,

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[38] "General Principles of Law in International Commercial Arbitration", Note (1987-88) 101 Harv L Rev 1816 ["General Principles"]. Over 70 institutions offer arbitration services, such as the ICC, the American Association of Arbitration, etc. which have actively promoted the progress of arbitration. However, this paper will limit itself to the study of ICC's arbitral awards. Tweedale & Tweedale, *supra* note 16 at para 3.03.

[39] Jan Paulsson, "La *lex mercatoria* dans l'arbitrage C.C.I." [1990] Rev arb 55 [Paulsson, "Arbitrage CCI"].

[40] 793 new cases filed in 2010, "ICC 2010 Statistical Report" (2011) 22:1 ICCCA Bull 5; 817 new cases filed in 2009, "ICC 2009 Statistical Report" (2010) 21:1 ICCCA Bull 5; 663 new requests were filed in 2008, "ICC 2008 Statistical Report" (2009) 20:1 ICCCA Bull 5. The success of the ICC is due to its many advantages. The universality, the geographical adaptability, the openness, the procedural flexibility and the institutional supervision are factors that help the perception of ICC arbitration as a reasonable alternative to domestic courts for dispute resolution. The ICC approach for dispute resolution has clearly responded to the needs and preferences of international merchants because, since its creation in 1923, it has become the dominant institution in international commercial arbitration. See Craig, Park & Paulsson, *supra* note 11 at 1-2.

[41] Carbonneau, "Arbitral Awards", *supra* note 14 at 588-89. See chapter 4, below, for a practical application of this statement.

[42] Concepts of harmonization, unification or standardization are not abstract concepts never used previously in legal theory, but are all means of legal integration of norms albeit to a different degree. At the first level, harmonization is a bridge-building process between systems of law with the objective to reduce and, if possible, eliminate a variety of contradictions. It is a means to establish the outline of a legal framework where each system of law would complete this common outline while adopting legislation best suited to their values or level of development. At the second level, unification is another means to integrate norms, where a detailed identical legislation/regulation is established in all participating systems of law but where each system of law has a choice as to the implementation of these common norms (i.e. the authorities applying these norms in concrete cases). Another level higher in legal integration of norms is standardization, where an elaborate legal framework is created in a unique instrument to which parties adhere in its entirety, without the possibility to depart from it either in substance or form. The adoption of a unique instrument which contains detailed norms according to states is what differentiates standardization from unification. Another concrete example of standardization is the codification of norms. We have to bear in mind these distinctions when we evaluate the harmonization of the *lex mercatoria*. Innocent Fetze Kamdem, "Harmonisation, unification et

arbitral decisions are rarely studied by Canadian courts and legal scholars. Instead, they are more prone to discuss *lex mercatoria* harmonized through international instruments [legislative *lex mercatoria*].[44] This means that although legislative *lex mercatoria* can be considered as an auxiliary source of substantive law in Canada, adjudicatory *lex mercatoria* (*lex mercatoria* harmonized through an adjudicatory approach) may not necessarily be considered as such a source.[45] This paper will try to evaluate whether adjudicatory *lex mercatoria* developed by ICC's caselaw can be considered an auxiliary source of substantive law in common law and civil law jurisdictions in Canada and if so, in what manner and to what extent.

- Hypothesis

Adjudicatory and legislative *lex mercatoria* are not mutually exclusive: legislative *lex mercatoria* is often based on concepts applied in arbitral caselaw and conversely, adjudicatory *lex mercatoria* is frequently based on international written instruments to

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uniformisation: plaidoyer pour un discours affiné sur les moyens d'intégration juridique" (2009) 43 RJT 605 at 617-620. See also Fabien Gélinas, "Codes, silence et harmonie: réflexions sur les principes généraux et les usages du commerce dans le droit transnational des contrats" (2005) 46 C de D 941; Katayoon Dalir, *Towards the Harmonized Interpretation of International Trade Law Texts: A New Approach to Discover Effective Methods* (DCL Thesis, Université Laval, 2005) at 7-18 [unpublished].

[43] See Carbonneau, "Arbitral Law-Making", *supra* note 33 at 1195; Drahozal, "Commercial Norms", *supra* note 35 at 94; Emmanuel Gaillard, "Transnational Law: A Legal System or a Method of Decision Making?" (2001) 17:1 Arb Int'l 59 [Gaillard, "Method of Decision Making"]; Kaufmann-Kohler, "Arbitral Dream", *supra* note 34 at 378; Maniruzzaman, *supra* note 16 at 693; Ole Lando, "The *Lex Mercatoria* in International Commercial Arbitration" (1985) 34 ICLQ 747 at 747.

[44] See *supra* note 32 and accompanying text.

[45] See e.g. Peter J Mazzacano, "Canadian Jurisprudence and the Uniform Application of the UN Convention on Contracts for the International Sale of Goods" in *Review of the Convention on Contracts for the International Sale of Goods (CISG), 2005-2006* (Munich, Germany: Sellier. European Law Publishers, 2007) 85.

support its reasoning.[46] Moreover, their use in Canada is subject to various interpretation principles.[47] This paper will verify to what extent Canadian courts can use adjudicatory *lex mercatoria* to interpret similar concepts. Legislative *lex mercatoria* is more permeable to civil law than to common law, because they both are deductive processes. This paper's hypothesis is that adjudicatory *lex mercatoria* should be incorporated to a greater extent in Quebec civil law because of the predominance of legislative *lex mercatoria* in this jurisdiction.[48] This paper will study the influence of adjudicatory *lex mercatoria* on three (3) transnational principles used in Canada: (i) *force majeure*, (ii) mitigation of damages and (iii) hardship[49]. These principles are conceptualized and applied in both civil law and in common law and can provide an appropriate basis for comparison. This will be studied through a two part-analysis.

First, to consider this hypothesis, it is critical to examine the way in which legislative *lex mercatoria* is an auxiliary source of substantive law in Canada and if there is a significant difference in its application in civil law as opposed to common law jurisdictions. While Canadian legal scholars and caselaw refer to legislative *lex mercatoria*[50], the concept

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[46] Michael Joachim Bonell, "The *UNIDROIT Principles* of International Commercial Contracts and the Harmonisation of International Sales Law" (2002) 36 RJT 335 at 343-47 [Bonell, "Harmonisation"]; Kaufmann-Kohler, "Arbitral Dream", *supra* note 34 at 362; Maniruzzaman, *supra* note 16 at 693; Darankoum, "Application des Principes UNIDROIT", *supra* note 31. See chapter 2, below, for more on this topic.

[47] Further analysis of this aspect will be found at section 3.3.1, below.

[48] Carbonneau & Firestone, *supra* note 20 at 55.

[49] However, many transnational principles were identified by scholarly writings. The list of *lex mercatoria* principles varies from one author to another. See e.g. Carbonneau, "Arbitral Awards", *supra* note 14 at 589-95; Rt Hon Lord Justice Michael Mustill, "The New Lex Mercatoria: The First Twenty-Five Years" (1988) 4 Arb Int'l 86 at 110-14; *Trans-Lex Law Research*, online: CENTRAL Database, University of Cologne <http://trans-lex.org/principles>; Paulsson, "Arbitrage CCI", *supra* note 39.

[50] *Supra* note 32. See also chapter 3, below, for more on this topic.

remains unclear in the eyes of many practitioners. To clarify this concept, caselaw and scholarly works discussing legislative *lex mercatoria* must be examined. This paper will limit its analysis to *CISG* and *UNIDROIT Principles*, two prominent instruments in transnational commerce. To evaluate if the influence of legislative *lex mercatoria* is different in common law and civil law jurisdictions, the core basis for each of these principles [(i) *force majeure*, (ii) mitigation of damages and (iii) hardship] must be briefly examined. Then, this paper will determine how legislative *lex mercatoria* interprets these same principles and identify if there exists significant differences in how such principles are interpreted in civil law and common law.

Second, these principles [(i) *force majeure*, (ii) mitigation of damages and (iii) hardship] have also been found in arbitral decisions published by the ICC. Even if Canadian courts do not directly refer to ICC's arbitral awards, similarities can be found in the interpretation of these transnational principles in Canadian common law and civil law jurisdictions as well as in legislative and adjudicatory *lex mercatoria*.

Table 1: Jurisdictions

Civil law (Quebec)	**Common law (Canada-excluding Quebec)**	***Lex mercatoria***	
		Legislative *lex mercatoria*	**Adjudicatory *lex mercatoria***

This comparison will demonstrate that ICC's arbitral awards can be used to interpret Canadian law in international commerce cases. To do so, it must be determined in which manner the adjudicatory *lex mercatoria* developed by the ICC's arbitral awards interprets *force majeure*, mitigation of damages and hardship and identify if there are significant

differences between the interpretation of these same transnational principles in civil law and common law.

As such, this paper will compare the influence of legislative and adjudicatory *lex mercatoria* on the concepts of (i) *force majeure*, (ii) mitigation of damages and (iii) hardship. Canadian caselaw and academic (or scholarly) writings will be examined to identify the similarities and differences that exist between the application of legislative versus adjudicatory *lex mercatoria* in Canada. This will verify if adjudicatory *lex mercatoria* has an impact in Canada.

By comparing findings from Quebec to those in the rest of Canada, this paper will also demonstrate whether adjudicatory *lex mercatoria* has a greater influence in the civil law jurisdiction (Quebec) than to the common law jurisdictions in Canada.

In part I, I will discuss international commercial arbitration in general, including the basic concepts of international commercial arbitration and the methodological transnational law approach applied to *lex mercatoria*. In part II, I will discuss the reception of international commercial arbitration and legislative and adjudicatory *lex mercatoria* in Canada. I will discuss the legislation, academic works and caselaw discussing international commercial arbitration in Canada as an alternative mode of resolution of conflicts and will focus on the specific impact of the ICC's arbitral awards through selected transnational principles [(i) *force majeure*, (ii) hardship and (iii) mitigation of damages].

PART 1 International Arbitration and *Lex Mercatoria*

Chapter 1 International Commercial Arbitration in General

To fully understand the potential influence of ICC's arbitral awards on Canadian law, a brief overview of international commercial arbitration (1.1) as well as its philosophical development (1.2) are necessary before addressing current issues of choice of law (1.3) and the use of a non-domestic law (*lex mercatoria*) by arbitral tribunals (1.4).

1.1 Overview of International Commercial Arbitration

Arbitration is a private process whereby the parties to a dispute agree to select one or more individuals to find a binding resolution to their dispute. Such "private" justice is therefore underpinned by the parties' willingness to submit their dispute to a binding third party's decision.[51] Arbitration differs from court adjudication because of its private nature, and from mediation and conciliation because of the binding character of the decision.[52] Indeed, mediation can be defined as a "non-binding" intervention by an impartial third party who

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[51] Pierre Lalive, "L'importance de l'arbitrage commercial international" in Nabil Antaki & Alain Prujiner, eds, *Proceedings of the 1st International Commercial Arbitration* (Montreal: Wilson & Lafleur, 1986) 15 at 20 [Lalive, "L'importance de l'arbitrage"]; Lynch, *supra* note 4 at 7; Várady, Barceló & Von Mehren, *supra* note 7 at 3; Born, *supra* note 5 at 64-65; Emmanuel Gaillard & John Savage, eds, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) at para 7.

[52] Bühring-Uhle, Kirchhoff & Scherer, *supra* note 1 at 31. One of the key characteristics distinguishing both dispute resolution mechanisms is that court audiences are public: Anyone can have access to them whereas arbitration is private. Some legal scholars consider conciliation to be a synonym of mediation while others contrast it with mediation by defining conciliation as the process of bringing parties to the negotiation table and mediation as a non-binding intervention by a third party. For the purposes of this paper, mediation and conciliation will be used as synonyms. *Ibid* at 176. See also Born, *supra* note 5 at 235-41. *Contra*: Bruno Oppetit, *Théorie de l'arbitrage* (Paris: Presses Universitaires de France, 1998) [Oppetit, *Théorie de l'arbitrage*]; Tweedale & Tweedale, *supra* note 16 at para 1.1.7; Fouchard, Gaillard & Goldman, *supra* note 51 at paras 16-21.

helps the disputants negotiate an agreement."[53] Within social groups, arbitration and mediation can be seen as natural ways to solve a dispute. For instance, two members of a social group who have a dispute will often turn to a third person to find a solution. This third person, whom they trust, will first try to mediate the dispute in an attempt to reconcile the parties, and resort to the authority of an arbitration to provide a binding solution if mediation is not successful.[54]

Similarly, these dispute resolution mechanisms are found in international commerce, where parties sometimes resort to mediation before arbitration, with the latter meant to be a viable alternative to state courts when a dispute arises in an international business relationship.[55] Business agreements often contain arbitral clauses to resolve disputes.[56] This is partly due to the international character of arbitration which takes into account the almost certain possibility that transborder transactions will involve parties and lawyers from different legal backgrounds. This attracts business parties to the arbitral process because its neutrality presupposes knowledge of comparative law and open-mindedness towards different judicial systems.[57]

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[53] Bühring-Uhle, Kirchhoff & Scherer, *supra* note 1 at 176. See Born, *supra* note 5 at 217-18 for definitions of arbitration, litigation, mediation and other dispute resolution concepts proposed by various legal scholars and courts.
[54] Várady, Barceló & Von Mehren, *supra* note 7 at 3; Bühring-Uhle, Kirchhoff & Scherer, *supra* note 1 at 31.
[55] See above at 1-2.
[56] Lalive, "L'importance de l'arbitrage", *supra* note 51 at 16.
[57] Jan Paulsson, "International Arbitration is Not Arbitration" [2008:2] Stockholm International Arbitration Review 1; Fouchard, Gaillard & Goldman, *supra* note 51 at para 1036.

As commercial parties became more sophisticated, so did international arbitration. From an *ad hoc* type of arbitration at the outset (as described above), institutional arbitration developed. *Ad hoc* arbitration is a process where parties set out the procedure to be followed in case of a dispute in their commercial agreement. When a dispute arises, they jointly select the composition of the arbitral tribunal and the details of the procedure which are not already set out in the previously concluded agreements. This is the default mode of arbitration unless parties agree to employ services of an arbitral institution. The main advantage of *ad hoc* arbitration is the greater control for the parties over procedural matters. However, the principal disadvantage is the level of cooperation it requires between parties. If a dispute already exists, the parties may be reluctant to cooperate in devising procedural rules, or at the very least, attempt to craft these rules to their advantage, therefore mitigating the likelihood of an agreement. This problem can be solved by resorting to institutional arbitration.[58]

Arbitral institutions such as the ICC, the Arbitration Institute of the Stockholm Chamber of Commerce and the London Court of International Arbitration, generally provide model arbitral clauses as well as ready-made arbitration rules, often in several languages.[59] The

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[58] Born, *supra* note 5 at 12-13, 149-50. The flexibility associated with *ad hoc* arbitration can however be lost with institutional arbitration, Fouchard, Gaillard & Goldman, *supra* note 51 at para 53.

[59] See e.g. *2012 ICC Arbitration Rules* which provide a variety of rules on the arbitration proceedings that parties can use instead of elaborating their own rules. They even provide a variety of standard arbitral clauses that parties can include in their contract such as: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules." Similarly, the London Court of Arbitration also provides arbitration rules (*LCIA Arbitration Rules*, *supra* note 37) and the following standard clause: "Any dispute arising out of or in connection with this contract, including any question regarding its

principal drawbacks of institutional arbitration are the additional administrative fees and the delays associated with the arbitral institutions' administrative procedures.[60] These drawbacks are often offset by important benefits such as increased convenience, security and administrative effectiveness for the parties. In addition to the foregoing, the credibility associated with the decisions of an arbitral institution also facilitates both voluntary compliance and enforcement. Hence the credible, definite and binding nature of the decisions, the neutrality of the forum, the expertise of arbitrators and most importantly, confidentiality, make institutional arbitration a very sought-after alternative mode of resolution of conflicts.[61]

The aforementioned benefits can only be appreciated by comparing arbitration with judicial courts *in concreto*. International arbitration has been successful because of the disadvantages of domestic courts, which are public, and at times, formalistic and inflexible.[62]

1.2 Legal Nature of International Commercial Arbitration

As international arbitration developed, so did the controversy surrounding its legal nature. Could international arbitration be considered a full-fledged system of law? Could it be

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existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause."

[60] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed (London, UK: Sweet & Maxwell, 2004) at para 1-46; Craig, Park & Paulsson, *supra* note 11 at 14.

[61] Tweedale & Tweedale, *supra* note 16 at para 2.14; Lynch, *supra* note 4 at 11 & Várady, Barceló & Von Mehren, *supra* note 7 at 27-28.

[62] Lalive, "L'importance de l'arbitrage", *supra* note 51 at 24; Craig, Park & Paulsson, *supra* note 11 at 311.

independent from domestic courts? The recognition of international commercial arbitration as a legal order (system of law) is of the utmost importance because it is often confused with the legal nature of *lex mercatoria*.[63] Part of this confusion is due to the fact that arbitral decisions contribute significantly to *lex mercatoria* but are rendered within the framework of international arbitration. Several legal theories have been proposed to elaborate this framework but the difficulty is that it must reconcile various stakeholders.

1.2.1 Traditional Classification

This brief overview of international arbitration illustrates why its existence depends on three levels of legal regimes: contractual agreement between parties, national legal systems and international treaties.[64] The importance of each of these levels varies according to the legal theory used to explain the nature of international commercial arbitration. Traditionally, four theories have been used: 1) the jurisdictional theory; 2) the contractual theory; 3) the mixed or hybrid theory and 4) the autonomous or "supranational" theory.[65]

The jurisdictional theory essentially considers that arbitration is only allowed to the extent recognized by the law of the place of arbitration. Arbitration, similarly to national courts, is a delegation of state authority. According to this theory, the only difference between

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[63] See chapter 2, below, for more on this topic.
[64] Bühring-Uhle, Kirchhoff & Scherer, *supra* note 1 at 42.
[65] Julian DM Lew, "Achieving the Dream: Autonomous Arbitration" (2006) 22:2 Arb Int'l 179 at 186 [Lew, "Autonomous Arbitration"]. The legal nature of arbitration was the subject of several arguments between French civil lawyers, see e.g. Rideau, *supra* note 8. It must be pointed out that the debate surrounding the autonomy of international arbitration differs from the debate surrounding the autonomy of *lex mercatoria*, which prevailed amongst legal scholars in the second half of the twentieth century. See chapter 2, below, for further analysis on the legal nature of *lex mercatoria*.

international arbitration and domestic courts is that arbitration grants limited autonomy to the parties; a judge "derives his nomination and authority from the sovereign" while the arbitrator "derives his authority from the sovereign but his nomination is a matter for the parties."[66] At the opposite end of the spectrum, the contractual theory argues that arbitration is based on the parties' intent; the powers of the arbitral tribunal are derived from their agreement. Parties consent to submit to the arbitral tribunal of their own free will. The state has very little influence, if at all, on international arbitration because of the contractual character of arbitration.[67] In response to these two opposing theories, a third theory was developed incorporating elements of the jurisdictional and the contractual theory. This mixed (or hybrid) theory states that arbitration "has its origin in the [parties'] agreement and draws its jurisdictional effects from the civil law."[68] Thus, according to the mixed theory, international arbitration includes both a judicial and a contractual component.[69]

The last theory, the autonomous theory, is more recent and takes into consideration that arbitration is a stand-alone mechanism.[70] Instead of trying to fit arbitration in the national and/or international legal systems, the autonomous theory examines arbitration from the

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[66] Julian DM Lew, *Applicable Law in International Commercial Arbitration* (New York: Oceana Publications, 1978) at 53 [Lew, *Applicable Law*]; FA Mann, "Lex Facit Arbitrum" in Pieter Sanders, ed, *International Arbitration: Liber Amicorum for Martin Domke* (The Hague: Martinus Nijhoff, 1967) 157; Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (DJur Thesis, York University, 1992) at 30-34 [unpublished]; Lynch, *supra* note 4 at 68-70.

[67] Lynch, *supra* note 4 at 66-68; Chukwumerije, *supra* note 66 at 26-29; Lew, *Applicable Law*, *supra* note 66 at 56; Rideau, *supra* note 8 at 17.

[68] Georges Sauser-Hall, "L'arbitrage en droit international privé" (1957) 47-II Ann inst drt int 394 at 398-99. See also Redfern & Hunter, *supra* note 60 at para 1-19.

[69] Fouchard, Gaillard & Goldman, *supra* note 51 at paras 11-57; Chukwumerije, *supra* note 66 at 34-36; Lynch, *supra* note 4 at 71-72

[70] Lew, *Applicable Law*, *supra* note 66 at 59.

angle of its characteristics and purposes. It considers factors such as the autonomy of the parties, domestic laws, non-domestic arbitration rules, international instruments, the mixed nationalities of the parties and the arbitrators, the neutral place of arbitration and the special procedure, as evidence of the unique and autonomous character of arbitration. This theory is based on the fact that, as previously discussed, arbitration was developed in the business world by merchants and thus followed existing commercial practice rather than the rule of law.[71] This particular conception of international arbitration is criticized by many legal scholars, due to its overly idealistic framework or, in other words, its complete disregard of the need for basic national laws to regulate international commercial arbitration.[72]

The classification of the legal nature of arbitration directly influences its more practical aspects, such as the application of the law governing the substance of the dispute or the arbitrator's powers. For example, if one applies the jurisdictional theory to arbitration, the law to be applied by the arbitral tribunal to the merits of a case can only be determined in accordance with the choice of law rules of the seat (or *loci*) of arbitration.[73] If the contractual theory is applied, then only the parties have the authority to decide what law applies to the substance of the case. However, this classification is outdated as all of the

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[71] *Ibid* at 60; Lew, "Autonomous Arbitration", *supra* note 65 at 186-87; Lynch, *supra* note 4 at 72-73; Chukwumerije, *supra* note 66 at 36-38.

[72] Lynch, *supra* note 4 at 73; Chukwumerije, *supra* note 66 at 38; Jan Paulsson, "Arbitration in Three Dimensions" (2010), online: London School of Economics and Political Science Law Department <https://www.lse.ac.uk/collections/law/wps/WPS2010-02_Paulsson.pdf> at 11-15 [Paulsson, "Three Dimensions"]; Oppetit, *Théorie de l'arbitrage*, *supra* note 52 at 86-87; Antoine Kassis, *L'autonomie de l'arbitrage commercial international: le droit français en question* (Paris: L'Harmattan, 2005) [Kassis, *Autonomie de l'arbitrage*].

[73] Berthold Goldman, "L'arbitre, les conflits de lois et la *lex mercatoria*" in Antaki & Prujiner, *supra* note 51, 103 at 109. One of the most ardent proponents of the jurisdictional theory explains that "every arbitration is a national arbitration, that is to say, subject to a specific system of national law." Mann, *supra* note 66 at 159.

existing theories fail to explain adequately the "nature and legitimacy of international commercial arbitration in the new millennium".[74] Some authors have recently tried to offer an alternative to this classical classification.

1.2.2 Contemporary Classification

French specialist in international arbitration, Emmanuel Gaillard, proposes to restate the different conceptions of international arbitration in three categories: a territorial thesis, a pluralistic thesis and an arbitral legal order.[75] International expert Jan Paulsson summarizes this classification but criticizes Gaillard's creation of an arbitral legal order. Paulsson then adds a fourth category, a revised pluralistic thesis where "arbitration may be fully effective pursuant *to conventional arrangements that do not depend on national law or judges at all*."[76]

1.2.2.1 Gaillard's Classification

According to Gaillard, the territorial thesis puts emphasis on the fact that international arbitration is an element of a specific national legal order where, in the *loci* of the arbitration, the role of the arbitrator is assimilated to the role of a judge.[77] The best way to

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[74] Lynch, *supra* note 4 at 74.
[75] Emmanuel Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008) [Gaillard, *Aspects philosophiques*].
[76] Paulsson, "Three Dimensions", *supra* note 72 at 3 [emphasis in the original].
[77] Similarly to the jurisdictional theory, Gaillard bases this conception on Mann's position (*supra* note 66) and on the philosophical view of legal positivism of HLA Hart, *The Concept of Law*, 2d ed (Oxford: Clarendon Press, 1994) at 91-99: the core of a legal system is defined by primary rules of obligation and secondary rules of recognition, change and adjudication, the combination of both solving the problems of uncertainty, static

avoid chaos is for the state where the arbitration is held to have the most control over the arbitral process. The *Convention on the Execution of Foreign Arbitral Awards of September 1927*[78] illustrates the prevalence of this centralized view of arbitration which existed for several decades. Even if this convention is outdated, the territorial thesis' influence still lingers to this day in other instruments, such as the *New York Convention* (even if the latter represents the pluralistic thesis).[79]

The pluralistic thesis conceptualizes international arbitration as a product of multiple national legal orders. The legal nature of the arbitral award does not take its origin from one legal order but from the plurality of legal orders willing to recognize its efficiency.[80] Contrary to the territorial thesis, in the pluralistic thesis, the law from the *loci* of arbitration is not the exclusive source of law influencing the arbitral decision; the law of any state likely to come into contact with the specific arbitration can be considered. In other words, the arbitral award takes into account the laws of multiple states. The pluralistic thesis evaluates arbitration at the end of the process (i.e. all possible places of enforcement) whereas the territorial thesis only considers its starting point (i.e. the *loci* of arbitration). Hence, the pluralistic thesis favours the delocalization of arbitral proceedings. The place where the arbitration proceedings are held is not as important as in the territorial thesis because the arbitral awards are retroactively validated (i.e. because the burden of

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character of rules and inefficiency of "primitive" communities. See also Hans Kelsen, *Théorie pure du droit*, 2d ed (Neuchâtel: La Baconnière, 1988); Gaillard, *Aspects philosophiques*, *supra* note 75 at paras 12-22.

[78] 26 September 1927, 92 LNTS 301.

[79] *New York Convention*, art V(1)(a). See e.g. Michael W Bühler & Thomas H Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 2d ed (London, UK: Sweet & Maxwell, 2008) at paras 0.30-35. In an ICC arbitration, the requirements of the place of arbitration will generally be met.

[80] Gaillard, *Aspects philosophiques*, *supra* note 75 at paras 23-24.

recognition falls to the possible places of enforcement).[81] This decentralized view of international arbitration is adopted by the *New York Convention*, which considerably reduces the role of the place of arbitration (which, however, still remains important because of the lingering influence of the territorial thesis) and places the burden of the recognition of awards on the place of execution.[82]

Gaillard's third option considers that the legal nature of arbitration is grounded in its own legal order and not in one particular state. Arbitrators often use this vision of international arbitration to explain that they are not rendering decisions for a particular state but rather are providing a service to the international community. This theory rests on consensus instead of the isolated will of a particular sovereign state or on the legitimacy acquired by arbitration over the years.[83] From the standpoint of an arbitrator, this decentralized model may raise questions as to the applicable law where two legal orders have different norms. The application of the conflict of law rules is tantamount to choosing one legal order over another. To avoid this, some arbitrators apply principles, such as mitigation of damages, which are generally accepted by the international community, over the isolated rules of a particular state.[84] The distinction between the pluralistic thesis and the arbitral legal order

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[81] This "decentralized" conception of arbitration is also based, as the "centralized" conception, on the philosophical view of legal positivism of Hart, *supra* note 77 & Kelsen, *supra* note 77. It only differentiates itself from the territorial thesis in its conception of the relationship between states in a Westphalian perspective, where every state can, independently from other states, pronounce itself on the validity of the award. Gaillard, *Aspects philosophiques*, *supra* note 75 at paras 27-33.

[82] *New York Convention*, art V; Gaillard, *Aspects philosophiques*, *supra* note 75 at para 33.

[83] This legitimacy is based on the broad recognition of arbitral awards, which were not challenged over the years. Gaillard, *Aspects philosophiques*, *supra* note 75 at para 40.

[84] For cases of mixed arbitration, i.e. when state is a party, see generally Stephen Toope, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons* (Cambridge: Grotius, 1990). State

lies in the transition of the arbitral process as a product of plural norms to one based on collective norms.[85]

The enforceability of the arbitral award by states does not undermine the autonomy of the arbitral legal order. Once the arbitral award is granted, states support international commerce by enforcing it.[86] As such, arbitral awards are not enforceable "as contracts nor as a concession on the part of the enforcing sovereign state, but rather as an essential requirement for the smooth functioning of international commercial relations."[87] In other words, this conception of arbitration is based on the consensus (not unanimity) of the international community.[88]

1.2.2.2 Paulsson's Classification

According to Paulsson, the territorial thesis was prevalent until the middle of the 20th century. Interestingly, Paulsson criticizes Mann -one of the most fervent defenders of this conception of arbitration- for confusing the foundations of arbitration with the law applicable to the substance of the dispute. Indeed, he asserts that the focus of Mann's

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contracts remain rooted in municipal law, George Delaume, "The Myth of Lex Mercatoria and State Contracts" in Thomas E Carbonneau, ed, *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant*, revised edition (np: Juris Publishing, 1998) 111 at 130 [Carbonneau, *New Law Merchant*].

[85] This conception of arbitration can also base itself on jusnaturalist philosophy: An arbitral tribunal takes into account parties' interests, which sets apart international commercial law from domestic law in René David, "Droit naturel et arbitrage" in *Natural Law and World Law: Essays to Commemorate the Sixtieth Birthday of Kotaro Tanaka* (Tokyo: Yuhikako, 1954) 19 at 24. See also Bernard Oppetit, *Philosophie du droit* (Paris: Dalloz, 1999). This conception of arbitration can also be supported through a positivist approach. Gaillard, *Aspects philosophiques*, *supra* note 75 at paras 50ff.

[86] *Ibid* at para 62.

[87] Lew, *Applicable Law*, *supra* note 66 at 60.

[88] Gaillard, *Aspects philosophiques*, *supra* note 75 at para 118. The acceptance of rules by states is reflected through the use of international organisations resolutions, international conventions, etc.

demonstration was the law to be applied to the award (i.e. arbitrators cannot refer to equity and/or supranational norms but must apply a domestic law to the substance of the award). Paulsson shares Gaillard's view that this theory is no longer relevant in the context of globalization of commercial markets.[89]

Paulsson also discusses the foundations of the pluralistic thesis. As the number of transborder transactions increased exponentially after World War II, arbitration was undoubtedly influenced by the *loci* of arbitration as well as the place of its enforcement. For Paulsson, it is important to understand that the awards are not independent of any legal order. Rather, an award may be accepted in the jurisdiction where enforcement is sought regardless of whether it has been accepted in the jurisdiction where it was arbitrated. However, the difficulty with the pluralistic thesis is the large number of potentially relevant legal orders. Thus, Paulsson agrees with Gaillard that the application of a pluralistic thesis may be chaotic.[90]

As for the arbitral legal order theory, Paulsson insists that this latest conception of international arbitration merely constitutes a restatement of the autonomous theory. It adds nothing more than the pluralistic thesis and shares the same conclusions. According to Paulsson, Gaillard does not challenge the validity of the pluralistic thesis but merely challenges its consequences. Gaillard characterizes the pluralistic thesis as unstable because, in his opinion, arbitrators would need to examine an arbitral award against the

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[89] Paulsson, "Three Dimensions", *supra* note 72 at 5-7.
[90] Despite this possible confusion, this conception of arbitration corresponds better to today's reality than the territorial thesis. *Ibid* at 8, 10-11.

laws of all potential countries where the award may be enforced. Paulsson asserts the pluralistic thesis does not operate in this way since it is impossible to predict all the places where an award may potentially be enforced. Furthermore, Paulsson has serious reservations about the arbitral legal order theory because he feels Gaillard uses substantive rules applicable to the merits of a case as if they were the reflection of a legal order. He thus commits the same fallacies as Mann when defending the jurisdictional theory.[91] Substantive rules and the arbitral process are not identical and one cannot be used to justify the existence of the other. Paulsson also argues that a state's recognition of an arbitral award is not recognition of an arbitral legal order (as Gaillard claims) but an "expression of its own legal order."[92]

Paulsson proposes a fourth conception of international commercial arbitration which is a revised version of the pluralistic thesis. In this conception, arbitration does not depend on any particular national order but is dependent upon a contractual arrangement between parties.[93] The legitimacy of such an arrangement results from the notion of private social groups, as developed by Santi Romano. According to Santi Romano, law is anchored in social reality and it is this social reality that creates a legal order.[94] Thus, every organized social group is a representation of a legal order that may be superior, inferior or parallel to

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[91] Mann, *supra* note 66.
[92] Paulsson, "Three Dimensions", *supra* note 72 at 11-12, 18.
[93] *Ibid* at 15.
[94] This idea is also expressed by other legal scholars who elaborated the idea that an "international commercial and financial legal order" was created by professional participants. Legal orders start with the notion of "social grouping" that subsequently confirms a "rule-creating function". JH Dalhuisen, "Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and its Lex Mercatoria" (2006) 24:1 Berkeley J Int'l L 129 at 132, 154ff. For an overview of other legal philosophies (e.g. Hart and Kelsen), see text accompanying notes 77, 81.

nation-states. These social groups can exist within a greater legal order -i.e. nation-state- which tolerates them without imposing itself on the smaller legal orders. Thus, a legal order is the inevitable result of the formation of a social group rather than the product of a set of positive laws.[95]

The application of Santi Romano's definition of a legal order to international arbitration offers several benefits. First, different conceptions of arbitration can be recognized regardless of the debate surrounding the autonomous nature of arbitration. Second, even if Paulsson uses it to justify his revised pluralistic thesis, Santi Romano's definition of a legal order also seems to contain Gaillard's arbitral legal order theory. States' recognition of the arbitral legal order fits with Santi Romano's notion that a legal order is the result of the formation of a social group which can exist within a greater legal order of a nation-state.[96]

It is difficult to evaluate which thesis is more suitable to the realities of international commercial arbitration, Gaillard's arbitral legal order or Paulsson's revised pluralistic model. For our purposes, both can be used to justify the demonstration that international arbitral decisions can be used within a domestic legal order. Both theses are based on a conception, albeit different, of a legal order.[97] The general recognition of the *New York*

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[95] Santi Romano, *L'ordre juridique* (Paris: Dalloz, 1975) at 29ff; Paulsson, "Three Dimensions", *supra* note 72 at 15-16

[96] Gaillard mainly uses examples of French tribunals and some other European courts. For more details, see Gaillard, *Aspects philosophiques*, *supra* note 75 at paras 43, 63-67.

[97] This thesis only briefly touches upon philosophies underlying arbitration. It must be noted that any use of a particular philosophy to justify any theories of arbitration will reflect a certain subjectivity of the author. As such, any discussion of philosophies of law holds no absolute truth: It provides food for thought. Gaillard, *Aspects philosophiques*, *supra* note 75 at paras 5-6.

Convention and the *Model Law* within several jurisdictions demonstrates that states have, for the most part, accepted that international commercial arbitration is a legal order in its own right, whether it is autonomous or not.[98] Nonetheless, this legal order is subject to several globalizing forces, which rapidly challenge its definition.[99] Despite these changes, the vast majority of arbitral decisions are executed willingly by the parties without appealing to forced execution by states. The status of international arbitration as an essential institution of international commerce is insured, regardless of the underpinning philosophical justification.[100]

Santi Romano's notion, applied to either Gaillard's arbitral order or Paulsson's revised pluralistic thesis, has the benefit of taking into account the interests of the various stakeholders of international commerce.[101] It also takes into account the dual nature of international arbitration as a state-centric system (i.e. a system with reciprocal and interdependent links amongst states themselves and their connection to international institutions) as well as a multi-centric system (i.e. a system based on the network of connections between "transnational actors, organizations and institutions").[102]

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[98] Whether international arbitration is autonomous or not is not the focus of this paper. The discussion above illustrates the various points of views from eminent scholars.
[99] Lynch, *supra* note 4 at 85-89.
[100] Tweedale & Tweedale, *supra* note 16 at para 12.01; Calliess & Zumbansen, *supra* note 18 at 122. It must be noted that the possibility of sanctions by states insures the high rate of voluntary compliance (90% of ICC arbitration according to its estimation). Lynch, *supra* note 4 at 10, 77.
[101] Dalhuisen, *supra* note 94 at 156. For example, the legal order referenced by the author is the international commercial and financial legal order, where the production of rules depends on various factors, such as the willingness of the community to organize itself, to produce and respect rules, and communication. *Ibid* at 166. *Contra*: Kassis, *Autonomie de l'arbitrage*, *supra* note 72.
[102] Lynch, *supra* note 4 at 85-89. See also Sosa, *supra* note 1 at 110-11.

The framework of international arbitration described above is particularly important because it is within this setting that arbitral decisions are rendered, thus contributing to the elaboration of *lex mercatoria*. Indeed, legal scholars Colliers and Zumbansen exemplify *lex mercatoria* as the methodological approach to transnational law. Transnational law is not a law applied in a sphere territorially different than from a state. Instead, it should be considered a methodological approach to the creation of a legal order distinct from a state. As such, a transnational law regime, similarly to a nation-state, should perform the three functions of legislating, adjudicating and enforcing norms.[103] Applying Colliers and Zumbansen's model specifically to *lex mercatoria*, norm creation can be broken down into legislation and adjudication components.[104] The adjudication component is exercised by courts and international arbitral tribunals (and more specifically in this paper, the ICC's arbitral awards).

This framework can be the basis for the development of *lex mercatoria*. However, issues concerning the choice of law problem (1.3) and the use of a non-domestic law (*lex mercatoria*) by arbitral tribunals (1.4) must first be addressed to fully understand the context of the elaboration of *lex mercatoria*.

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[103] Calliess & Zumbansen, *supra* note 18 at 6, 110-13.
[104] See chapter 2, below, for more on this topic.

1.3 Choice of Substantive Law in International Arbitration

One of the most acute problems in international arbitration is associated with choice of law (or conflict of law rules). Several laws or rules can be in conflict (for example, the *lex fori*, law of the state of execution, etc.) at three different stages: during the determination of the applicable law to the arbitration agreement, during the determination of the applicable law to the arbitral procedure or during the determination of the applicable law to the merits of the dispute.[105]

The starting point in analyzing and understanding the determination of the applicable law is the separability presumption, a basic principle of arbitration.[106] The separability presumption means that "the arbitral clause is autonomous and judicially independent from the main contract in which it is contained".[107] In other words, the arbitration agreement, sometimes taking the form of an arbitral provision in the main contract, is separate from the underlying contract. Hence both the arbitration agreement and the main contract may - although not necessarily- be subject to two different legal regimes (e.g. the arbitration agreement may be subject to Canadian law and the main contract subject to U.S. law).[108] A

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[105] Chukwumerije, *supra* note 66. A fourth level, enforcement law and a fifth level, parties' capacity to enter into an arbitration agreement can be added. Lynch, *supra* note 4 at 169; Redfern & Hunter, *supra* note 60 at paras 2-04; 2-75ff. Also, some legal scholars consider the conflict of law rules to be applied to each of the foregoing laws as another level. Born, *supra* note 5 at 2109-10 (vol 2).

[106] Born, *supra* note 5 at 411-12. Some legal scholars also call this "the autonomy of the arbitration agreement" or "arbitral clause". Fouchard, Gaillard & Goldman, *supra* note 51 at paras 420ff; Craig, Park & Paulsson, *supra* note 11 at 48-52.

[107] Case No 8938 (1999), (1996) 21 Va YB Comm Arb 174 at 176 (ICC).

[108] Separability doctrine does not mean that two different legal regimes are necessarily applied to the arbitration agreement and the main contract. In fact, it can be noted that the same law generally applies to both agreements. Born, *supra* note 5 at 412; Craig, Park & Paulsson, *supra* note 11 at 52-54, 107-08.

practical effect of this distinction is the possibility of upholding the validity of an arbitration agreement, "notwithstanding [...] the non-existence, invalidity, illegality, or termination of [the parties'] underlying contract."[109]

In determining the applicable law to the arbitral procedure, it is generally recognized that parties have complete autonomy in selecting the procedural aspects of their dispute.[110] In fact, this leading principle in international commercial arbitration is recognized in several international instruments.[111]

Yet, choice of law can be problematic when determining the applicable law to the substantive issues or merits of the dispute.[112] The parties having already chosen a substantive law in a contract must be distinguished from the circumstances where the parties have not chosen a substantive law and the arbitral tribunal must determine the applicable law to govern the merits of their dispute.

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[109] Born, *supra* note 5 at 351. Because a different legal regime may apply to the arbitration agreement than to its underlying contract, it may be difficult to determine the applicable law to the formation, validity or termination of the main contract, given the confusing and inconsistent different choice of law -or conflict of law rules- approaches. For example, compare the application of the law of the *loci* of the arbitration versus the application of the "closest connection" law. *Ibid* at 422-23; Redfern & Hunter, *supra* note 60 at para 2-05.

[110] "General Principles", *supra* note 38 at 1817, n 11; *Model Law*, art 28(1); Craig, Park & Paulsson, *supra* note 11 at 295; *2012 ICC Arbitration Rules*, art 19; Frédéric Bachand, *L'intervention du juge canadien avant et durant un arbitrage commercial international* (Cowansville, Que: Yvon Blais, 2005) at para 128 [Bachand, *Intervention du juge canadien*].

[111] See e.g. *New York Convention*, art II, V(1)(d); *CISG*, art 6; *Model Law*, art 2(d), 19(1); Jeffrey A Talpis, "Prevention of disputes arising out of international contracts" in Générosa Bras Miranda & Benoît Moore, eds, *Mélanges Adrian Popovici: les couleurs du droit*, (Montréal: Thémis, 2010) 553 at 558 [Talpis, "Prevention of disputes"].

[112] *Ibid* at 556; Chukwumerije, *supra* note 66 at 230ff; Tweedale & Tweedale, *supra* note 16 at para 6.05.

In the first case, when the parties have agreed to a choice of law provision, international conventions, arbitrators and legal scholars must respect the principle of party autonomy.[113] In particular, Article V of the *New York Convention* fails to list "erroneous choice of law" or "error (or misapplication) of law" as grounds for not recognizing an award. However, the principle of party autonomy may be limited by public policy considerations.[114] In cases where the parties have not selected the substantive law to govern their dispute, the arbitral tribunal may choose the law applicable to the substance of the dispute.[115] Several institutions, instruments and principles have provided parameters that can guide arbitral tribunals in the selection of a substantive law.[116]

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[113] Fouchard, Gaillard & Goldman, *supra* note 51 at para 46; Mo Zhang, "Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law" (2006) 20 Emory Int'l L Rev 511.

[114] *New York Convention*, art V; Symeon C Symeonides, "Party Autonomy and Private-Law Making in Private International Law: The *Lex Mercatoria* that Isn't" in *Liber Amicorum Konstantinos D Kerameus* (Athens: Sakkoulas/Kluwer Press, 2006), online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946007> at 17 (integral PDF version) where attention must be brought on the conception of public policy (*ordre public*). The question is to know whether the sources and content of public policy varies upon the location, the judge/arbitrator or on any random factor. This thesis does not directly discuss the public policy issue, but see generally Homayoon Arfazadeh, *Ordre public et arbitrage international à l'épreuve de la mondialisation: une théorie critique des sources du droit des relations transnationales*, revised edition (Zurich: Schultless Médias Juridiques SA, 2006); Pierre Lalive, "Ordre public transnational (ou réellement international) et arbitrage international" [1986] Rev Arb 329; Yves Derains, "L'ordre public et le droit applicable au fond du litige dans l'arbitrage international" [1986] Rev Arb 375. See also Dalhuisen, *supra* note 94 at 169-79 (how public policy can influence competition between legal orders); Bachand, *Intervention du juge canadien*, *supra* note 110 at para 2; Fouchard, Gaillard & Goldman, *supra* note 51 at paras 1710-13 (notion of international public policy); Yves Derains, "Case Comment on Case No 2404 (ICC)" (1976) 103 JDI 998.

[115] *Model Law*, art 28(2); *2012 ICC Arbitration Rules*, art 21; Craig, Park & Paulsson, *supra* note 11 at 295. The arbitral tribunal's powers seem unlimited, Symeonides, *supra* note 114 at 17; Várady, Barceló & Von Mehren, *supra* note 7 at 652ff.

[116] There are various approaches (e.g. choice of law in force at the seat of arbitration, cumulative application of choice of law systems, general principles of conflict of laws), Talpis, "Prevention of disputes", *supra* note 111 at 557. *2012 ICC Arbitration Rules*, art 21(1) provides for the *voie directe* approach. Bühler & Webster, *supra* note 79 at paras 0.17-25.

For practitioners whose clients are involved in international commercial arbitration, the freedom to determine the law applicable to a dispute helps to manage their clients' expectations. In turn, this freedom assists in the predictability and certainty in such clients' international commercial relationships.[117] However, in international business, contract terms and trade usages frequently fill gaps left by the applicable law as the "world of international commerce may frequently develop more rapidly than the law."[118] Trade usages are also meant to complete a national law, because the latter can create a barrier to international trade.[119] The difficulty is that "uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict of laws rules."[120] In light of the foregoing, one would expect the use of a transnational commercial law by practitioners should be widespread. However, the use of a uniform "law of trade" in transnational disputes is still marginal in practice.

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[117] Zhang, *supra* note 113 at 512. For limits to the principle of party autonomy, see e.g. Talpis, "Prevention of disputes", *supra* note 111 at 560. See generally Born, *supra* note 5 at 2153, n 218 (vol 2).
[118] Craig, Park & Paulsson, *supra* note 11 at 331. This is illustrated by the codification of this statement in the *2012 ICC Rules of Arbitration*, art 21(2): "The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages."
[119] Van Houtte, *supra* note 22 at paras 1.32-33; Josée Ringuette, *Le hardship: vers une reconnaissance du principe par les tribunaux arbitraux du commerce international* (LLM Thesis, Université de Montréal, 2003) at 82 [unpublished].
[120] *Sherk v Alberto-Culver Co*, 417 US 506 at 516 (1974).

1.4 Use of *Lex Mercatoria* in Arbitral Caselaw: ICC's Model

From the statistics available at the ICC, the substantive law usually applied to a dispute is generally a national -or domestic- law chosen by the parties.[121] Few arbitral tribunals seem to apply a law other than a domestic law to govern the merits of the dispute as demonstrated in the table below.[122] In fact, the table below illustrates the consequences of the misconceptions and uncertainties associated with the traditional conception of *lex mercatoria*.[123] In the absence of a clear universal law, parties tend to fall back on what is familiar to them: domestic laws. However, applying domestic laws to international commerce does not provide greater certainty or clarity. In fact, because these laws are not adapted to international business, they are more at a risk of destabilizing it.[124]

Table 2: Statistics on Applicable Law in ICC Arbitration Provisions

	2003	2004	2005	2006	2007	2008	2009	2010
National Law (%)	80.4	79.1	79.3	82.7	79.8	84	86.8	99
Other Rules (%)[125]	1.2	1.3	1.7	2.0	0.5	2.8	1.2	1
Applicable Law Not Specified (%)	18.3	19.6	19.0	15.3	20.2	13.2	12	N/A

Source: *Annual Statistical Reports 2003-2010*[126]

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[121] See Table 2: Statistics on Applicable Law in ICC Arbitration Provisions; Sosa, *supra* note 1 at 126ff; Barton S Selden, "*Lex Mercatoria* in European and U.S. Trade Practice: Time to Take a Closer Look" (1995) 2:1 Ann Surv Int'l & Comp L 111 at 113-14; Yves Fortier, "The New, New Lex Mercatoria, or, Back to the Future" (2001) 17:2 Arb Intl 121 at 127.

[122] Even if the use of domestic laws has its pitfalls in international commerce, Lynch, *supra* note 4 at 170-71.

[123] Berthold Goldman, "Introduction" in Carbonneau, *New Law Merchant*, *supra* note 84, xix at xxi; Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria*, 2d ed (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2010) at 58ff [Berger, *Creeping Codification*].

[124] Dalhuisen, *supra* note 94 at 153.

[125] Other Rules include *CISG*, *UNIDROIT Principles*, "ex aequo et bono", "principles of international law", "equity", "international trade law", EC law, etc. See *Annual Statistical Reports 2003-2010*.

[126] These statistics are from the ICCCA's annual statistical reports. When the percentage was not provided, the author calculated the percentage with the number of cases the parties did not choose a domestic law

The next chapter's objective is to explain the different misconceptions associated with *lex mercatoria* and to provide the groundwork for a method of classification that will ensure greater acceptance of *lex mercatoria* as a uniform substantive law in international commercial disputes.

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divided by the number of cases filed that particular year. "ICC 2010 Statistical Report", *supra* note 40 at 5ff (10/793); "ICC 2009 Statistical Report", *supra* note 40 at 5, 12 (10/817); "ICC 2008 Statistical Report", *supra* note 40 at 12 (ICCCA approximates it to 3%); "ICC 2007 Statistical Report" (2008) 19:1 ICCCA Bull 6, 12 (3/599); "ICC 2006 Statistical Report" (2007) 18:1 ICCCA Bull 11; "ICC 2005 Statistical Report" (2006) 17:1 ICCCA Bull 11; "ICC 2004 Statistical Report" (2005) 16:1 ICCCA Bull 11; "ICC 2003 Statistical Report" (2004) 15:1 ICCCA Bull 13 (ICCCA uses 1,6% but these number do not correspond to the numbers calculated by the author and by Christopher R Drahozal, "Busting Arbitration Myths" (2007-08) 56 U Kan L Rev 663 at 672, who established a similar table for the years 2003-2006). These statistics are based on the parties' choice of substantive law in their initial contract: They do not include the law eventually applied by the arbitral tribunal.

Chapter 2 Transnational Law and *Lex Mercatoria*: Traditional Views and Modern Conceptualizations

It is important to evaluate the framework in which arbitral decisions are rendered (chapter 1) because they contribute to a large extent to the elaboration of *lex mercatoria*. This contribution can constitute, for example, in the application by some arbitral tribunals of "general principles of law", "trade usages and customs" or "*lex mercatoria*" as the law governing the merits of the dispute. The use of norms with "vague" content, such as *lex mercatoria*, is sometimes criticized: It is argued that they do not offer a coherent legal solution equivalent to one based on domestic laws.[127] This chapter seeks to clarify several of the misconceptions often associated with *lex mercatoria* and to demonstrate that it can provide a coherent legal solution.

First, traditional conceptions of transnational law and *lex mercatoria* will be distinguished from one another (2.1). Second, a methodological approach to transnational law will be defined (2.2), which in turn will be used to elaborate a new framework for the development of *lex mercatoria* (2.3). Third, this methodological approach will identify the sources of *lex mercatoria* and classify its content in a legislative approach (2.3.1) and an adjudicatory approach (2.3.2).

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[127] Craig, Park & Paulsson, *supra* note 11 at 333-34; Van Houtte, *supra* note 22 at para 1.35; Mustill, *supra* note 49 at 114. *Contra*: Recent works contradict that statement and argue that *lex mercatoria* is more developed and precise. See e.g. Fortier, *supra* note 121 at 127; Berger, *Creeping Codification*, *supra* note 123 at 127; Tweedale & Tweedale, *supra* note 16 at paras 6.38-39. See also *infra* note 159 and accompanying text.

2.1 Inadequacy of Traditional Conceptualizations of Transnational Law and *Lex Mercatoria*

The inadequate conceptualization of *lex mercatoria* is in part the result of the various definitions associated to it.[128] The uncertain terminology between *lex mercatoria* and transnational law adds to this confusion.

2.1.1 Distinguishing Transnational Law and *Lex Mercatoria*

The concept of transnational law was first introduced by Philip Jessup in 1956 who defined it as "all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not completely fit into such standard categories."[129] Jessup wanted to distinguish transnational law from international law. In his opinion, international law was preoccupied with relationships between states.[130] Jessup's definition initiated many discussions about transnational law, but its conceptualization has varied greatly from one author to another, depending on the author's general perspective on the intrinsic nature of law.[131]

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[128] Fouchard, Gaillard & Goldman, *supra* note 51 at paras 1454-55; Berger, *Creeping Codification*, *supra* note 123 at 58-64; Emmanuel Gaillard, "Trente ans de *lex mercatoria*" (1995) 122 JDI 5 at para 4 [Gaillard, "Trente ans"].

[129] Philip Jessup, *Transnational law* (New Haven: Yale University Press, 1956) at 2; Craig Scott, "'Transnational Law' as Proto-Concept: Three Conceptions" (2009) 10:7 German Law Journal 859.

[130] Jessup, *supra* note 129 at 2; Roy Goode, "Usage and Its Reception in Transnational Commercial Law" (1997) 46:1 ICLQ 1 at 2.

[131] Scott, *supra* note 129 at 859-60.

One of the major issues associated with transnational law is that different definitions of transnational law perpetuate the ambiguity of the concept.[132] These definitions can be grouped in three general categories of transnational law: (i) transnationalized legal traditionalism, (ii) transnationalized legal decisionism and (iii) transnational socio-legal pluralism.[133]

According to transnationalized legal traditionalism, the law applicable to a transborder transaction refers either to private international law or to a state's domestic law. It describes the legal norm applicable to an international agreement including, but not limited to, *lex contractus*. According to this conception, transnational law is neither an autonomous law nor a special law: It is the law applicable to a transborder transaction, which is "located" either in private international law or domestic law.[134]

Transnationalized legal decisionism suggests that transnational law is built from a variety of decisions applying both domestic and international law. The result is a transnational law

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[132] See e.g. Eugen Langen, *Transnational Commercial Law* (Leiden, The Netherlands: AW Sijthoff, 1973) at 33 where the author defines transnational commercial as "the aggregation of all those rule which hold good in the same or a very similar way for a given concrete legal situation in two or more spheres of national jurisdiction." See also Matthias Lehmann, "A Plea for a Transnational Approach to Arbitrability in Arbitral Practice" (2003-04) 42 Colum J Transnat'l L 753 at 753-54, where the author identifies transnational law as the general principles of law which are recognized by a "significant number" of domestic laws.

[133] Scott, *supra* note 129. Other conceptualizations exist but this classification seems most topical. *C.f.* Norbert Horn, "Uniformity and Diversity in the Law of International Commercial Contracts" in Norbert Horn & Clive M Schmitthoff, eds, *The Transnational Law of International Commercial Transactions*, vol 2 (Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1982) at 12-15; Harold Hongju Koh, "Transnational Legal Process" (1996) 75 Neb L Rev 181.

[134] Scott, *supra* note 129 at 868. *C.f.* Horn, *supra* note 133 at 13.

which provides potential standards to be applied to transborder transactions.[135] These decisions analyse the different rules, principles and contractual provisions used in international contracts from different countries and organize them in similar patterns.[136]

Finally, transnational socio-legal pluralism, transnational law is somewhat autonomous from international and domestic legal regimes, and as such, occupies its own normative sphere. For proponents of this conception, transnational law emerges from decisions, rules and principles and develops its own internal coherence.[137] Various sources of international commerce can be included in this conception of transnational law.[138]

Some legal scholars tend to use transnational law and *lex mercatoria* interchangeably[139] by associating *lex mercatoria* to one of the three conceptualizations of transnational law.[140] Others will distinguish transnational law and *lex mercatoria* on the basis of their normative

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[135] Scott, *supra* note 129 at 870-73. The author does not precise if these decisions originated from arbitral tribunals and/or domestic courts.
[136] *C.f.* Horn, *supra* note 133 at 13-14. Horn commonly labels a similar conception of transnational law as *lex mercatoria*.
[137] Scott, *supra* note 129 at 873-875. See also *supra* note 132 and accompanying text. Also, this author notes that there are two conceptions of legal pluralism: First, in regards to plurality of sources (national law, customs, general principles, etc.) and second, to plurality of sources and legal concepts.
[138] *C.f.* Horn, *supra* note 133 at 14-15. Transnational socio-legal pluralism includes one of Horn's conceptions of transnational law (international uniform law). These sources can be either international conventions (also called international legislation) or customary law. International legislation, such as the *CISG* or the *Hague-Visby Rules*, has the benefit of being clear and mandatory once adopted through states. International customary law includes some general principles which provide a common ground for both civilists and common law lawyers. See chapter 3, below, for more on this topic.
[139] See e.g. Tweedale & Tweedale, *supra* note 16 at para 6.34 where *lex mercatoria* is said to be a common expression of transnational law; Fouchard, Gaillard & Goldman, *supra* note 51 at paras 1449-55 where the authors use interchangeably *lex mercatoria* and transnational rules.
[140] See e.g. Lando, *supra* note 43; Goode, *supra* note 130 at 2. *C.f.* Horn, *supra* note 133 at 13-14.

characters.[141] Regardless of the distinction –or lack thereof-, controversy still surrounds the concept of *lex mercatoria*.

2.1.2 *Lex Mercatoria:* 50 Years of Definitions, Approaches and Controversy

It can be said that *lex mercatoria* "means different things to different people."[142] *Lex mercatoria* has been much present in international commercial law for the past 50 years, even if it has been defined, mocked, attacked, redefined and misunderstood several times. The number of definitions published in the last half-century provides an insight on the diverging views of *lex mercatoria*. For some legal scholars, *lex mercatoria* is transnational law and is a descriptive term that designates "*de facto* similarities of domestic legal systems", "uniform law created by international conventions" or "unified contractual provisions".[143] Others refer to *lex mercatoria* in substantive terms, to designate an inconsistent "legal mass of rules and principles", a "factual *ius commune*" made of trade usages (an "autonomous law of trade") or an autonomous supra-national legal order.[144] Finally, certain legal scholars deny that *lex mercatoria* even exists.[145] These various

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[141] Maniruzzaman, *supra* note 16 at 666; Goode, *supra* note 130 at 2.
[142] Craig, Park & Paulsson, *supra* note 11 at 623; Bühler & Webster, *supra* note 79 at paras 17.41. See also Nikitas E Hatzimihail, "The Many Lives - and Faces - of *Lex Mercatoria*: History as Genealogy in International Business Law" (2008) 71 Law & Contemp Probs 169 at 169-71 which provides a plurality of definitions associated with *lex mercatoria*. He also thoroughly explained both Schmitthoff's and Goldman's schools of thought: Much of the following is based on his analysis.
[143] Berger, *Creeping Codification*, *supra* note 123 at 59-60. *C.f.* Horn, *supra* note 133 at 14, 16; Craig, Park & Paulsson, *supra* note 11 at 623; Born, *supra* note 5 at 2232-33 (vol 2).
[144] Berger, *Creeping Codification*, *supra* note 123 at 61-62.
[145] See e.g. Paul Lagarde "Approche critique de la *lex mercatoria*" in *Le droit des relations économiques internationales: études offertes à Berthold Goldman* (Paris: Librairies techniques, 1982) 125; Kassis *Autonomie de l'arbitrage*, *supra* note 72 at para 660. Kassis also objected that *lex mercatoria* was an incoherent mass of principles (for e.g. *pacta sunt servanda* (binding nature of agreements) versus *rebus sic*

definitions illustrate that the status of *lex mercatoria* as positive law varies according to the scholar's conception of the "identity of law".[146]

From the outset, two schools of thought, represented respectively by Goldman and Schmitthoff, have shaped the concept of *lex mercatoria* and influenced much of the terminology issues associated to it. The commonality between these two schools of thought lies in that *lex mercatoria* is seen as a group of norms distinct from "state" law but share a "normative commitment to the autonomous regulation of transnational business".[147]

According to Schmitthoff, *lex mercatoria* –also known as the modern law merchant- is very similar from one country to another, regardless of whether its legal tradition is rooted in common law or civil law.[148] *Lex mercatoria* stems from international legislation and international customs and is unified through the role of various institutions, intergovernmental and non-governmental agencies. Schmitthoff determines the importance of these sources using a positivist approach and by categorizing the history of *lex mercatoria* in three phases: (i) the rise of the law merchant in the Middle Ages as a body of customary international rules governing merchants, (ii) the incorporation in national laws through the seventeenth and the nineteenth centuries and (iii) the unification at an

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stantibus (as long as the conditions have not changed) or hardship). Antoine Kassis, *Théorie générale des usages de commerce*, (Paris: LGDJ, 1984) at paras 549-83 [Kassis, *Usages de commerce*]. *Contra*: All legal orders recognize that there are exceptions (*rebus sic stantibus* or hardship) to general principles (*pacta sunt servanda*). Gaillard, "Trente ans", *supra* note 128 at para 11; Case No 2291 (1975), (1976) 103 JDI 989 (ICC).

[146] Gunther Teubner, "Breaking Frames: Economic Globalization and the Emergence of *Lex Mercatoria*" (2002) 5:2 European Journal of Social Theory 199 at 202 [Teubner, "Breaking Frames"].

[147] Hatzimihail, *supra* note 142 at 190.

[148] Clive M Schmitthoff, "The Unification of the Law of International Trade" [1968] J Bus L 105 at 109.

international level (current phase).[149] Interestingly, this understanding of *lex mercatoria* does not necessarily view traditional state's domestic law as an obstacle. On the contrary, the coexistence of both the *lex mercatoria* and states' domestic law is an illustration of legal cosmopolitanism.[150] Moreover, Schmitthoff does not believe in a rigid code of law merchant which would hinder the growth of international commerce. Rather, he proposes an eclectic and realist model in constant evolution, which makes it challenging to rank the sources of *lex mercatoria* because such sources originate from initiatives of various actors in international commerce.

Goldman criticizes Schmitthoff's model of *lex mercatoria* for not providing answers to specific issues of transnational commerce.[151] He reckons that each principle of *lex mercatoria* is a legal norm in its own right and *lex mercatoria* as a whole possesses the characteristics of a legal order, including autonomy from states (national legal orders).[152] Goldman, unlike Schmitthoff, believes in the uncodified and customary character of the law merchant: This "spontaneous" character is what distinguishes it from transnational law.[153] Goldman's *lex mercatoria* is a "set of general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without

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[149] *Ibid* at 105-09; Maniruzzaman, *supra* note 16 at 660.
[150] See generally Yoshiaki Sato, "Towards the Institutionalization of Cosmopolitan Law-Making" (2008-09) 46:4 Alta L Rev 1141.
[151] Hatzimihail, *supra* note 142 at 171, 180-81; Schmitthoff, *supra* note 148 at 112. Further discussion on the hierarchy of the sources of *lex mercatoria* will be found at 48ff, below.
[152] Berthold Goldman, "La *lex mercatoria* dans les contrats et l'arbitrage internationaux: réalité et perspectives" (1979) 106 JDI 475 at paras 38ff [Goldman, "Réalité et perspectives"]; Hatzimihail, *supra* note 142 at 183.
[153] Maniruzzaman, *supra* note 16 at 666. See also Van Houtte, *supra* note 22 at paras 1.32-1.35.

reference to a particular national system of law."[154] His claim is that *lex mercatoria* rose and failed twice already: During the Roman era and the Middle Ages. *Lex mercatoria* has been "revived" because current solutions to international commerce were unsatisfactory. Contrary to Schmitthoff, Goldman favors a "purist" notion of the sources of *lex mercatoria* (i.e. not state-based). *Lex mercatoria* is constituted of general principles and customs found in arbitral awards.[155]

Until now, Goldman and Schmitthoff's approaches to *lex mercatoria* have sparked countless debates. Some legal scholars, such as Osman, use Santi Romano to justify the existence of an autonomous *lex mercatoria*. For Santi Romano, the *societas mercatorum* is a community, an institution gathering various actors from international commerce. The *societas mercatorum* creates the norms constituting *lex mercatoria* in order to answer their commercial needs.[156] Other legal scholars reject the existence of a *societas mercatorum*. According to them, the operators of international commerce are too heterogeneous to amount to a legal order.[157] Some legal scholars have also stated that *lex mercatoria* fails to meet the criteria which characterize a legal order, namely (i) accessibility or general

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[154] Berthold Goldman, "The Applicable Law: General Principles of Law: the *Lex Mercatoria*" in Julian Lew, ed, *Contemporary Problems in International Arbitration* (London, Ont: School of International Arbitration, 1986) 113 at 116.
[155] Berthold Goldman, "*Lex Mercatoria*" (1983) 3 Forum Internationale 3, 3-7 cited in Hatzimihail, *supra* note 142 at 187-88.
[156] Filali Osman, *Les principes généraux de la Lex Mercatoria: contribution à l'étude d'un ordre juridique anational* (Paris: LGDJ, 1992) at 407ff; Lando, *supra* note 43 at 752. It is important not to confuse the use of Santi Romano to justify the autonomy of *lex mercatoria* versus its use to support international arbitration as a legal order, as elaborated in section 1.2, above.
[157] Kassis, *Usages de commerce*, *supra* note 145 at paras 623-26.

applicability; (ii) authoritativeness and consistency; (iii) relative predictability and (iv) evident fairness.[158]

The controversy over the legal nature of *lex mercatoria* remains.[159] It has been argued that *lex mercatoria* should be defined in terms of the method of decision making.[160] This threefold method would consist in (i) analysing the parties' intention, (ii) verifying that the parties' intention are supported by "widely accepted rule" (if not, the contention should be rejected) and (iii) evaluating that the "widely accepted rule" does not require unanimity and is not limited to a select number of legal systems.[161]

2.2 Transnational Law as a Methodological Challenge

Scholars, such as Calliess and Zumbansen, maintain that the pursuit of the debate on the autonomy of the *lex mercatoria* -or lack thereof- does not allow for "learning

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[158] Keith Highet, "The Enigma of the Lex Mercatoria" in Carbonneau, *New Law Merchant*, *supra* note 84, 133 at 140; Maniruzzaman, *supra* note 16 at 670-72. Most objections to the *lex mercatoria* (lack of procedural legitimacy, lack of legal publicity of its development, results in equity, etc.) are usually associated to the autonomous character of a legal system (which *lex mercatoria* may lack). Berger, *Creeping Codification*, *supra* note 123 at 114; Harold J Berman & Felix J Dasser, "The "New" Law Merchant and the "Old": Sources, Content, and Legitimacy" in Carbonneau, *New Law Merchant*, *supra* note 84, 53 at 53-54.

[159] However, *lex mercatoria*'s content (e.g. general principles) has been substantiated by arbitral caselaw, scholars and databases. See e.g. Tweedale & Tweedale, *supra* note 16 at paras 6.38-39; Berger, *Creeping Codification*, *supra* note 123; *Trans-Lex Law Research*, *supra* note 49; Mustill, *supra* note 49 at 110-14; Osman, *supra* note 156. See also *supra* note 127 and accompanying text. However, lawyers are wary of incorporating *lex mercatoria* in their contract as a governing law. See Table 2: Statistics on Applicable Law in ICC Arbitration Provisions, above.

[160] Gaillard, "Method of Decision Making", *supra* note 43 at 61-64. There is a debate between supporters of *lex mercatoria* regarding its definition: Is *lex mercatoria* defined by its content (i.e. a list of rules) or its sources? *Lex mercatoria* as a method of decision making is based on the latter. See also Fouchard, Gaillard & Goldman, *supra* note 51 at paras 1455ff.

[161] This method would meet criteria of completeness, structured character, evolving character and predictability and thus qualify *lex mercatoria* as a legal order or as performing very similar functions to a legal system. Gaillard, "Method of Decision Making", *supra* note 43 at 65-71. See also Gaillard, "Trente ans", *supra* note 128 at paras 29ff.

opportunities" of the interaction between non-state law ("privately made law") and "mainstream law" (state law). The importance of "privately made law" is particularly apparent in transborder commerce. This necessitates an approach that can take into account non-state law instead of perpetuating the belief that states are the exclusive creators of law.[162] Calliess and Zumbansen suggest:

> Instead of trying to define the transnational arena as a sphere, territorially different from that of the nation-state, implying issues of jurisdiction, conflict of laws and "extensions" of domestic law into the non-domestic arena, *transnational law is* [...] above all, *a methodological challenge* to rethink the hitherto made experiences with law, legal theory, legal sociology and legal doctrine with regard to relations and human activities that surpass the historically grown and institutionally evolved embeddedness of nation-states.[163]

Thus, transnational law is not a law applicable to international transactions (transnationalized legal traditionalism), a law derived from arbitral and/or court decisions (transnationalized legal decisionism) or a law occupying its own normative sphere (transnational socio-legal pluralism).[164]

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[162] Calliess & Zumbansen, *supra* note 18 at 110; Peer Zumbansen, "Transnational Legal Pluralism" (2010) 1:2 Transnational Legal Theory 141 at 168 [Zumbansen, "Legal Pluralism"]. This idea of legal pluralism, that law is not solely a "statist" result in a world of globalization was also expressed by many scholars. See e.g. Dalhuisen, *supra* note 94 at 129; Brian Z Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 Sydney L Rev 375; Jean-Guy Belley, "Law as *Terra Incognita:* Constructing Legal Pluralism" (1997) 12 Can JL & Soc 17; Teubner, "Breaking Frames", *supra* note 146 at 206-08. See also Sato, *supra* note 150 for the notion of legal cosmopolitanism.

[163] Calliess & Zumbansen, *supra* note 18 at 103 **[**emphasis added**]**.

[164] This methodological challenge positions transnational law as a continuation of reflexive law in a post-national and globalized context instead of in a distinct field similar to public international law or conflict of laws. Calliess & Zumbansen, *supra* note 18 at 6. For a more thorough discussion on reflexive law, please see Gunther Teubner, *Law as an Autopoeietic System* (Oxford: Blackwell Publishers, 1993); Gunther Teubner, "'Global Bukowina': Legal Pluralism in the World Society" in Gunther Teubner, ed, *Global Law Without a State* (Aldershot, Vt: Dartmouth Publishing, 1997) 3 [Teubner, "Global Bukowina"].

It is a hybrid -or mixed- methodology, neither private nor public, which allows for the creation of norms beyond the state.[165] The hybrid nature of Calliess and Zumbansen's *lex mercatoria* is particularly important because the blend of state and non-state norms and processes meets the needs of international businesses.[166] As such, transnational business systems are not completely separate from state systems; rather they overlap.[167] Transnational law can thus be viewed as an intermediate type of transnational governance, which includes "various and untraditional types of international and regional collaboration among both public and private actors."[168]

In the same way, *lex mercatoria* illustrates concretely the idea of transnational governance. Although Schmitthoff and Goldman provided an important conceptualization of *lex mercatoria*, their framework is no longer adequate. Instead of studying *lex mercatoria* as an autonomous legal order or as a method of decision making, it should be viewed as a "methodological challenge" to the creation of private norms or, in other words, as a

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[165] For example, *UNIDROIT Principles*, a private instrument, can complement *CISG*, a public instrument. Calliess & Zumbansen, *supra* note 18 at 110-12, 122; Zumbansen, "Legal Pluralism", *supra* note 162 at 159-60. Gralf-Peter Calliess, "Lex Mercatoria: A Reflexive Law Guide to an Autonomous Legal System", online: (2001) 2:17 German Legal Journal 6 <http://www.germanlawjournal.com/article.php?id=109>).

[166] Wai, "Interlegality", *supra* note 19 at 115. See e.g. Philippe Kahn, "À propos des sources du droit du commerce international" in *Philosophie du droit et droit économique: Quel dialogue? Mélanges en l'honneur de Gérard Farjat* (Paris, Frison-Roche: 1999) 185 [Kahn, "Sources du droit"]. See generally David, *Commerce international*, *supra* note 11 at para 44.

[167] Robert Wai, "Transnational Private Law and Private Ordering in a Contested Global Society Symposium: Comparative Visions of Global Public Order (Part I)" (2005) 46 Harv Int'l LJ 471 at 477 [Wai, "Transnational Private Law"]; Lynch, *supra* note 4 at 340.

[168] Christian Joerges, Inger-Johanne Sand & Gunther Teubner, "Foreword and Acknowledgements" in Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds, *Transnational Governance and Constitutionalism* (Portland, Or: Hart Publishing, 2004) ix at ix. For the link between private international law and transnational governance, see Wai, "Interlegality", *supra* note 19 at 107-08.

transnational law regime.[169] As stated by Calliess and Zumbansen, *lex mercatoria* "remains one of the most important conceptual laboratories to reflect on the elements of a legal order emerging at a critical distance from the State."[170] A transnational law regime performs the three fundamental functions of a state, namely legislating, adjudicating and enforcing norms. Applying this transnational law regime specifically to *lex mercatoria*, the creation of norms can be broken down into a legislative and an adjudicatory component.[171]

Table 3: *Lex Mercatoria*, an Example of a Transnational Law Regime (Hybrid System)[172]

Dimension / Regulator	Legislation	Adjudication	Enforcement
Public	Parliamentary Acts	Courts	Legal sanctions
Private	Social norms	Arbitration	Social sanctions

Legislative and adjudicatory components of *lex mercatoria* are far-reaching and can include public and private elements. This paper will limit its analysis to ICC's arbitral awards for the adjudicatory component and to the *CISG* and *UNIDROIT Principles* for the legislative component.

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[169] Calliess & Zumbansen, *supra* note 18 at 28-32. This conceptualization can attempt to answer the criticisms which still linger: is *lex mercatoria* law?" *Ibid* at 79. It also appears to be reminiscent of the notion of community developed by Santi Romano, as discussed in section 1.2, above.

[170] *Ibid* at 28. See also Wai, "Transnational Private Law", *supra* note 167 at 477.

[171] *Lex mercatoria* is more specifically a case in point of transnational market governance, a type of transnational law regime. Calliess & Zumbansen, *supra* note 18 at 112-23. The enforcement component is not the focus of this paper but it must be noted that sanctions may not be legal, but social such as black lists, withdrawal of trade associations' members' rights, etc. Klaus Peter Berger, "The *Lex Mercatoria* Doctrine and the UNIDROIT Principles of International Commercial Contracts" (1997) 28:4 Law & Pol'y Int'l Bus 943 at 956-57; [Berger, "*Lex Mercatoria* and UNIDROIT Principles"]; Ringuette, *supra* note 119 at 98-99.

[172] Efficacy of the various mechanisms illustrated as follows: white (low), light grey (middle) and dark grey (high). Table 3 is reproduced from Calliess & Zumbansen, *supra* note 18 at 122-23.

2.3 Example of a Methodological Transnational Law: *Lex Mercatoria*

This methodological approach to transnational law provides a framework for classifying potential sources of *lex mercatoria*.[173] For some legal scholars, *lex mercatoria* includes international conventions, model contracts and model laws.[174] For others, *lex mercatoria* is an uncodified source of customs and general principles.[175] There also exists a view according to which *lex mercatoria* is made of trade usages and rules of international organizations[176] applied through arbitral awards.[177] Attempts to enumerate sources, such as public international law, uniform laws, general principles of law, rules of international organizations, customs and usages, standard form contracts and reporting of arbitral awards are ineffective and controversial.[178] The problem is well summarized by the following quote: "the proper sources of the new *lex mercatoria* remain so opaque that it cannot yet function as a fully fledged system of law."[179]

The extensive listing and ranking of the sources or content of *lex mercatoria* is inadequate because of the broad variation from one legal scholar or database to another.[180] A

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[173] Peer Zumbansen, "Piercing the Legal Veil: Commercial Arbitration and Transnational Law" (2002) 8 Eur LJ 400 at 405-06. See also section 2.2, above, for more on this topic. For the debate concerning the content versus the sources of *lex mercatoria*, see *supra* note 160 and accompanying text.
[174] Osman, *supra* note 156 at 262ff.
[175] Goode, *supra* note 130 at 3.
[176] Highet, *supra* note 158 at 139.
[177] Goldman, "Réalité et perspectives", *supra* note 152 at paras 30ff.
[178] See e.g. Lando, *supra* note 43 at 749-51; Kahn, "Sources du droit", *supra* note 166 at 192.
[179] Dalhuisen, *supra* note 94 at 132.
[180] See e.g. Lando, *supra* note 43 at 749-51 (sources listed by this author can be found at 48, above); Dalhuisen, *supra* note 94 at 180 where the author lists the followings sources of *lex mercatoria* in the following hierarchy: a) fundamental legal principle; b) mandatory custom; c) mandatory uniform treaty law; d) contract (i.e. party autonomy); e) directory custom; f) directory uniform treaty law; g) general principles

methodological approach will harmonize[181] *lex mercatoria* by removing unpredictability, thus offering an alternative substantive transnational law to domestic laws.[182] *Lex mercatoria* can be broken down in its two constituting components, legislation and adjudication.[183] The hybrid character of transnational law allows for a more complete and thorough classification of the sources of *lex mercatoria* in (1) a legislative approach (fixed legislative rules in an international instrument) and (2) an adjudicatory approach (*stare decisis* created by international commercial tribunals).[184]

2.3.1 Legislative Approach

The legislative approach, reminiscent of civil law, refers to fixed and written legislative rules adopted in international instruments.[185] This approach relies on a codified system, inspired from the state-based notion of the law, which appeared on the European continent

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largely derived from comparative law, uniform treaty law, ICC Rules; h) residually, domestic laws found through conflict of laws rules.

[181] See *supra* note 42 and accompanying text for a distinction between concepts of harmonization, unification and standardization.

[182] Calliess & Zumbansen, *supra* note 18 at 122. Also, there is no harmonization of contract law in general: norms in certain areas of law are usually harmonized, such as law of sales. It could very well be argued that that *lex mercatoria* can be "spontaneously" created or is uncodified: It only means sources must fit in either the legislation or adjudication component. This comment is tentative as this point falls outside of the scope of this paper. Again a methodological approach to transnational law will provide greater legal certainty to the actors of transborder commerce. This transnational law is needed but how it is achieved is to be discussed. See generally Carbonneau & Firestone, *supra* note 20 at 55.

[183] See e.g. Ringuette, *supra* note 119 at 94.

[184] These components of *lex mercatoria* were proposed by various scholars before Calliess & Zumbansen, *supra* note 18 but in a different conception. See e.g. Carbonneau & Firestone, *supra* note 20 where the authors propose two mechanisms of harmonization as a method to elaborate a "common law of international transactions", thus elaborating the basis for a uniform law of sales. See also Gélinas, *supra* note 42 at 944 where the author identifies two vectors of harmonization: international conventional law (referring to written law) and "lex mercatoria" (referring to arbitral awards based on transnational rules). *C.f.* Alec Stone Sweet, "The New *Lex Mercatoria* and Transnational Governance" (2006) 13:5 Journal of European Public Policy 627 at 633.

[185] Carbonneau & Firestone, *supra* note 20 at 55.

in the 19th century.[186] Contrary to the state-based notion of the law, the legislative approach acknowledges both public and private international instruments in the creation of norms.[187]

CISG is an example of legislative harmonization made through a public international instrument.[188] The purpose of this multilateral treaty is to adopt uniform rules that will regulate international sale of goods contracts, in order to remove legal barriers in international trade.[189] Inspired by general principles (and referring to these general principles as interpretative aids), *CISG* is meant to be a coherent written instrument on international law of sales, dissociated from domestic laws.[190] This dissociation is illustrated, for example, by *CISG*'s approach of incorporating trade usages.[191] As such, *CISG* is neither in competition with the other sources of *lex mercatoria* nor does it decrease the influence of merchant law.[192]

UNIDROIT Principles is an example of legislative harmonization made through a private international instrument. They are a set of non-binding international restatements,

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[186] Dalhuisen, *supra* note 94 at 142-147.
[187] Calliess & Zumbansen, *supra* note 18 at 122. While harmonization through a legislative approach occurs through various international instruments, these instruments differ from one another and their influence on the harmonization process can be unequal. For instance, international conventions, restatements, model laws, standard trade terms (Incoterms), model contracts and uniform rules are all instruments that provide different degrees of harmonization. Sandeep Gopalan, *Transnational Commercial Law* (Buffalo: W.S. Hein, 2004) at 77-78. For another example of various means of legal harmonization in a global economic context, see Arthur Rosett, "UNIDROIT Principles and Harmonization of International Commercial Law: Focus on Chapter Seven" (1997) 2:3 Unif L Rev 441.
[188] *CISG* is an example of harmonization in international sales of law. Kamdem, *supra* note 42 at 624-25; Bernard Audit, "The Vienna Sales Convention and the *Lex Mercatoria*" in Carbonneau, *New Law Merchant*, *supra* note 84, 173 at 173-75
[189] *CISG*, Preamble.
[190] Gélinas, *supra* note 42 at 945ff.
[191] Drahozal, "Commercial Norms", *supra* note 35 at 84. Some states recognize trade usages but not to the same extent as *CISG*. See e.g. CCQ, art 1426.
[192] Audit, *supra* note 188 at 175.

elaborated with the view of establishing rules in transnational contract law to be used by any country, irrespective of its legal tradition or socio-economic situation.[193] Since they can be easily modified, their adaptability has often been contrasted with the lack of flexibility of international conventions.[194] *UNIDROIT Principles* are seen as a development of the *lex mercatoria*.[195] Legislative *lex mercatoria*, such as *CISG* and *UNIDROIT Principles*, is often used by arbitral tribunals as a point of reference.[196]

2.3.2 Adjudicatory Approach

The adjudicatory approach provides for the elaboration of *lex mercatoria* through the decisions of arbitral tribunals (hence on a case-by-case basis) and therefore, follows the *stare decisis* (precedent) process associated with the common law.[197] One cannot fully understand the notion of *stare decisis* in international commercial arbitration without discussing, at least briefly, its importance in common law and civil law traditions.

In common law, the *stare decisis* process has both a hierarchical and temporal dimension. It is hierarchical because lower courts are generally bound by the mandatory part of decisions

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[193] Bonell, "Harmonisation", *supra* note 46 at 341; "Introduction to *UNIDROIT Principles 1994*", *supra* note 29; Born, *supra* note 5 at 2243-44 (vol 2); Berger, "*Lex Mercatoria* and UNIDROIT Principles", *supra* note 171 at 947-48.

[194] Gopalan, *supra* note 187 at 81, 85-100. Restatements are often an alternative to international conventions, which are not always considered an appropriate tool of integration of norms in all areas of law.

[195] Van Houtte, *supra* note 22 at paras 1.34-35; Charpentier, "Codification", *supra* note 22 at 199. *UNIDROIT Principles* even suggest that parties refer to them when a case concerns *lex mercatoria*. *UNIDROIT Principles 1994*, Preamble; *UNIDROIT Principles 2004*, Preamble; *UNIDROIT Principles 2010*, Preamble.

[196] Ringuette, *supra* note 119 at 96-100; Redfern & Hunter, *supra* note 60 at paras 2-65-66. See chapter 4, below, for a practical application of this statement.

[197] Carbonneau & Firestone, *supra* note 20 at 55.

(*ratio decidendi*) of higher courts. This gives an "absolute" power to the highest jurisdictional power. It is temporal because courts follow previous decisions, to promote legal stability and as a sign of respect for their peers, save in exceptional circumstances.[198]

Civil law questions whether caselaw can be considered a custom or whether the decisions of certain higher courts in civil law countries have an almost-legislative authority.[199] Beyond the theoretical debate, it must be remembered that caselaw, while remaining subordinate to statutory law, must fit harmoniously with the tenants of the civilian legal systems. In the same way, despite its impressive presence, caselaw in common law countries, especially in Canada, is subordinate to the authority of the Parliament and as such, does not propose any major modifications to statutes.[200] As such, it is important not to overstate the differences in how civil law and common law view caselaw and *stare decisis*.[201]

Similarly to common law and civil law, the status of caselaw in international trade is of particular importance because arbitral tribunals have to reconcile the interests of various

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[198] Mathieu Devinat, *La règle prétorienne en droit civil français et dans la common law canadienne: étude de méthodologie juridique comparé* (Aix-en-Provence: Presses Universitaires d'Aix-Marseille, 2005) at 136-46 [Devinat, *Règle prétorienne*]. This paper only provides some background information on the *stare decisis* process to define the adjudicatory component. See this author for an in-depth analysis of the *stare decisis* process in common law and civil law traditions.

[199] *Ibid* at 21-99. The author uses the Cour de cassation in France to illustrate the civil law tradition. In Quebec, a bijuridical legal system, the normative character of caselaw is often considered as a "fait accompli". Mathieu Devinat, "La jurisprudence en droit civil: la mise en intrigue d'une controverse" in Stéphane Beaulac & Mathieu Devinat, eds, *Interpretatio Non Cessat: Essays in Honour of Pierre-André Côté* (Cowansville, Que: Yvon Blais, 2011) 283 at 292-93 [Devinat, "Jurisprudence en droit civil"].

[200] Devinat, *Règle prétorienne*, *supra* note 198 at 400ff, 416ff.

[201] *Ibid*; Devinat, "Jurisprudence en droit civil", *supra* note 199 at 284; Raj Bhala, "The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)" (1999) 14 Am U Int'l L Rev 845 at 914-15.

actors and as such, synthesize choices that allow different systems to coexist.[202] Arbitral tribunals often compare the applicable domestic law to other laws or usages in international trade in an effort to ensure the universal character of their decisions.[203]

While arbitral tribunals increasingly refer to past decisions in their reasoning[204], the existence of a *stare decisis* component in international trade law is ambiguous.[205] Some legal scholars claim that the value of the arbitral precedent is persuasive (but non-binding)[206] while others believe a *de facto stare decisis* exists in international trade law.[207] Despite its importance in developing *lex mercatoria* in a consistent and predictable manner, many objections are voiced in regards to the role of *stare decisis* in international arbitration.[208]

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[202] Hence they are responsible for overseeing public and private sources of law. David, *Commerce international*, *supra* note 11 at paras 133-49; Osman, *supra* note 156 at 313ff; Ringuette, *supra* note 119 at 99-101; Alain Plantey, "Is a General Policy of International Arbitration Possible?" (1996) 7 ICCCA Bull 15 at 25; Drahozal, "Commercial Norms", *supra* note 35. Before the nineteenth century, law did not originate primarily from the state or based on a territory, even in purely domestic matters: It originated from a variety of sources. This plurality of sources of law was rediscovered recently by the movement of legal realism (as it was called in the USA) or normative interpretation (as it was called in civil law). Legal realism takes into consideration social, ethical and economic factors in the application of the law which provides an increase use of legal principles and more importantly, a renewed respect towards law as a dynamic concept. Dalhuisen, *supra* note 94 at 143-147. Indeed, new law can be developed outside the appointed legal order. *Ibid* at 140. See section 2.1.2, above, for more on this topic.

[203] Ringuette, *supra* note 119 at 83ff. This increases their credibility in front of the parties. See Chapter 4, below, for practical examples of the comparisons made by arbitral tribunals between domestic laws and *lex mercatoria*.

[204] Osman, *supra* note 156 at 314, n1515; Paulsson, "Arbitrage CCI", *supra* note 39 at 56. *Contra*: Kaufmann-Kohler, "Arbitral Dream", *supra* note 34 argues that arbitral tribunals rarely refer to each other on substantive issues.

[205] Kaufmann-Kohler, "Arbitral Dream", *supra* note 34 at 358.

[206] Carbonneau, "Arbitral Awards", *supra* note 14 at 581. Trends and principles can also be found in the study of arbitral caselaw. *Ibid* at 589ff.

[207] Bhala, *supra* note 201 at 936ff. The argument is made with the WTO caselaw but the demonstration is valid for our purposes.

[208] Kaufmann-Kohler, "Arbitral Dream", *supra* note 34 at 378.

The most common objection associated with the elaboration of *stare decisis* in *lex mercatoria* is in its lack of consistency given a court of appeal does not exist.[209] In a domestic legal order, a court of appeal ensures the correct and consistent application of the law by first instance courts. In international commercial arbitration, the focus of arbitral tribunals is in providing an *ad hoc* solution to the dispute submitted to them.[210] An arbitral tribunal can thus render an award which directly contradicts another arbitral award based on the same fact pattern. This can create uncertainty for parties to a transnational dispute regarding the manner in which the law might be applied to their case as they cannot rely on a final decision from a higher authority to guide them.[211] Despite the drawback of not having a court of appeal, *stare decisis* has gained prominence in international arbitration. Over the years, caselaw has become more extensive, providing the opportunity for arbitral tribunals to use them as precedents.[212] Today, arbitral tribunals refer to precedents according to similar fact patterns and solutions, regardless of the *loci* and jurisdiction of these precedents.[213]

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[209] Fouchard, Gaillard & Goldman, *supra* note 51 at paras 379-382; Berger, *Creeping Codification*, *supra* note 123 at 95.
[210] David, *Commerce international*, *supra* note 11 at para 160.
[211] Kaufmann-Kohler, "Arbitral Dream", *supra* note 34. "[A]rbitration can generate private law norms so effectively and yet still face strong resistance in public international law processes and controversies. [It] has supplied a workable and adaptable trial system" in Thomas E Carbonneau, "Commercial Peace and Political Competition in the Crosshairs of International Arbitration" (2007-08) 18 Duke J Comp & Int'l L 311 at 311.
[212] Berger, *Creeping Codification*, *supra* note 123 at 95-98. *Contra*: Kaufmann-Kohler, "Arbitral Dream", *supra* note 34 at 362.
[213] Gopalan, *supra* note 187 at 134-35; Fouchard, Gaillard & Goldman, *supra* note 51 at paras 379-82; Klaus Peter Berger, "Harmonization of European Contract Law" (2001) 50 ICLQ 877 at 885. The examples cited above originate from the European law harmonization experience but the same reasoning applies for our purposes.

Hence arbitral caselaw is an integral part of modern international arbitration. As such, access to published arbitral decisions is necessary.[214] It is the first step in developing an adjudicatory *lex mercatoria*.[215] The ICC is one of the arbitral institutions that publishes part of its decisions.[216] The next section provides an insight as to the pivotal role of the ICC in the elaboration of an international caselaw.[217]

2.3.2.1 The ICC Arbitration System

The task of putting into motion, conducting, supervising and concluding an ICC arbitration is entrusted to different institutional organs.[218] The ICC is not a multi-state entity or a chamber of commerce. It is an institution exclusively managed by private entities and represents the interests of the international business world.[219] The ICC Court of Arbitration [ICCCA] is one of four ICC bodies concerned with settling international commercial disputes.[220]

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[214] *Ibid*.
[215] See generally Carbonneau, "Arbitral Awards", *supra* note 14 for the elaboration of a common trend in adjudicatory *lex mercatoria* from the study of a limited number of arbitral awards.
[216] "General Principles", *supra* note 38 at 1817. ICC probably has the higher percentage of published decisions among leading arbitral institutions. See also Drahozal, "Commercial Norms", *supra* note 35 at 100.
[217] Paulsson, "Arbitrage C.C.I.", *supra* note 39 at 78ff.
[218] Craig, Park & Paulsson, *supra* note 11 at 17.
[219] Schäfer, Verbist & Imhoos, *supra* note 9 at 17. The purpose of the ICC is to "promote international commerce worldwide". Thousands of international businesses and organizations worldwide are members of the ICC: In most countries, ICC members have created National Committees regrouping actors of the industry and economy which serve as an interface between the members and the ICC headquarters in Paris. The ICC was instituted in Paris in 1919 by industrials and businessmen as a private society ruled by French law. Craig, Park & Paulsson, *supra* note 11 at 17-18.
[220] *Statutes of the International Court of Arbitration*, Appendix I of the *2012 ICC Rules of Arbitration*, art 1, 6; Bühler & Webster, *supra* note 79 at paras 0.9ff. The settlement and prevention of dispute is a natural part of any effort to remove barriers to transnational commerce and investment. Craig, Park & Paulsson, *supra* note 11 at 19.

The ICCCA is not a "court" in the ordinary sense: It does not decide cases and parties never appear before the ICCCA. Its role is not to supervise all aspects of a particular dispute. The ICCCA merely oversees the work of arbitrators, appointed on a case-by-case basis, and the application of the *2012 ICC Rules of Arbitration*.[221] The ICCCA appoints arbitrators or confirms those nominated by the parties, provides a decision in cases where objections to arbitrators are raised, examines or approves arbitral awards and fixes arbitrators fees. Indeed, article 41 of the *2012 ICC Rules of Arbitration* states that the ICCCA must "make sure that the award is enforceable at law." In other words, the ICCCA's must ensure that the decision rendered by the arbitrators is logical and intelligible but in doing so, it must not interfere with the reasoning of the awards. The ICCCA cannot correct alleged errors of fact or law but must ensure the formal sufficiency of the award.[222] The key element of the success of ICC arbitration resides in this additional guaranty as it decreases the risk of a judicial domestic court cancelling the award.

The ICC arbitration system has earned the reputation of being the most efficient in the world.[223] The security, credibility and predictability of the ICC's arbitral awards make them

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[221] Craig, Park & Paulsson, *supra* note 11 at 19.
[222] *Ibid*.
[223] Craig, Park & Paulsson, *supra* note 11 at 1; Sosa, *supra* note 1 at 145-47. It is a highly regulated process. The ICCCA controls the arbitral procedure: It supervises the entirety of the arbitral process, from the initial request to the final award. The *2012 ICC Rules of Arbitration* demand that the arbitral tribunal establishes and communicates to the ICCCA, within 2 months of the reception of the file, a document specifying its mission, the procedure used to determine the issues to solve and the organization of the details of the sequence of the arbitration. The arbitral tribunal has 6 months to render the awards. One of the principal functions of the ICCCA is to examine arbitral awards. According to the *2012 ICC Rules of Arbitration*, the ICCCA must approve the form of the award before it is rendered. It can also bring the attention of the arbitrators on substantive points but must respect the freedom of decision of the arbitral tribunal. Moreover, the trend in international arbitration is for arbitrators to prepare the reasons to provide for their awards. Fouchard, Gaillard & Goldman, *supra* note 51 at para 1392; Case No 10527 (2000), (2004) 131 JDI 1263 (ICC).

an important part of adjudicatory *lex mercatoria*, even if the status of these decisions as precedents is not yet fully determined.

2.4 Recapitulation: Methodological Transnational Law applied to *Lex Mercatoria*

Adjudicatory and legislative *lex mercatoria* are ways to demystify *lex mercatoria* and prevent the need to identify general principles of law or trade usages as a formal source of *lex mercatoria*. Indeed, one can turn to legislative *lex mercatoria* (for example, *CISG* or *UNIDROIT Principles*) or adjudicatory *lex mercatoria* (for example, ICC's arbitral decisions) and apply both to solve a dispute. The concerns relating to the lack of consistency in adjudicatory *lex mercatoria* can be solved by an additional review of the arbitral awards, as provided by the ICCCA and by the increasing presence of *stare decisis* in international commercial arbitration.

Classification of sources of *lex mercatoria* following the adjudicatory and legislative approaches is similar to classification of the main legal sources of domestic law. For instance, in Canadian law, statutes can be assimilated to legislative *lex mercatoria* and caselaw can be assimilated to adjudicatory *lex mercatoria*. Legislative *lex mercatoria* and statutes both provide written legal rules with general guidelines, agreed upon by constituting authorities, after debates and negotiations. Adjudicatory *lex mercatoria* and caselaw can coordinate in their decisions other miscellaneous sources of law, such as

customs, trade usages.[224] They also provide concrete solutions to particular factual situations. The similarity between legislative and adjudicatory *lex mercatoria* and Canadian statutory enactments and caselaw makes it easier to compare and contrast the substantive law of both legal orders.

The hybrid nature of Calliess and Zumbansen's *lex mercatoria* has the benefit of taking into account the interests of various stakeholders in international commerce, who expect a blend of state and non-state norms.[225] However, the reception of this hybrid system is still a challenge in domestic legal orders, such as Canada. The traditional dichotomy between international/domestic law and public/private international sources of law still influences the reception of legislative and adjudicatory *lex mercatoria* in Canadian law, as demonstrated in the next chapter.

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[224] Gerald Gall, *The Canadian Legal System*, 5d ed (Scarborough, Ont: Thomson/Carswell, 2004) at 40-47 for examples of cases where miscellaneous sources of law were considered by domestic courts.
[225] See section 2.3.2, above, for more on this topic.

PART 2 Adjudicatory *Lex Mercatoria* in Canada

Chapter 3 International Arbitration and *Lex Mercatoria* in Canada

To fully assess the influence of adjudicatory *lex mercatoria*, and more particularly ICC's caselaw, on Canadian law, it is appropriate to see how international law, international commercial arbitration and *lex mercatoria* are received in Canada (3.1, 3.2 and 3.3 respectively). This will provide a valuable tool in assessing the influence of adjudicatory *lex mercatoria* on substantive law in Canadian civil law and common law jurisdictions.

3.1 Reception of International Law in Canada

International law is based on the Wesphalian system, which provides that states are the sovereign actors of international law.[226] While arbitral tribunals are called upon to interpret both domestic and international sources of law, domestic courts are called upon to interpret international law and its influence on domestic law.[227] However, the transnational approach favoured by arbitral tribunals is difficult to apply by domestic courts because of the barrier provided by the dichotomy between international law and domestic law.[228]

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[226] Lynch, *supra* note 4 at 60; Stéphane Beaulac, "Arrêtons de dire que les tribunaux au Canada sont "liés" par le droit international" (2004) 38 RJT 359 at 370-73 [Beaulac, "Droit international"] where the author discusses the Westphalian model based on the legal order articulated by Emer de Vattel.
[227] Jutta Brunnée & Stephen J Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002) 40 Can YB Int'l L 3 at 8.
[228] Beaulac, "Droit international", *supra* note 226 at 373.

Traditionally, two types of approaches are used to assess how international law is received and applied within a sovereign state: monism and dualism. In a monist jurisdiction, international law is directly applied -without legislative or executive action- within a domestic legal order. If a conflict arises between both international and domestic law, the former will prevail. In a dualist jurisdiction, international law must be incorporated within domestic law through a legislative or executive action to have an effect in a domestic legal order.[229] Canada, however, applies a hybrid system, whereby customary international law is applied through a monist approach and international treaties (or international conventions), through a dualist approach.[230]

3.1.1 Reception of Customary International Law in Canada

International customary law is based upon the existence of state practices and *opinio juris*.[231] International customary law can "restrict certain courses of conduct" or allow certain behaviour without requiring any explicit action from the state.[232] Hence, courts can apply customary international law unless the state takes a positive action to limit its

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[229] Gibran van Ert, *Using International Law in Canadian Courts*, 2d ed (Toronto: Irwin Law, 2008) at 3-4.
[230] *Ibid* at 5. This hybrid system can lead to ambiguities. See e.g. France Houle & Noura Karazivan, "Application of Non-Implemented International Law by the Federal Court of Appeal: Towards a Symbolic Effect of s. 3(3)(f) of the IRPA?" (2009) 32 Dal LJ 221 at 222, where the authors identify several approaches used by scholars to conceptualize the role of international law in domestic law.
[231] Malcom N Shaw, *International Law*, 6th ed (Cambridge: Cambridge University Press, 2008) at 72ff; Brunnée & Toope, *supra* note 227 at 15.
[232] Van Ert, *supra* note 229 at 218. The distinction between permissive and prohibitive customary international law and their respective incorporation in Canada has been developed in *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292 [*Hape*] but will not be discussed in this paper.

application.[233] The Supreme Court of Canada has agreed to incorporate customary international law within the common law. In *Hape*[234], Justice Lebel stated the following:

> According to the doctrine of adoption, the courts may adopt rules of customary international law as common law rules in order to base their decisions upon them, *provided there is no valid legislation that clearly conflicts with the customary rule.* [...] Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that *prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation.* [...] Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.[235]

Akin to the common law when it applies domestically, international customary law can be set aside by a legislative act or, of course, if it conflicts with a constitutional rule.[236]

3.1.2 Treaty Law

The way international treaties are incorporated into domestic law is an illustration of the dualist approach, which believes that both the domestic and international legal systems have their own normative framework. Some legal scholars say that approximately forty per cent of Canadian federal statutes incorporate -or implement- international treaties.[237] The

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[233] Armand de Mestral & Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53 McGill LJ 573 at 576-77, 583-88.
[234] *Supra* note 232.
[235] *Ibid* at paras 36, 39 [emphasis added].
[236] *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 for the delimitation of competence between the federal Parliament and the provincial legislatures. De Mestral & Fox-Decent, *supra* note 233 at 587; Van Ert, *supra* note 229 at 218. The status of international customary law in Canada is ambiguous according to Brunnée & Toope, *supra* note 227 at 35.
[237] De Mestral & Fox-Decent, *supra* note 233 at 578-79; Pierre-André Côté in collaboration with Stéphane Beaulac & Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Thomson Reuters, 2011) at 296, n331.

Supreme Court of Canada has rendered many decisions on the status of international treaties in Canadian domestic law. In fact, Justice L'Heureux-Dubé reiterated the principle established in previous Supreme Court caselaw and stated that "[i]nternational treaties and conventions are not part of Canadian law unless they have been implemented by statute [...and] therefore have no direct application within Canadian law."[238] This means that an international convention that has been ratified, but not incorporated, is not part of Canadian law. Once an international convention has been implemented by the competent legislature, it is deemed part of Canadian law and judges can interpret and apply it.[239] Two techniques are traditionally used to implement international treaties: (i) direct reference, where the legislator reproduces the provisions of the convention within the statute itself or as a schedule of a domestic statute or (ii) harmonization, where the legislator redrafts the international convention in its own terms –such as enacting a brand new statute- to adapt it to the already existing domestic statute.[240]

Interestingly, in Canada, the dualist approach is also used to preserve the separation of powers as an underlying principle of the *Constitution Act, 1867*.[241] The executive branch has the power to conclude a treaty, leaving the Parliament and provincial legislatures with limited or no formal role in the treaty-making process. Even if some provinces, such as Quebec, sign treaty-like documents on their own, the practice is limited, not endorsed by

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[238] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 69 [*Baker*].
[239] *Ibid*.
[240] Stéphane Beaulac, "No More International Treaty Interpretation in Canada's Statutory Interpretation: A Question of Access to Domestic *Travaux Préparatoires*" in Beaulac & Devinat, *supra* note 199, 303 at 313-14 [Beaulac, "International Treaty Interpretation"].
[241] *Supra* note 236; *Canada (Attorney General) v Ontario (Attorney General)*, [1937] AC 326 at 347 (HL) (Eng); Van Ert, *supra* note 229 at 270-72; Beaulac, "Droit international", *supra* note 226 at 378-81.

the federal government and reserved to particular areas of provincial jurisdiction under the *Constitution Act, 1867*[242], such as economic development or cultural co-operation.[243]

3.1.3 International Law as an Element of Context or Presumption of Conformity

While international customary law and treaties incorporated into domestic law are part of Canadian law, other international instruments such as unimplemented treaties are deemed, strictly speaking, as outside the legal realm of the domestic jurisdiction. This leads to a scholarly debate as to the influence of international law on domestic law. One can ask whether international law is persuasive or binding.[244] For its part, the Supreme Court of Canada has stated two positions in respect of the use of international law in Canadian law. The Court has considered international law both to be a contextual element and to benefit from a presumption of conformity.[245]

On the one hand, the Supreme Court of Canada concluded that international law is an element of context in the interpretation of domestic law. According to Justice L'Heureux-Dubé:

> [T]he legislature is presumed to respect the values and principles enshrined in *international law*, both customary and conventional. These *constitute a part of the legal context* in which

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[242] *Supra* note 236.
[243] Joanna Harrington, "Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament" (2005) 50 McGill LJ 465 at 473-75.
[244] See e.g. Beaulac, "Droit international", *supra* note 226 at 367-68, 384-87.
[245] Stéphane Beaulac, *Handbook on Statutory Interpretation: General Methodology, Canadian Charter and International Law* (Markham, Ont: LexisNexis, 2008) at 403ff [Beaulac, *Handbook*].

> legislation is enacted and read. In so far as possible, therefore, *interpretations that reflect these values and principles are preferred*.[246]

Since then, many decisions issued by the Supreme Court of Canada have adopted a more liberal approach.[247]

On the other hand, a decision handed down by the Supreme Court of Canada in 2007, *Hape*[248], confirmed that domestic legislation should be interpreted in a manner that is presumed to conform to customary and conventional international law. In this decision, Justice Lebel stated the following:

> *It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law.* The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. [...*T*]*he legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community.* In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. [...] The presumption applies equally to customary international law and treaty obligations.[249]

Statutes that are not consistent with international law are not automatically void. Rather, where two interpretations are possible, courts will typically favour the interpretation that

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[246] *Baker*, *supra* note 238 at para 70 [emphasis added] citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Markham, Ont: Butterworths, 1994) at 330 [Sullivan, *Construction of Statutes-3d*]. This extract was reiterated in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis, 2008) at 539 [Sullivan, *Construction of Statutes-5d*]. See also Côté, Beaulac & Devinat, *supra* note 237 at 395.

[247] See e.g. *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241, *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3; *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429. See also Côté, Beaulac & Devinat, *supra* note 237 at 399-400; Beaulac, *Handbook*, *supra* note 245 at 396ff.

[248] *Supra* note 232.

[249] *Ibid* at paras 53-54 [emphasis added]. Ironically, Sullivan, *Construction of Statutes-5d*, *supra* note 246 at 539 refers to this decision to demonstrate the acceptance of the presumption of compliance while *Baker*, *supra* note 238 at para 70 used the same extract in Sullivan, *Construction of Statutes-3d*, *supra* note 246 at 330 to illustrate the use of international law as an element of context.

respects a state's international obligations.[250] Already embedded in Canadian caselaw, this concept was recently reinforced in the decision *Schreiber*[251], where the Supreme Court of Canada still suggested, however, that international law is only applicable if the domestic statute is ambiguous.[252]

In addition to the dualism/monism dichotomy, another source of confusion is the status of soft law within international law. Soft law includes various international instruments, such as United Nations resolutions or the *Model Law*, which lack the "imperative quality of law" of international treaties and custom. To the contrary of unimplemented international treaties, strictly speaking, soft law is not submitted to the presumption of conformity and it is not an element of context. Soft law is a persuasive element which helps the development of the law.[253] The distinction between binding international law and persuasive international law is important because it impacts the influence of international law on domestic courts.[254]

Implemented international treaties and international custom law are thus deemed part of Canadian law. The rest of international law, such as unimplemented treaties, can be used in Canadian law either as a contextual element and/or benefit from a presumption of

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[250] Côté, Beaulac & Devinat, *supra* note 237 at 395-96.
[251] *Schreiber v Canada (Attorney General)*, 2002 SCC 62, [2002] 3 SCR 269.
[252] *Ibid* at para 50. This controversy is explained in Côté, Beaulac & Devinat, *supra* note 237 at 396-98. It is interesting to note that the changing concept of sovereignty has influenced the traditional dualism/monism dichotomy (Lynch, *supra* note 4 at 58-75). Some scholars have suggested that the appropriate balance between domestic and international legal orders has not been reached in Canada (see generally De Mestral & Fox-Decent, *supra* note 233 for various possible solutions).
[253] Van Ert, *supra* note 229 at 32-33, 285-86.
[254] Brunnée & Toope, *supra* note 227 at 6.

conformity. However, soft law does not benefit from the same status as unimplemented treaties and is only considered to be a persuasive element. The difference in the reception of these international instruments creates an unequal reception of legislative *lex mercatoria*, which is composed of public and private instruments. It also implies that adjudicatory *lex mercatoria* is likely not considered in Canadian law, as a contextual element and/or to benefit from a presumption of conformity. The reception of international law in general also has a direct influence on the status of international commercial arbitration within Canada.

3.2 Recognition of International Commercial Arbitration as a Legal Order in Canada

The interaction between international law and Canadian domestic law, as outlined above, will also allow us to better understand how international commercial arbitration has been recognized in Canada. As discussed above, the appeal of international commercial arbitration increased drastically in the second part of the 20th century.[255] Two of the most important instruments contributing to its development are the *Model Law* and the *New York Convention*.[256] The *New York Convention* is a treaty that has been incorporated into Canadian domestic law. The *Model Law* is an example of soft law which, despite its non-binding character, was also incorporated to some extent into domestic law.[257]

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[255] Further discussion of this statement can be found at 1-3, above.
[256] *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at paras 38-41, [2007] 2 SCR 801 [*Dell*].
[257] Bachand, *Intervention du juge canadien*, *supra* note 110 at paras 30ff; Van Ert, *supra* note 229 at 285-86.

The objective of both the *Model Law* and the *New York Convention* is to harmonize arbitral procedures as well as to recognize the validity of arbitration agreements and the execution of arbitral awards. Many states, including Canada, have incorporated these instruments, which demonstrates the importance conferred upon international arbitration.[258] Regardless of the philosophical model underpinning arbitration -Gaillard's arbitral order or Paulsson's revised arbitration model-[259], international arbitration is considered a legal order because it

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[258] Many jurisdictions, in addition of ratifying the *New York Convention*, included the *Model Law* in a legislative act even if the latter is deemed soft law. See Craig, Park & Paulsson, *supra* note 11 at 679; Bachand, *Intervention du juge canadien*, *supra* note 110 at paras 30ff. In Canada, the *New York Convention* and the *Model Law* has been adopted by the federal Parliament and by almost all the provincial legislatures, except Ontario, which does not implement the *New York Convention* (Anthony R Daimsis, "Canada's Indoor Arbitration Management: Making Good on Promises to the Outside World" in Chios Carmody, ed, *Is Our House in Order? Canada's Implementation of International Law* (Montreal: Queen's University Press, 2010) 174 at 181-85). Unless specified, statutes include both the *New York Convention* and the *Model Law*: *Commercial Arbitration Act*, RSC 1985, c 17 (2d Supp) [*CAA(Fed)*] (this statute incorporates the *Model Law* at the federal level); *United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16 (2d Supp) [*UNFAACA(Fed)*] (this statute incorporates the *New York Convention* at the federal level); *International Commercial Arbitration Act*, RSO 1990, c I-9 [*ICAA(Ont)*] (this statute incorporates the *Model Law* in Ontario); *International Commercial Arbitration Act*, RSNB 2011, c 176 [*ICAA(NB)*]; *International Commercial Arbitration Act (The)*, SM 1986-87, c 32, CCSM c C151 [*ICAA(Man)*]; *International Commercial Arbitration Act*, RSNWT 1988, c I-6 [*ICAA(NWT)*]; *International Commercial Arbitration Act*, RSNWT 1988, c I-6, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28 [*ICAA(Nu)*]; *International Commercial Arbitration Act*, RSA 2000, c I-5 [*ICAA(AB)*]; *International Commercial Arbitration Act*, RSBC 1996, c 233 [*ICAA(BC)*] (this statute incorporates the *Model Law* in British Columbia); *Foreign Arbitral Awards Act*, RSBC 1996, c 154 [*FAAA(BC)*] (this statute incorporates the *New York Convention* in British Columbia); *International Commercial Arbitration Act*, RSPEI 1998, c I-5 [*ICAA(PEI)*]; *International Commercial Arbitration Act*, RSNS 1989, c 234 [*ICAA(NS)*]; *International Commercial Arbitration Act*, SS 1988-89, c I-10.2 [*ICAA(Sask)*] (this statute incorporates the *Model Law* in Saskatchewan); *Enforcement of Foreign Arbitral Awards Act*, SS 1996, c E-9.12 [*EFAAA(Sask)*] (this statute incorporates the *New York Convention* in Saskatchewan); *International Commercial Arbitration Act*, RSNL 1990, c I-15 [*ICAA(NL)*]; *International Commercial Arbitration Act*, RSY 2002, c 123 [*ICAA(YK)*] (this statute incorporates the *Model Law* in Yukon); *Foreign Arbitral Awards Act*, RSY 2002, c 93 [*FAAA(YK)*] (this statute incorporates the *New York Convention* in Yukon), art 940.6 CCP (this statute incorporates, to a certain extent, the *Model Law* in Quebec (see *infra* note 264 and accompanying text)); art 948 CCP (this statute incorporates the *New York Convention* in Quebec).

[259] See section 1.2, above, for further discussion of these philosophical models.

is "a unit that is stable and permanent, that does not lose its identity following a series of mutations [...] and can renew itself while conserving its own identity."[260]

Most Canadian jurisdictions have adopted both the *New York Convention* and the *Model Law* by incorporating them into their corpus of laws, although the method of implementation varies from one jurisdiction to another. Parliament and the majority of provincial legislatures (Manitoba, Saskatchewan, Ontario, Alberta, Yukon, New Brunswick, Prince Edward Island, Northwest Territories, Nunavut, Nova Scotia, Newfoundland and Labrador) implemented the *Model Law* and the *New York Convention* through a direct reference approach, by reproducing them in their entirety in the annex of the incorporating law.[261] Other provincial legislatures, such as British Columbia[262], also used the direct reference approach, but copied the text of these instruments in the body of the incorporating law instead. The incorporation of international instruments within domestic law illustrates that Canadian common law favours a transnational approach in cases involving international arbitration, a trend followed by several other states.

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[260] Santi Romano, *supra* note 95 at 28 [translated by author]. See section 1.2, above, for more on this topic.

[261] *CAA(Fed)*, *supra* note 258; *UNFAACA(Fed) supra* note 258; *ICAA(Ont)*, *supra* note 258; *ICAA(NB)*, *supra* note 258; *ICAA(Man)*, *supra* note 258; *ICAA(NWT)*, *supra* note 258; *ICAA(Nu)*, *supra* note 258; *ICAA(AB)*, *supra* note 258; *ICAA(PEI)*, *supra* note 258; *ICAA(NS)*, *supra* note 258; *ICAA(Sask)*, *supra* note 258; *EFAAA(Sask)*, *supra* note 258; *ICAA(NL)*, *supra* note 258; *ICAA(YK)*, *supra* note 258; *FAAA(YK)*, *supra* note 258. This paper does not provide an in depth discussion of the differences between various jurisdictions in regards to the *Model Law* and the *New York Convention* but see Daimsis, *supra* note 258 for an excellent analysis.

[262] *ICAA(BC)*, *supra* note 258; *FAAA(BC)*, *supra* note 258. See Bachand, *Intervention du juge canadien*, *supra* note 110 at para 237.

This situation is somewhat different in Quebec's civil law jurisdiction. Quebec refers to the *Model Law* in article 940.6 CCP and to the *New York Convention* in article 948 CCP by stating the following:

> Art 940.6 CCP: Where matters of extraprovincial or international trade are at issue in an arbitration, the interpretation of [arbitration proceedings], where applicable, shall take into consideration
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> (1) the [*Model Law*] as adopted by the United Nations Commission on International Trade Law on 21 June 1985;
>
> (2) the Report of the [UNCITRAL] on the work of its eighteenth session held in Vienna from 3 to 21 June 1985;
>
> (3) the Analytical Commentary on the draft text of a model law on international commercial arbitration contained in the report of the Secretary-General to the eighteenth session of the [UNCITRAL].
>
> Art 948 CCP: This Title [Of recognition and execution of arbitration awards made outside Québec] applies to an arbitration award made outside Québec whether or not it has been ratified by a competent authority. The interpretation of this Title shall take into account, where applicable, the [*New York Convention*] as adopted by the [UNCITRAL] at New York on 10 June 1958.

A literal interpretation of these provisions would lead to a more restrictive reception of international arbitration in Quebec than in common law provinces. However, the Supreme Court of Canada has confirmed that article 948 CCP incorporates the *New York Convention* whereas the status of the *Model Law* remains ambiguous.[263] In fact, in *Dell*, while restating that the *Model Law* has "considerable interpretative weight", the Court refuses to consider it implemented to the same extent as it does with the *New York Convention* within

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[263] *Act to amend the Civil Code and the Code of Civil Procedure in respect of arbitration*, SQ 1986, c 73; *GreCon Dimter Inc v JR Normand Inc*, 2005 SCC 46 at para 41, [2005] 2 SCR 401. See also Bachand, *Intervention du juge canadien*, *supra* note 110 at para 48.

Quebec's jurisdiction.[264] However, Quebec has always maintained that its domestic law reflects the *Model Law* and should be interpreted accordingly.[265]

As a result, every Canadian jurisdiction, including Quebec, favours an approach that is not deemed purely "domestic" by referring to the documents of the UNCITRAL and its working group for interpretation purposes. In other words, a transnational interpretation is favoured over a purely local interpretation in international arbitration cases.[266]

The adoption of these international instruments in Canadian law has incited domestic courts to show deference towards international arbitration cases.[267] For example, Canadian courts have ruled that the standard of review for international arbitration cases cannot be

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[264] *Dell*, *supra* note 256 at paras 41, 44-46; Van Ert, *supra* note 229 at 285-86. See also Bachand, *Intervention du juge canadien*, *supra* note 110 at paras 238-41 for an account on the debate relating to the incorporation of the *Model Law* in Quebec versus the adaptation of domestic laws to the *Model Law*.

[265] Bachand, *Intervention du juge canadien*, *supra* note 110 at para 242.

[266] See e.g. *Dell*, *supra* note 256 at paras 71-78, where the Supreme Court analyzed the legislative history of the *New York Convention* and the *Model Law*, both generally incorporated in Canadian law, (see *supra* note 258 and accompanying text) regarding issues of competence-competence and the similarity with other countries' approaches. See also Frédéric Bachand, "Kompetenz-Kompetenz, Canadian Style" (2009) 25:3 Arb Intl 431 at 435. *CAA(Fed)*, *supra* note 258, s 4; *ICAA(Ont)*, *supra* note 258, s 13; *ICAA(NB)*, *supra* note 258, s 13(2); *ICAA(Man)*, *supra* note 258, s 12(2); *ICAA(NWT)*, *supra* note 258, s 2(2); *ICAA(Nu)*, *supra* note 258, s 2(2); *ICAA(AB)*, *supra* note 258, s 12(2); *ICAA(PEI)*, *supra* note 258, s 12(2); *ICAA(NS)*, *supra* note 258, s 13(2); *ICAA(Sask)*, *supra* note 258, s 11(2); *EFAAA(Sask)*, *supra* note 258; *ICAA(NL)*, *supra* note 258, s 13(2); *ICAA(YK)*, *supra* note 258, s 10(2); *ICAA(BC)*, *supra* note 258, s 6; art 940.6 CCP.

[267] *Automatic Systems Inc v Bracknell Corp* (1994), 18 OR (3d) 257 at 264-66, 113 DLR (4th) 449 (CA) [*Automatic Systems*]; *Kaverit Steel and Crane Ltd v Kone Corp* (1992), 85 Alta LR (2d) 287 at 297-99, 87 DLR (4th) 129 (CA) [*Kaverit Steel*]; *Canada (Attorney General) v S.D. Myers Inc*, 2004 FC 38 at para 39, [2004] 3 FCR 368 [*Myers*]; *Holding Tusculum, B.V. v Louis Dreyfus, S.A.S. (SA Louis Dreyfus & Cie)*, 2008 QCCS 5904 at paras 99-102 [*Tusculum*]; *Coderre v Coderre*, 2008 QCCA 888, [2008] RJQ 1245; *BWV Investments Ltd v Saskferco Products Inc* (1994), 125 Sask R 286 (CA) (where the court emphasizes the importance of consistency between various jurisdictions) [*BWV Investments*].

determined through the same standard of review as decisions arising from domestic arbitral tribunals and that courts should exercise caution before intervening in these cases.[268]

This transnational approach towards international commercial arbitration was reiterated in the *Model Law* in 2006 through the addition of article 2A:

> (1) In the interpretation of this [*Model Law*], regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
> (2) Questions concerning matters governed by this [*Model Law*] which are not expressly settled in it are to be settled in conformity with the general principles on which this [*Model Law*] is based.[269]

It was believed that through this amendment, the *Model Law* would "conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement and the granting of interim measures" as well as "[promote...] a uniform interpretation and application of the [*New York Convention*]".[270]

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[268] For example, the functional and pragmatic approach is rejected in international arbitration cases. *Dell*, *supra* note 256 at paras 65-89; *United Mexican States v Metalclad Corp*, 2001 BCSC 664 at para 54, 89 BCLR (3d) 359.

[269] *Model Law 2006*, Sixth Committee, *Report of the United Nations Commission on International Trade Law on the Work of its Thirty-Ninth Session*, UNCITRALOR, 61st Sess, UN Doc A/61/17 (Annex 1) (2006) [*Model Law 2006*], online: UNCITRAL <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>, art 2A (titled "International origin and general principles"). The 2006 amendments to the *Model Law* are not part of Canadian law because various jurisdictions did not make an open reference to UNCITRAL works. Only British Columbia seems to make an open reference to UNCITRAL works. See Annex II Incorporation of the *Model Law* in Canada. See also *Status of Conventions and Model Laws*, UNCITRAL, 44th Sess, UN Doc A/CN.9/723, (2011) online: UNCITRAL <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V11/827/54/PDF/V1182754.pdf?OpenElement>. For more information on open and clause references, see Côté, Beaulac & Devinat, *supra* note 237 at 84ff.

[270] *Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958*, GA Res 61/33, UNGAOR, 61st Sess, UN Doc A/RES/61/33 (2006) based on *Model Law 2006*.

The incorporation of the *New York Convention* and the *Model Law* demonstrates the importance given to international arbitration within Canada. However, while international arbitration has succeeded in establishing a procedural harmonization, it has not been as successful in establishing harmonization in large part because it leaves the choice of the applicable substantive law to the parties.[271] Indeed, the *Model Law* suggests that a dispute can be governed either by a set of domestic laws or rules of law chosen by the parties or, in case of disagreement, by the arbitral tribunal.[272]

3.3 Reception of *Lex Mercatoria* in Canada

Canadian law does not view the framework provided by *lex mercatoria* with much interest and as such, *lex mercatoria* is not frequently used by the courts.[273] Breaking down *lex mercatoria* in its two components -legislative and adjudicatory- will allow us to evaluate its application in Canada. Similarly, the contrast between adjudicatory *lex mercatoria* and legislative *lex mercatoria* will provide further insight into the influence of ICC's arbitral awards on Canadian law.

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[271] Further discussion on choice of law issues can be found at section 1.3, above.
[272] *Model Law*, art 28.
[273] *Canada 3000 Inc (Re)* (2002), 33 CBR (4th) 184 (available on QL) at para 38 (Ont Sup Ct); *Holt Cargo Systems Inc v ABC Containerline N.V. (Trustees of)*, 2001 SCC 90 at para 25, [2001] 3 SCR 907; *N.M. Paterson & Sons Ltd v Birchglen (The)*, [1990] 3 FC 301 at 305-06, 36 FTR 92; *Richardson International, Ltd v Mys Chikhacheva (The)*, 2002 FCA 97 at para 2, [2002] 4 FC 80; *JPMorgan Chase Bank v Mystras Maritime Corp*, 2006 FC 409 at para 53, [2007] 1 FCR 289; *Nanaimo Harbour Link Corp v Abakhan & Associates Inc*, 2007 BCSC 109 at para 9, 67 BCLR (4th) 332 all refer to an extract of a book on maritime law, William Tetley, *Maritime Liens and Claims*, 2d ed (Montreal: Yvon Blais, 1998) at 56, 59-60 (or corresponding pages in previous editions), which associates *lex mercatoria* to maritime law.

3.3.1 Legislative *Lex Mercatoria* in Canada

Legislative *lex mercatoria* refers to a written set of rules adopted in international instruments.[274] These international instruments can take the form of international conventions signed and/or ratified by states, such as *CISG* or international restatements such as *UNIDROIT Principles*. The reception of legislative *lex mercatoria* in Canadian common law and Quebec civil law is similar.

CISG is an international convention with the objective of promoting the development of international trade by establishing uniform rules governing contracts of international sale of goods. These rules were created to take into account different social, economic and legal systems and are considered better suited to the realities of international commerce than the application of domestic laws.[275]

CISG has been incorporated into Canadian law by Parliament and all provincial legislatures.[276] Despite the enactment of these laws several years ago, few Canadian courts

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[274] Further description of legislative *lex mercatoria* can be found at section 2.3.1, above.
[275] *CISG*, Preamble; Emmanuel S Darankoum, "L'article 25 de la Convention de Vienne: Le Musée du Favor Contractus revisité à la lumière des intérêts du commerce international" in Miranda & Moore, *supra* note 111, 417 at 420.
[276] *Act respecting the United Nations Convention on Contracts for the International Sale of Goods (An)*, RSQ c C-67.01 [*CISG(Qc)*]; *International Sale of Goods Act (The)*, SM 1989-90, c 18, CCSM c S11; *International Sale of Goods Act*, RSBC 1996, c 236; *International Sale of Goods Act*, RSNL 1990, c I-16; *International Sale Of Goods Act*, RSNWT 1988, c I-7; *International Sale Of Goods Act*, RSNWT 1988, c I-7, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28 and as amended by *Act to Amend the International Sale of Goods Act(An)*, SNu 2003, c 9; *International Sale of Goods Act*, RSO 1990, c I.10 [*Ontario Sale of Goods Act*]; *International Sale of Goods Act*, RSPEI 1988, c I-6; *International Sale of Goods Act*, RSY 2002, c 124; *International Sale of Goods Act*, RSNB 2011, c 177; *International Sale of Goods Act*, SNS 1988, c 13; *International Sale of Goods Act*, SS 1990-91, c I-10.3*(The)*; *International Sale of Goods Contracts Convention Act*, SC 1991, c 13.

have applied *CISG*.[277] This is rather surprising if one considers the increase in international commercial relations during the same timeframe.[278] Legal scholars have criticized Canadian courts for not applying *CISG* in cases that warranted it and for not contributing to building caselaw relating to *CISG*.[279] In the words of Canadian lawyer Rajeev Sharma:

> Canadian courts still show a reluctance to disregard domestic law when applying the CISG. The CISG is to be applied by looking to its provisions, its guiding principles and CISG decisions from other jurisdictions, not by trying to fit the provisions within the framework of domestic law. Nevertheless, a comparison of the earlier cases with the most recent ones illustrates a marked willingness to apply the Convention's provisions and international case law interpreting it. While the Canadian courts have been slow to recognise and employ the provisions of the CISG, with time and education it is likely that they will become much more savvy in applying the Convention's provisions appropriately.[280]

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[277] *CISG* specifically excluded from application: *Beechy Stock Farm (1998) Ltd v Managro Harvestore Systems (1997) Ltd*, 2002 SKQB 120 (available on QL); *Sicis North America Inc v Panache Interiors Inc*, 2011 BCSC 1610 (available on WL Can); *Matrix Integrated Solutions Ltd v Naccarato*, 2009 ONCA 593, 97 OR (3d) 693; *Ford Aquitaine Industries SAS v Canmar Pride (The)*, 2005 FC 431, [2005] 4 FCR 441; *Hewlett-Packard France c Matrox Graphics Inc*, 2007 QCCS 31, aff'd 2007 QCCA 1784 [*Matrox*]; *Multiactive Software Inc v Advanced Service Solutions Inc*, 2003 BCSC 643 (available on WL Can); *CISG* taken into consideration: *Brown & Root v Aerotech Herman Nelson Inc*, 2004 MBCA 63, 184 Man R (2d) 188 [*Brown & Root*]; *Compagnie d'assurances ING du Canada c Goodyear Canada Inc*, 2007 QCCQ 1356 (available on QL); *Diversitel Communications Inc v Glacier Bay Inc* (2003), 42 CPC (5th) 196 (available on QL) (Ont Sup Ct) [*Diversitel*]; *CISG* applied: *Chateau Des Charmes Wines Ltd v Sabate, USA, Inc*, 2005 CarswellOnt 5271 (WL Can) (Ont Sup Ct); *La San Giuseppe v Forti Moulding Ltd*, [1999] OJ no 3352 (Sup Ct); *Shane v JCB Belgium N.V.*, [2003] OJ no 4497 (Sup Ct); *Unique Labelling*, *supra* note 32; *Mansonville*, *supra* note 32; *Nova Tool & Mold Inc v London Industries Inc*, 1998 CarswellOnt 4950 (WL Can) (CA); *Cherry Stix Ltd v Canada (Border Services Agency)*, [2005] CITT no 71 (QL), aff'd 2007 FCA 274.

[278] Bühring-Uhle, Kirchhoff & Scherer, *supra* note 1.

[279] See e.g. Genevieve Saumier, "International Sale of Goods in Canada: Are We Missing the Boat?" (2007) 7:1 Can Int'l Law 1; Rajeev Sharma, "The United Nations Convention on Contracts for the International Sale of Goods: The Canadian Experience" (2005) 36 VUWLR 847; J Anthony VanDuzer, **"**The Adolescence of the United Nations Convention on Contracts for the International Sale of Goods In Canada" (Paper delivered at Canadian Bar Association's International Law Section Annual Conference, May 2001), online: Osgoode Hall Law School <http://www.osgoode.yorku.ca/CISG/writings/vanduzer-one>; James M Klotz, Peter J Mazzacano & Antonin I Pribetic, "All Quiet on the CISG Front: *Guiliani v. Invar Manufacturing*, the Battle of the Forms, and the Elusive Concept of *Terminus Fixus*", Case Comment on *Guiliani v Invar Manufacturing*, (2008) 46 Can Bus LJ 430.

[280] Sharma, *supra* note 279 at 858. This unpredictable, inconsistent and non-application of *CISG* can result in abusive behaviour or encourage parties not to comply with it. Mary J Shariff & Kevin Marechal de Carteret, "Revisiting the Battle of the Forms: A Case Study Approach to Legal Strategy Development" (2009) 9 Asper Rev of Int'l Bus & Trade Law 21 at 56-57.

The reasoning that emerges from the limited number of decisions rendered in regards to *CISG* by Canadian courts is that *CISG* is tantamount to domestic laws on the same subject. For example, the Court of Appeal of Manitoba stated that "[b]oth The International Sale of Goods Act [...] and The Sale of Goods Act [...] provide that when a purchaser receives delivery of goods, having had a reasonable opportunity to inspect them, any act done inconsistent with ownership by the seller will constitute acceptance."[281] The same was observed by the Ontario Superior Court of Justice, which stated the following:

> Under the International Sale of Goods Act, [...] the plaintiff submits that a failure to deliver what was contracted for may constitute a fundamental breach of contract in accordance with article 25. [...] Although this case is an instructive application of the various articles under the Act, supra, I am not satisfied the Act necessarily lowers the bar for proof of fundamental breach, as established under the common law.[282]

The influence of *CISG* on Quebec civil law is similar to that found in Canadian common law jurisdictions:[283] *CISG* is not always applied, even when it is warranted.[284] Indeed, courts in Quebec compare *CISG* with domestic law (such as the CCQ), even if *CISG* is part of domestic law.[285] Recently, the Quebec Court of Appeal reminded us that *CISG* might be the applicable law even if the parties do not raise it.[286]

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[281] *Brown & Root*, *supra* note 277 at para 50 [references omitted].
[282] *Diversitel*, *supra* note 277 at paras 27-28 (the judge finally did not apply *CISG*).
[283] The importance of good faith in the CCQ is an example of the contemporary trend where good faith is codified in *UNIDROIT Principles* and *CISG*. Pierre-Gabriel Jobin with the collaboration of Nathalie Vézina, *Baudouin et Jobin: Les obligations*, 6th ed (Cowansville, Que: Yvon Blais, 2005) at paras 436-37.
[284] Alain Prujiner, "Les conflits de clauses types et la jurisprudence québécoise" in Miranda & Moore, *supra* note 111, 527 at 547 citing the example of *Matrox*, *supra* note 277.
[285] Interestingly, judges refer often to *CISG* and not to the incorporating law, such as *CISG(Qc)*, *supra* note 276. They also generally refer to scholarly writings citing *CISG* such as Didier Lluelles & Benoît Moore, *Droit des obligations*, (Montreal: Thémis, 2006) at para 1520; Jean-Louis Baudouin & Patrice Deslauriers, *La responsabilité civile: La responsabilité professionnelle*, vol 2, 7th ed (Cowansville, Que: Yvon Blais, 2007) at para 2-405 (or the corresponding pages in previous editions); Jeffrey Edwards, *La garantie de qualité du vendeur en droit québécois*, 2d ed (Montreal: Wilson & Lafleur, 2008) at 215-16; Quebec, Ministère de la

Canadian courts refer even less often to legislative *lex mercatoria* made of "soft law" instruments, such as *UNIDROIT Principles*. Only a few decisions incidentally refer to *UNIDROIT Principles*.[287] In fact, these references usually occur within the context of a larger excerpt of scholarly work cited in court decisions.[288] Legal scholars have been more inclined to study *UNIDROIT Principles* for comparative purposes.[289] Although some legal scholars examine *UNIDROIT Principles* in the sphere of international private law[290], others study them within a Canadian context. In particular, several authors have focused on the similarities between *UNIDROIT Principles* and CCQ.[291] As such, in many civil law

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Justice, *Commentaires du ministre de la Justice*, vol 1 (Quebec: Publications du Québec, 1993) at 1096 [*Commentaires du ministre de la Justice*]. See e.g. *Taillefer c Cinar Corporation*, 2009 QCCA 850 at para 73 [*Taillefer*]; *Cousineau c General Motors du Canada*, 2006 QCCQ 12488 at para 25; *Canadian Jewish Congress c Polger*, 2011 QCCA 1169 at para 228; *Guay et Construction M. Williams Inc* (2011), AZ-50780464 (Azimut) (OAGBRN); *Syndicat de copropriété Le Vendôme et 9137-7937 Québec Inc* (2011), AZ-50764376 (Azimut) (OAGBRN); *Aubut c Martel*, [1999] RDI 697 (CQ (Civ Div)); *Campeau c Muhling* (1997), AZ-97036380 (Azimut) (CQ (Civ Div)); *Fata c Marché de la tuile*, 2011 QCCQ 13530, aff'd 2012 QCCA 62 (available on Azimut); *Trépanier c Poirier*, 2010 QCCQ 1034 (available on Azimut).

[286] *Mazzetta Company c Dégust-Mer Inc*, 2011 QCCA 717 at paras 11, 16 & 18.

[287] *Grantech Inc c Domtar Inc*, [1999] JQ no 5342 (QL) (Sup Ct), rev'd on other grounds [2002] JQ no 3186 (QL) (CA); *Énerchem Transport Inc v Gravino*, [2005] RJQ 2594 (available on QL) (Sup Ct); *Gamelin c Coderre*, 2010 QCRDL 20511 (available on Azimut); *Viau c Grignon*, 2010 QCRDL 10277 (available on Azimut); *Grenier c Legrand*, 2010 QCRDL 4073 (available on Azimut);

[288] These decisions usually cite scholarly works such as Jobin & Vézina, *supra* note 283 at paras 436-37 (or corresponding pages of the previous editions); *Encyclopédie juridique Dalloz: Répertoire de droit civil*, 2d ed, "bonne foi" by Philippe Le Tourneau & Mathieu Poumanède, No 17 (Tome III).

[289] See e.g. Anne-Marie Trahan, "Les Principes d'UNIDROIT relatifs aux contrats du commerce international" (2002) 36 RJT 623; Talpis, "Retour vers le futur", *supra* note 32; Bonell, "Harmonisation", *supra* note 46; Vincent Gautrais, "Les Principes d'UNIDROIT face au contrat électronique" (2002) 36 RJT 481; Zoubeir Mrabet, "Les comportements opportunistes du franchiseur: étude du droit civil et du droit international uniforme" (2007) 41 RJT 429.

[290] See e.g. Antoine Leduc "L'émergence d'une nouvelle *lex mercatoria* à l'enseigne des principes d'UNIDROIT relatifs aux contrats du commerce international: thèse et antithèse" (2001) 35 RJT 429; Charpentier, "Codification", *supra* note 22; Prujiner, "Pratique contractuelle", *supra* note 32.

[291] Paul-A Crépeau with the collaboration of Élise M Charpentier, *The UNIDROIT Principles and the Civil Code of Québec: Shared Values?* (Scarborough, Ont: Carswell, 1998); Trahan, *supra* note 289; Jacob S Ziegel, "The UNIDROIT Contract Principles, CISG and National Law" (Paper delivered at the seminar on the *UNIDROIT Principles* in Valencia, Venezuela, 6-9 November 1996), online: CISG Database, Pace Law School <http://www.cisg.law.pace.edu/cisg/biblio/ziegel2.html>.

jurisdictions, *UNIDROIT Principles* can be used to interpret domestic laws in the context of cross-border transactions.[292]

The influence of *UNIDROIT Principles* on Canadian common law jurisdictions is, however, less tangible. This is due to the "judge-made law" nature of common law: *UNIDROIT Principles* can only be persuasive to "the extent to which it resonates with courts, practitioners and law professors."[293]

Ultimately, it appears that the application of legislative *lex mercatoria* -*CISG* and *UNIDROIT Principles*- to Canadian law is not very conclusive. This is somewhat surprising because *CISG*, as an international treaty incorporated in domestic law, is deemed part of Canadian law and should be applied when warranted just as any domestic statute. However, *CISG* is used more often by Canadian courts than UNIDROIT Principles, which are only a persuasive element due to their "soft law" status. As such, the public or private aspect of an international instrument renders the reception of legislative *lex mercatoria* unequal.

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[292] Michael Joachim Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, 3d ed (Ardsley, NY: Transnational Publishers, 2005) at 234ff [Bonell, *International Restatement*]; Ziegel, *supra* note 291.

[293] Ziegel, *supra* note 291. The influence of *UNIDROIT Principles* on Canadian common law is not radical but more "interstitial". For example, in Ontario, the Ontario Law Reform Commissions (OLRC) referred to them to support their recommendations on the revision of the *Ontario Sale of Goods Act*, *supra* note 276.

3.3.2 Reception of Adjudicatory *Lex Mercatoria* in Canada

International arbitral tribunals are *fora* where international law is considered but the decisions rendered within these *fora* –or their potential influence within domestic law- are not discussed.[294] The reception of adjudicatory *lex mercatoria* in Canada is thus difficult to evaluate. As discussed above, *lex mercatoria* is not frequently applied by Canadian courts.[295] As such, a specific study of adjudicatory *lex mercatoria* through ICC's caselaw is necessary. The majority of Canadian court decisions regarding ICC's caselaw deals, albeit not exclusively[296], with (i) referrals to arbitration (or the validity of the agreement that submits the dispute to arbitration)[297], (ii) the enforcement of the arbitral awards[298], (iii) the setting aside of an arbitral award[299], (iv) the standard of review[300] and (v) stays of

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[294] Van Ert, *supra* note 229 at 33, 35-37. Arbitral decisions are also only considered binding upon the parties and without a precedential value. *Ibid* at 25.
[295] Discussion on this topic can be found at 73-74, above.
[296] Also, it must be noted that decisions may be classified in more than one category.
[297] This can lead to the competence or not of domestic tribunal to hear the cause. (scope of the arbitral clause: agreement to arbitrate null and void, inoperative or incapable of being performed): See e.g. *3702391 Canada Inc c Akaneks Ic Ve Disticaret Limited Sti*, [2003] JQ no 13574 (QL) (Sup Ct); *Agrawest Investments Ltd v BMA Nederland B.V.*, 2005 PESCTD 36, 251 Nfld & PEIR 64 [*Agrawest*]; *Rio Algom Ltd v Sammi Steel Co* (1991), 47 CPC (2d) 25 (Ont Ct J (Gen Div)); *Automatic Systems*, *supra* note 267; *BWV Investments*, *supra* note 267; *Benner and Associates Ltd v Northern Lights Distribution Inc* (1996), 22 BLR (2d) 79 (Ont Ct J (Gen Div)); *Cangene Corp v Octapharma AG*, 2000 MBQB 111; *Chauvco Resources International Ltd (Re)*, 1999 ABQB 56; *Deco Automotive Inc v G.P.A. Gesellschaft Fur Pressenautomation MbH*, [1989] OJ no 1805 (QL) (Div Ct); *Mind Star Toys Inc v Samsung Co* (1992), 9 OR (3d) 374 (Ct J (Gen Div)).
[298] See e.g. *Adamas Management & Services Inc v Aurado Energy Inc*, 2004 NBQB 342; *Grow Biz International Inc v D.L.T. Holdings Inc*, 2001 PESCTD 27; 199 Nfld & PEIR 135 [*Grow Biz*].
[299] See e.g. *Corporacion Transnacional de Inversiones, S.A. de C.V. v Stet International, S.p.A.* (2000), 49 OR (3d) 414 (available on QL) (CA) [*Stet International*]; *Xerox Canada Ltd v MPI Technologies Inc*, [2006] OJ no 4895 (QL) (Sup Ct) [*Xerox*]; *Quintette Coal Ltd v Nippon Steel Corp* (1990), 50 BCLR (2d) 207 (CA) [*Quintette*]; *Tusculum*, *supra* note 267.
[300] See e.g. *Quintette*, *supra* note 299; *Myers*, *supra* note 267; *Xerox*, *supra* note 299. See also note 268 and accompanying text.

proceedings[301]. Very few decisions examine the impact of international arbitral decisions on substantive law in Canada. Most decisions will study the procedural aspects, such as the relationship between international arbitration and class actions.[302] For example, in *Dell*[303], the Supreme Court of Canada had to determine, in a contract for the sale of computers, whether class actions were a matter of public policy that should not be submitted to arbitration. The Supreme Court of Canada ruled that the case should be referred to arbitration by reiterating the principle stated in *Desputeaux*[304] according to which public policy must be interpreted restrictively. Similarly, in *Stet International*[305], the Court of Appeal of Ontario reiterated the statement of principle issued previously in *Schreter*[306] regarding public policy:

> The concept of imposing our public policy on foreign awards is to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where

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[301] While not an independent category strictly speaking, the amount of cases relating to stays of proceedings are such that they should be mentioned separately. For example, they are often discussed in connection to referrals of arbitration. See e.g. *Agrawest*, *supra* note 297; *Gulf Canada Resources Ltd v Arochem International Ltd* (1991), 1 BCAC 158 (available on QL); *Fuller Austin Insulation Inc v Wellington Insurance Co* (1995), 135 Sask R 254, 23 CLR (2d) 193 (QB); *Dillingham Canada International Ltd v Mana Construction* (1985), 69 BCLR 133 (available on QL) (CA); *Morran v Carbone* (2005), 7 CPC (6th) 360 (available on QL) (Ont Sup Ct); *Tos Varnsdorf A.S. v Omnitrade Ltd* (2006), 14 BLR (4th) 307, 19 CBR (5th) 90 (Ont Sup Ct); *Resin Systems Inc v Industrial Service and Machine Inc*, 2008 ABCA 104; *Neptune Bulk Terminals Ltd v Intertec Internationale Technische Assistenz, GmbH*, [1980] BCJ no 969 (QL) (SC (Chambers)); *ABN Amro Bank Canada v Krupp MaK Maschinenbau GmbH* (1994), 21 OR (3d) 511 (Ct J (Gen Div)); *BWV Investments Ltd v Saskferco Products Inc* (1995), 137 Sask R 238 (CA).

[302] See e.g. *MacKinnon* v *National Money Mart Co*, 2009 BCCA 103 (available on QL). See also *CRC-Evans Pipeline International Inc v Noreast Services & Pipelines Ltd*, 2005 ABQB 459 (collateral use of discovery information).

[303] *Supra* note 256.

[304] *Desputeaux v Éditions Chouette (1987) Inc*, 2003 SCC 17, [2003] 1 SCR 178.

[305] *Stet International*, *supra* note 299.

[306] *Schreter v Gasmac Inc* (1992), 7 OR (3d) 608 at 623 (Ct J (Gen Div)).

> there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts.[307]

Other procedural aspects, such as stay of proceedings, are often discussed in domestic courts in regards to international arbitration disputes. For example, in the case *Kaverit Steel*[308], the defendant, Kone Corporation, a Finnish manufacturer of industrial cranes, entered into a licence and distributorship agreement with the plaintiff Kaverit Steel, an Albertan corporation which operates an industrial supplies business. Kaverit Steel sued Kone Corporation on the basis that the latter violated the exclusive distributorship granted in the agreement between both companies. Instead of submitting the dispute to arbitration as provided in the arbitration agreement, Kaverit Steel decided to initiate proceedings before a domestic court. The argument was that the initial agreement did not provide for every aspect of the current dispute to be referred to arbitration but only for matters in connection to the existence of the contract. As such, for convenience purposes, it was argued that all matters in the case at hand should be judged before the same forum, i.e. a domestic court. The Court of Appeal of Alberta rejected that argument, stayed the proceedings and referred all matters relating to the existence of the contract to arbitration. Similarly, in the case *Grow Biz*[309], the Supreme Court of Prince Edward Island allowed an application for the recognition and enforcement of a foreign arbitral award by company Grow Biz. The respondent company, D.L.T. Holdings, -and respondent shareholder/officer Tanton- purchased a franchise agreement for a clothing line from the applicant. In the

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[307] *Ibid* [emphasis in the original]. For more on public policy and international arbitration, see *supra* note 114 & accompanying text, above.
[308] *Kaverit Steel*, *supra* note 267.
[309] *Supra* note 298.

arbitral award, the tribunal concluded that the respondent had to reimburse various fees to Grow Biz. The respondent opposed the enforcement of the awards for various reasons, including that the award exceeded the scope of arbitration. The Supreme Court of Prince Edward Island rejected that claim and allowed the application for enforcement of the arbitral award, reiterating the principle of deference towards international arbitral awards.

These cases show the deference of Canadian courts towards international arbitration. However, this deference also leads to the gap between Canadian courts and international arbitration: On substantive matters, Canadian courts do not refer to international arbitral awards, even if they are both ruling on transborder commerce.[310]

In conclusion, to assess how adjudicatory *lex mercatoria* can have an influence on Canadian substantive law, we must demonstrate that there are more similarities than distinctions between them. To help identify these potential similarities and differences, we will compare common law, civil law and *lex mercatoria*.

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[310] See e.g. *Mansonville*, *supra* note 32; *Diversitel*, *supra* note 277.

Chapter 4 Comparison of Principles in Quebec, Canada, Legislative and Adjudicatory *Lex Mercatoria*

Canadian caselaw rarely refers to arbitral decisions to interpret substantive law. This is partly due to the unequal reception of international law within Canadian law (chapter 3) and partly because of the lack of consistency associated with the *stare decisis* in international arbitration (chapter 2). Yet, there are more similarities than differences in international commerce cases submitted before domestic courts and international arbitral tribunals. As such, in matters of international commerce, adjudicatory *lex mercatoria* could be used by Canadian courts as an interpretation tool.

To help ascertaining the potential influence of adjudicatory *lex mercatoria* on Canadian law, three (3) principles, namely *force majeure*, hardship and mitigation of damages, will be compared and contrasted.[311] These three principles are found in civil law, common law as well as in legislative and adjudicatory *lex mercatoria*. The review of these principles in each of these legal orders will demonstrate the similarities in how these issues are addressed between a state legal order and a non-state legal order and more particularly, between Canadian law and decisions from the ICC arbitral tribunals.

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[311] The disparities in these principles (*force majeure*, hardship and mitigation of damages) between Canadian common law jurisdictions will not be discussed as the differences are minimal and not the focus of this paper. It must also be noted that although the majority of cases discussed in this paper relates to international commerce, some domestic cases may concern other domestic issues.

4.1 *Force Majeure*

4.1.1 Concept in Civil Law (Quebec)

Under Quebec civil law, article 1470 CCQ provides for the principle of *force majeure*. It states:

> A person may free himself from his liability for injury caused to another by proving that the injury results from superior force, unless he has undertaken to make reparation for it.
>
> A superior force is an unforeseeable and irresistible event, including external causes with the same characteristics.[312]

Force majeure is generally defined as an unforeseeable and irresistible (or unavoidable) event, beyond the control of a given party, which makes the execution of a given obligation impossible.[313] The event must be unpredictable -or unforeseeable- as determined by a comparable person in the same circumstances. This calls upon the notion of a "reasonable and prudent person placed in the same circumstances".[314] The irresistibility factor is fulfilled when the non-performing party is unable to prevent the event, despite taking

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[312] Art 1470 CCQ; *Commentaires du ministre de la Justice*, *supra* note 285 at 899; Jean-Louis Baudouin & Patrice Deslauriers, *La responsabilité civile: Principes généraux*, vol 1, 7th ed (Cowansville, Que: Yvon Blais, 2007) at para 1-1359; Jobin & Vézina, *supra* note 283 at para 915; Lluelles & Moore, *supra* note 285 at para 2730-45.

[313] Baudouin & Deslauriers, *supra* note 312 at para 1-1359. For example, a governmental act can be considered *force majeure*. See generally Saber Salama, *L'acte de gouvernement: contribution à l'étude de la force majeure dans le contrat international* (Bruxelles: Bruylant, 2001). Natural elements can also lead to *force majeure*. See e.g. *PierreVillage Inc c Construction 649 Inc*, [1999] RJQ 1369 (available on Azimut) (Sup Ct) [*PierreVillage*]; *Tremblay c Charlevoix-Est (Municipalité régionale de comté de)*, 2008 QCCS 1491 at paras 104-08 [*Charlevoix-Est*] aff'd 2010 QCCA 386.

[314] Jobin & Vézina, *supra* note 283 at para 916. See also Jean Pineau, Danielle Burman & Serge Gaudet, *Théorie des obligations*, 4th ed (Montreal: Thémis, 2001) at para 473; *Nexans Canada Inc c Papineau International, s.e.c.*, 2010 QCCA 1682 at para 7, aff'g 2008 QCCS 5553 at paras 12-13, 23-24; *Transport Rosemont Inc c Montréal (City of)*, 2008 QCCS 5507 at para 39 [*Transport Rosemont*]; Baudouin & Deslauriers, *supra* note 312 at para 1-1361.

adequate precautions. As such, the non-performing party must try to mitigate its occurrence.[315] Also, the obligation is discharged only if the event prevents the execution of said obligation. Hence, in cases where the impediment is temporary -and where the original contract is not time barred-, the obligation is only suspended for the duration of the *force majeure* event.[316] Furthermore, the impossibility must be one which would prevent every non-performing party in the same situation to carry out the execution of the obligation.[317]

Article 1470 CCQ does not explicitly state that exteriority is an element of *force majeure*. While it is suggested by some legal scholars that an unpredictable and irresistible situation is sufficient to raise the defense of *force majeure*, others insist that a *force majeure*-based defense requires exteriority.[318] The reasoning is as follows: If exteriority is not necessary,

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[315] Jobin & Vézina, *supra* note 283 at para 917; *Entreprises Piertrem (1989) Inc c Pomerleau Les Bateaux Inc*, 2007 QCCA 759 at paras 63-65, [2007] RJQ 1131; *Québec Métal Recyclé (FNF) Inc c Transnat Express Inc* (2005), AZ-50344891 (Azimut) (Qc Sup Ct) [*Transnat*]; *Charlevoix-Est*, *supra* note 313 at para 103; *Groupe CGU Canada Ltée c Ste-Marie de Beauce (City of)*, 2006 QCCS 1105, [2006] RRA 394, *Transport Rosemont*, *supra* note 314 at paras 36, 40; Baudouin & Deslauriers, *supra* note 312 at para 1-1361; Pineau, Burman & Gaudet, *supra* note 314 at para 472. Compare with hardship, at section 4.2, below.

[316] Vincent Karim, *Les obligations*, vol 1, 3d ed, (Montreal: Wilson & Lafleur, 2009) at 1118; *PierreVillage*, *supra* note 313.

[317] Baudouin & Deslauriers, *supra* note 312 at para 1-1364; Pineau, Burman & Gaudet, *supra* note 314 at paras 471-73; *Transport Rosemont*, *supra* note 314 at paras 41-43 (extinctive character of force majeure); *Caisse Desjardins de St-Paulin c Bombardier Inc*, 2008 QCCS 3725 at paras 266-95 (not satisfying contractual definition of *force majeure*).

[318] Jobin & Vézina, *supra* note 283 at para 918; Pineau, Burman & Gaudet, *supra* note 314 at paras 471, 474; *Guarantee Company of North America c Phil Larochelle Équipement Inc*, 2009 QCCS 133 at para 40, aff'd 2010 QCCA 952 at para 10. *Contra*: Exteriority is deemed necessary by some legal scholars and caselaw such as Lluelles & Moore, *supra* note 285 at para 2735ff; *Taillefer*, *supra* note 285 at para 73; *Transnat*, *supra* note 315.

the non-performing party who has control over an unpredictable and irresistible event can use the *force majeure* defense to justify non-performance.[319]

The concept of exteriority is ambiguous and the caselaw reveals many contradictions. For example, a strike does not necessarily present any signs of exteriority but is still deemed a *force majeure* event.[320] Some legal scholars suggest that exteriority is not an independent factor in itself, in the same manner as irresistibility and unpredictability. The non-performing party must prove that it could not prevent the event despite the control it exercised.[321]

Interestingly, the CCQ makes several references to the term *force majeure* but never as a provision of public order.[322] Hence, parties can define *force majeure* –and thus allocate the risk- as they wish in a contract, by including a more sophisticated approach regarding the discharge of obligations due to supervening events. They can list the specific events that

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[319] See e.g. *Lambert c Minerve Canada, compagnie de transport aérien*, [1998] RJQ 1740 at 1746 (CA); Baudouin & Deslauriers, *supra* note 312 at para 1-1360; Karim, *supra* note 316 at 1116.
[320] *Ibid*.
[321] Lluelles & Moore, *supra* note 285 at para 2735; Jobin & Vézina, *supra* note 283 at para 918.
[322] See arts 91 (absence), 876 (return of gifts and legacies), 1160 & 1161 (usufruct and bare owner), 1210 (emphyteusis), 1308 (administration of the property of others), 1582 (tender and deposit), 1600 (default), 1693 (impossibility of performance), 1699 & 1701 (restitution of prestations), 1727 (warranty of quality), 1804 (alienation for rent), 1846 (leasing), 1864 (rights and obligations resulting from the lease), 1890 (termination of the lease), 2019 & 2029 (affreightment), 2034 (means of transportation), 2037 & 2038 (carriage of persons), 2049 (carriage of property), 2072 & 2078 (carriage of property by water), 2105 (property necessary for the performance of the contract), 2240 (limited partnerships), 2286, 2289 & 2295 (deposit), 2322 & 2323 (loan for use), 2464 (damage insurance) & 2739 (loss of the hypothecated property). These examples were taken from Frédéric Pérodeau, "La force majeure comme mécanisme contractuel d'allocation des risques" in *Développements récents en droit de la construction (2011)* (Cowansville, Que: Yvon Blais, 2011) 111 at 115.

would trigger the *force majeure* mechanism (e.g. war, revolution, earthquakes, etc.) and/or describe the consequences of such event.[323]

4.1.2 Concept in Common Law

In common law, *force majeure* is defined in a similar manner as in Quebec civil law.[324] *Force majeure* is generally said to be an "[a]n event or effect that can be neither anticipated nor controlled. The definition includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes and wars)."[325] This definition takes into account both acts of nature -or "acts of God"-[326] and human intervention.

In 1976, the Supreme Court of Canada stated that a *force majeure* clause may "discharge a contracting party when a supervening, sometimes supernatural, event, beyond the control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill."[327] The courts have applied this

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[323] *Ibid*; Lluelles & Moore, *supra* note 285 at para 2744; Karim, *supra* note 316 at 1104; Ugo Draetta, "Force Majeure Clauses in International Trade Practice" [1996] Int'l Bus LJ 546 at 550-53. See e.g. *Entreprises Rioux & Nadeau Inc c Société de récupération, d'exploitation et de développement forestiers du Québec (Rexfor)*, REJB 2000-17936 at paras 27-28 (available on QL) (Qc CA); *British Columbia (Minister of Crown Lands) v Cressey Development Corp* (1992), 66 BCLR (2d) 146 (available on QL) (Sup Ct (Chambers)) [*Cressey*].

[324] Pérodeau, *supra* note 322 at 116.

[325] *Black's Law Dictionary*, 9th ed, *sub verbo* "*force majeure*".

[326] "Act of nature" can also be used. Centre de traduction et de terminologie juridiques, *Banque Juriterm* (Banque terminologique de la common law), online: Faculté de droit, Université de Moncton <http://www8.umoncton.ca/cttj/juritermplus/cttj/juriterm.dll/EXEC> [*CTTJ*], *sub verbo* "act of God".

[327] *Atlantic Paper Stock Ltd v St Anne-Nackawic Pulp & Paper Co*, [1976] 1 SCR 580 at 583. Interestingly, the Court uses "Acts of God or *force majeure* clauses" which contributes to the confusion. *Force majeure* clauses are also used to deal with the notion of frustration, discussed at section 4.2.2, below. They are

test not only to "acts of God", but also to several "acts of people". For example, Alberta's Queen Bench examined the foregoing *force majeure* clause test in a case where a purchase and sale of land agreement was concluded. The Court considered that a "delay by the city of Calgary authorities in approving an application for a development permit might constitute a cause beyond the control of the purchaser so as to permit [the application of the *force majeure* clause]."[328]

In some Canadian common law jurisdictions, *force majeure* is defined restrictively to include only "acts of God".[329] The confusion between the concepts of "act of God" and *force majeure* is partly due to the fact that these concepts are often found under the heading *force majeure* in a contract or in the legislation. However, the concept of "act of God" has a narrower sense than the concept of *force majeure* in Quebec: "act of God" includes events caused by natural forces only.[330] In fact, the concept of "act of God" often excludes human intervention from its definition. Black's Law Dictionary defines "act of God" as follows:

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sometimes considered to have an archaic language. Angela Swan, *Canadian Contract Law*, 2d ed (Markham, Ont: LexisNexis, 2009) at paras 8.346-51.

[328] *World Land Ltd v Daon Development Corporation*, [1982] 4 WWR 577 at 596 (available on QL) (AB QB); *West Fraser Mills Ltd v Crown Zellerbach Canada Ltd* (1983), 23 BLR 126 (available on QL) (BCSC). *Force majeure* was rejected because it was judged foreseeable in *Thibodeau v Air Canada***,** 2005 FC 1621 at para 19. See also *Boligomsetning AS v Terpstra Management Ltd* (1989), 75 Nfld & PEIR 239 at para 12 (available on WL Can) (Nfld SC (TD)) [*Terpstra*]; *Cressey*, *supra* note 323 at 153-55 (the judge also examined the notion of frustration). See also *CTTJ*, *supra* note 326, *sub verbo* "*force majeure*".

[329] See e.g. *Charter of Ville de Gatineau*, RSQ, c C-11.1, s 6.2 of *Schedule B*; *Charter of Ville de Longueuil*, RSQ, c C-11.3, s 11 of *Schedule C*; *Re Charkaoui*, 2005 FC 1670 at para 23, [2006] 3 FCR 325 (translated by "*force majeure*" in French version (2005 FC 1670 at para 23; [2006] 3 RCF 325)); *Metson v R.W. DeWolfe Ltd* (1980), 43 NSR (2d) 221 at para 9, 117 DLR (3d) 278 (Sup Ct (TD)) [*Metson*].

[330] "'*force majeure*' clauses […] excuse performance in case of, for example, an "act of God" or of the Queen's enemies, restraint of princes, riots, strikes and civil war." SM Waddams, *The Law of Contracts*, 6th ed (Aurora, Ont: Canada Law Book, 2010) at para 378 [Waddams, *Law of Contracts*]; See also *CTTJ*, *supra* note 326, *sub verbo* "*force majeure*".

> An overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado. The definition has been statutorily broadened to include all natural phenomena that are exceptional, inevitable, and irresistible, the effects of which could not be prevented or avoided by the exercise of due care and foresight.[331]

This definition has been adopted in various Canadian common law jurisdictions.[332] According to caselaw, "acts of God" are primarily an exception and should not be seen as condoning negligent inaction. As such, an "act of God" must have a natural cause which could not have been reasonably foreseen or anticipated regardless of the due diligence exercised.[333] The detailed classification of an event as an "act of God" may vary from one jurisdiction to another. Natural phenomena may be considered "acts of God" in Canada, for instance, but not in Australia.[334] Courts in Canada have considered lightning, storms, perils of the sea, earthquakes, floods, sudden death and illness as "acts of God".[335] A definition similar to the one in Black's Law Dictionary can be found in other Canadian legislation. One New Brunswick regulation defines "act of God" as follows:

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[331] *Black's Law Dictionary*, 9th ed, *sub verbo* "Act of God". See also *CTTJ*, *supra* note 326, *sub verbo* "act of God".

[332] See e.g. *Falk Enterprises Ltd v McLaine* (1994), 123 Nfld & PEIR 50 at para 5 (available on WL Can) (PEI SC (TD)) [*Falk Enterprises*].

[333] *R* v *Canadian Pacific Railway*, [1965] 2 Ex CR 222 at 241-42 (available on WL Can). Restated as "such a defense required an extraordinary operation of nature to which no man contributed, which the accused could not have foreseen and could not have guarded against" in *R v Pioneer Timber Co* (1979), 9 CELR 66 at 70 (available on WL Can) (BC Co Ct). See also *R v North Canadian Enterprises Ltd* (1974), 20 CCC (2d) 242, 3 CELN 204 (Ont Prov Ct) (the judge differentiates between biblical and legal senses); *Carney v Caraquet Railway* (1890), 29 NBR 425 at 426 (available on WL Can) (Sup Ct); *R v Falconbridge Nickel Mines Ltd* (1982), 11 CELR 136 at 140 (available on WL Can) (Ont Prov Ct); *Heinbigner v Kinzel*, [1931] 2 WWR 539 at 541-42 (available on QL) (Sask Dist Ct). *Falk Enterprises*, *supra* note 332 at para 7.

[334] Heavy rains were rejected as an "act of God" in British Columbia. *Greater Victoria School District No 61 v Goudie* (1984), 59 BCLR 176 (available on WL Can) (Co Ct). Frost was also not considered an "act of God" in *Bishop v Gander (Town)* (1986), 60 Nfld & PEIR 310 (available on WL Can) (Nfld SC (TD)). Heavy rain and intense cold were also rejected as "acts of God" in *Metson*, *supra* note 329 at para 9.

[335] *Slattery v Haley*, [1923] 3 DLR 156 at 159 (available on QL) (Ont SC (AD)) citing *Fish v Champman & Ross* (1847), 2 Ga 349 at 357. Storms considered "acts of God" in *Nugent v Smith* (1876), 1 CPD 423, 45 LJCP 697, cited in *Marchyshyn v Fane Auto Works Ltd*, [1932] 1 WWR 689 at 692-93 (available on WL Can) (Alta SC (AD)) (applies caselaw to violent tornadoes). *Contra*: *McQuillan v Ryan* (1921), 50 OLR 337 at 343, 348; 64 DLR 482 (CA).

> [A]n extraordinary occurrence or circumstance that is directly and exclusively due to natural causes without human intervention, which could not by any amount of ability have been foreseen or, if foreseen, could not by any amount of human care and skill have been resisted.[336]

Notwithstanding the foregoing, legislation rarely provides a definition of this term and instead typically lists "act of God" as one of the factors which excludes liability.[337] For instance, *The Animal Liability Act*[338] states that an "act of God" is one of the situations which would allow the owner of a livestock to exclude liability from damages caused by the livestock. Similarly, the *Canada Elections Act*[339] states that, in an election context, a judge can grant an order excusing the official agent of a candidate from providing certain documents if "he or she is satisfied that the applicant cannot provide the documents because of their destruction by an "act of God" or a superior force, including a flood, fire or other disaster".[340]

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[336] *Loch Lomond Watershed Planning Area Basic Planning Statement Adoption Regulation - Community Planning Act*, NB Reg 89-7, s 2.

[337] *Canadian Wheat Board Act*, RSC 1985, c C-24, s 52(4); *Income Tax Act*, RSC 1985, c 1 (5th Supp) s 18(3.5); *Animal Liability Act(The)*, SM 1998, c 8, CCSM c A95, s 2.3; *Scott Maritimes Limited Agreement (1965) Act*, RSNS 1989, c 415, s 3(2A) of the Schedule; *Ontario New Home Warranties Plan Act*, RSO 1990, c O.31, s 13(2); *Stora Forest Industries Limited Agreement Act*, RSNS 1989, c 446, s 8(c), (e); *Environmental Management Act*, SBC 2003, c 53, s 46(1)(a); *Northern Pipeline Act*, RSC 1985, c N-26, s 12 of Schedule I; *Contaminated Sites Remediation Act(The)*, SM 1996, c 40, CCSM c C205, s 21(b)(xiii); *Clean Water Act*, SNB 1989, c C-6.1, s 1; *Clean Environment Act*, RSNB 1973, c C-6, s 1; *Lower Churchill Development Act*, RSNL 1990, c L-27, s 11(1)(a) of Schedule A; *Nisga'a Final Agreement Act*, SBC 1999, c 2, s 61 of Chapter 5; *Condominium Property Act*, RSA 2000, c C-22, s 1(c) of the Appendix 2, Schedule A; *Residential Tenancies Act*, RSNWT 1988, c R-5, s 31(1); *Residential Tenancies Act*, RSNWT 1988, c R-5, s 31(1) as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28; *Maa-nulth First Nations Final Agreement Act*, SBC 2007, c 43, Appendix E-6**.** The term "Act of God can also be found in several regulations in various Canadian common law jurisdictions.

[338] *Supra* note 337, s 2.3: "In an action brought under this section against the owner of livestock for damages for harm alleged to have been caused by the livestock while running at large, it is a defense for the owner to prove that (a) his or her control of the livestock was in accordance with generally accepted agricultural practices; or (b) the livestock was at large due to an *act of God* or the act or default of a person other than (i) the owner, (ii) an employee of the owner acting within the scope of his or her employment, or (iii) the spouse, common-law partner or child of the owner, who is not estranged from him or her" [emphasis added].

[339] SC 2000, c 9.

[340] *Ibid*, s 462(2).

The concept of *force majeure* in Quebec civil law and Canadian common law is thus very similar in practice despite some conceptual differences. Moreover, even if *force majeure* is discussed in a similar manner in domestic law, it is very analogous to *force majeure* in legislative and adjudicatory *lex mercatoria*. This is not surprising because legislative and adjudicatory *lex mercatoria* are inspired to a certain extent, through a process of comparative law, from domestic legal orders.[341]

4.1.3 Concept in Legislative *Lex Mercatoria*

The concept of *force majeure* in legislative and adjudicatory *lex mercatoria* is much broader than in Canadian civil law or common law. *Force majeure* is found in both *CISG* and *UNIDROIT Principles*. In the *UNIDROIT Principles*, the concept of *force majeure* is found in article 7.1.7. It reads as follows:

> 7.1.7 (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
>
> (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
>
> (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such nonreceipt.
>
> (4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.[342]

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[341] See section 4.1.5, below, to illustrate this statement.
[342] *UNIDROIT Principles*, art 7.1.7.

The above article was inspired to a large extent from article 79 of *CISG*[343]:

> 79 (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
>
> (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
> *(a)* he is exempt under the preceding paragraph; and
> *(b)* the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
>
> (3) The exemption provided by this article has effect for the period during which the impediment exists.
>
> (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such nonreceipt.
>
> (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.[344]

Article 7.1.7 of the *UNIDROIT Principles* and article 79 of the *CISG* are designed to encompass the concept of *force majeure* in civil law as well as the concepts of frustration and impossibility of performance in common law.[345]

Force majeure events can be due to natural, political (e.g. war, embargo, etc.) or economic (e.g. currency devaluation) causes and do not require a fault by the non-performing party.[346]

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[343] "Introduction to *UNIDROIT Principles 1994*", *supra* note 29; Christoph Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2009) at 101, 106.

[344] *CISG*, art 79.

[345] See e.g. "Comments under article 7.1.7", *UNIDROIT Principles 2004*, online: UNIDROIT <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf> at 206-08 ["Comments under article 7.1.7"]. The term *force majeure* was used because it was widely spread in international contracts, which often include a "*force majeure* clause". Also, this article must be read in conjunction with Chapter 6, Section 2 of the *UNIDROIT Principles*, which deals with hardship. See section 4.2, below, for further discussion on the difference between *force majeure* and hardship/frustration as well as the criterion of impossibility versus a "radical change in circumstances".

[346] Darankoum, "Application des Principes UNIDROIT", *supra* note 31 at 457.

In order to be considered a *force majeure* under legislative *lex mercatoria*, the event *preventing* the performance "must be *beyond the control* of the non-performing party [who must] not explicitly or implicitly *assume* [...] *the risk* of its occurrence."[347] The test is clear: a causal link between the impediment and the non-performance is necessary (i.e. "the non-performance [must] not have occurred *but for* the impediment"[348]) and that such impediment must be beyond the control of the non-performing party.[349]

Few Canadian courts have applied article 79 of the *CISG* and/or article 7.1.7 of the *UNIDROIT Principles*.[350] While there are similarities between *force majeure* in civil law, common law and legislative *lex mercatoria* (for example characteristics of unforeseeability and unavoidability), some legal scholars have noted that the concept of *force majeure* in legislative *lex mercatoria*, especially in *UNIDROIT Principles*, is more specific than in civil law.[351]

4.1.4 Concept in Adjudicatory *Lex Mercatoria*

The concept of *force majeure* is also deemed important in adjudicatory *lex mercatoria*. As in civil law and common law, the will of the parties is given precedence over suppletive

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[347] Brunner, *supra* note 343 at 76 [emphasis added]. The same requirements apply to both art 79 of the CISG and 7.1.7 of the *UNIDROIT Principles* (*ibid* at 106). See generally Bonell, *International Restatement*, *supra* note 292. *Contra*: Dionysios P Flambouras, "The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law - A Comparative Analysis" (2001) 13 Pace Intl'l L Rev 261 at 287-89.

[348] Brunner, *supra* note 343 at 340ff [emphasis in the original].

[349] Sarah Howard Jenkins, "Exemption for non-performance: UCC, CISG, UNIDROIT Principles - A comparative assessment" (1997-98) 72 Tul L Rev 2019 at 2023; "Comments under article 7.1.7", *supra* note 345 at 206-08. See also Flambouras, *supra* note 347 at 266ff; Bernard Audit, *La vente internationale des marchandises: Convention des Nations-Unies du 11 avril 1980* (Paris: LGDJ, 1990) at paras 180-86.

[350] For example, it was used as a comparative element in *Taillefer*, *supra* note 285 at para 72 for the exteriority criterion.

[351] See e.g. Darankoum, "Application des Principes UNIDROIT", *supra* note 31 at 456.

transnational or domestic law. Indeed, arbitral tribunals will seriously consider a *force majeure* clause, if available, because its presence indicates the desire of the parties to be bound by more severe or more permissive conditions than required at law.[352]

Force majeure in adjudicatory *lex mercatoria* is applied either through domestic laws or legislative *lex mercatoria*. Arbitral tribunals may apply any domestic law requested by the parties.[353] The use of legislative *lex mercatoria* is twofold. First, as the law applicable to the merits of the dispute. Second, as a mean to legitimize a decision based on domestic law.[354]

In cases where a dispute is governed by legislative *lex mercatoria*, arbitral tribunals do not readily accept a defense based on *force majeure*. For example, *CISG* was applicable in Case No 8790[355], where the seller of processed food products did not deliver a product, as required under the terms of the contract. The arbitral tribunal concluded that a drought, which reduced one of the raw materials, constituted a *force majeure* event, although the delivery of the product needed to resume upon termination of the drought. In Case No

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[352] See e.g. Case No 3880 (1983), (1985) 10 YB Comm Arb 44 at 45-46 (ICC); Case No 4462 (1985, 1987), (1991) 16 YB Comm Arb 54 at 57 (ICC) (under Libyan law). See Annex III ICC *Force Majeure* Clause 2003, below for an example of a *force majeure* clause in international trade.

[353] See Table 2: Statistics on Applicable Law in ICC Arbitration Provisions, above, for the percentage of arbitral cases submitted to domestic laws. See e.g. Case No 3099/3100 (1979), (1982) 7 YB Comm Arb 87 (ICC) (under Algerian law and French law); Case No 5617 (1989), (1994) 121 JDI 1041 at 1043 (ICC) (under Swiss law).

[354] Yves Derains, "The Role of *UNIDROIT Principles* in International Commercial Arbitration: A European Perspective" in *UNIDROIT Principles of International Commercial Contracts: Reflections on their Use in International Arbitration*, [2002] ICCCA Bull (Special Supplement) 9. See chapter 1, above, for a discussion on the theories of arbitration which do not necessarily agree on the application of legislative *lex mercatoria*. Most arbitral tribunals use general principles of law to fill the gaps of the domestic law chosen by the parties or to supplement domestic laws. Sosa, *supra* note 1 at 133-34.

[355] (2000), (2004) 29 YB Comm Arb 13 (ICC).

8501[356], an arbitral tribunal had to decide whether to uphold a contract for the sale of rice following the congestion in the home port of the seller and the decision of the authorities of the country of the seller to limit its exportation quotas. The arbitral tribunal concluded that the sale of rice was not impossible: The seller was selling rice to other purchasers and should therefore have been able to execute its obligation. In Case No 7197[357], the conditions of payment in a contract of sale required the opening of an irrevocable letter of credit. The arbitral tribunal had to decide whether the failure to open the letter of credit because of an unclear state-imposed moratorium constituted *force majeure*. The *force majeure* defense was refused because the opening of a letter of credit was not unforeseeable.[358] Even though the aforementioned decisions apply legislative *lex mercatoria* in very different factual circumstances, they share a similar approach by applying narrowly the concept of *force majeure* and by insisting on the importance of *pacta sunt servanda* –or the binding nature of agreements.

4.1.5 Similarities of *Force Majeure* between Civil Law, Common Law, Legislative and Adjudicatory *Lex* Mercatoria

This restrictive approach is found in all legal orders as illustrated in the table below, which shows the similarities between the concepts of *force majeure* in Canadian domestic laws, legislative *lex mercatoria* and adjudicatory *lex mercatoria*.

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[356] (2001), (2001) 128 JDI 1164 (ICC).
[357] (1992), (1993) 120 JDI 1029 (ICC) analyzed in detail in Darankoum, "Application des Principes UNIDROIT", *supra* note 31 at 457.
[358] *Ibid* at 508.

Table 4: *Force Majeure* in Canada and *Lex Mercatoria*

Force majeure					
		Civil law (Quebec)	**Common law (Canada-excluding Quebec))**	***Lex mercatoria***	
				Legislative *lex mercatoria*	**Adjudicatory *lex mercatoria***
	Criteria (Unforeseeable/ Unavoidable)	Unforeseeable Irresistible	Unexpected Unavoidable	Unforeseeable Unavoidable	Unforeseeable Unavoidable
1	**(Exteriority)**	Not always applied: Controversy among courts' decisions and legal scholars	Difficult to evaluate due to the dichotomy between *force majeure* and "act of God" but the presence of exteriority seems implicit	Beyond the control of the non-performing party	Decisions vary according to the law applied by the arbitral tribunal: Legislative *lex mercatoria* or a domestic law (civil law or common law)
2	**Link**	Performance impossible for a reasonable and prudent person in the same circumstances	Performance impossible despite due diligence	Performance impossible "but for" test Notion of reasonableness	Performance impossible (Respect of *pacta sunt servanda*) Reasonableness seems implicit
3	**Temporary event**	Suspension of the obligation for the duration of the *force majeure* event			
4	**Notion of risk**	Very important: Underlies the issue of *force majeure*			
5	**Notice**	Non-performing party must inform other parties as soon as possible			
6	**Clause**	No public order provisions: Parties can add their own restrictions in a clause			
		Addition of events or consequences to allocate the risk differently than as stated in the law	Different allocation of the risk. Archaic language: "Act of God" is one of the factors of liability in *force majeure* clauses	Addition of events or consequences to allocate the risk differently than as stated in the law	

The shades of grey show the similarities between the various legal orders.

This table shows that there are six similarities (and very few material distinctions) between the concepts of *force majeure* within different legal orders.[359] These six similarities may be summarized as follows:

First, many arbitral decisions and comments on arbitral decisions have established that the three principal conditions of *force majeure* are unforeseeability, irresistibility and exteriority.[360] However, Case No 9466[361] is one of several decisions[362] in which the arbitral tribunal stated that the "the *unforeseeability* and the *irresistibility* of the event" will determine whether a *force majeure* event exists.[363] This is similar to the ongoing debate in both civil law and common law where the importance of the element of exteriority is not clearly ascertained.[364] However, this controversy is not found in legislative *lex mercatoria*, where the criterion of exteriority is recognized and applied generally.

Second, the execution of the performance must be impossible. For example, in Case No 2139[365], a foreign purchaser was contractually obligated to accept the delivery of raw materials exploited by a newly nationalized state enterprise. This nationalized state

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[359] *Contra*: Flambouras, *supra* note 347 at 266.
[360] See e.g. Case No 4462, *supra* note 352 at 57; Case No 8501, *supra* note 356 at 1166; Case No 7197, *supra* note 357 at 1036-37; Case No 3099/3100, *supra* note 353 at 90; Case No 3093/3100 (1979), (1980) 107 JDI 951 at 953 (ICC); Yves Derains, "Case Comment on Case No 3093/3100 (ICC)" (1980) 107 JDI 955 at 958.
[361] (1999), (2002) 27 YB Comm Arb 170 (ICC).
[362] See e.g. Case No 2139 (1974), (1975) 102 JDI 929 at 930 (ICC); Case No 2216 (1974), (1975) 102 JDI 917 at 918-19 (ICC); Case No 2142 (1974), (1974) 101 JDI 892 at 893 (ICC); Case No 3880, *supra* note 352 at 45. See also Yves Derains, "Case Comment on Case No 2216 (ICC)" (1975) 102 JDI 920 at 921-22.
[363] Case No 9466, *supra* note 361 at 174 [emphasis added] (these characteristics are common in both civil law and common law systems according to the arbitral tribunal).
[364] The exteriority factor can be difficult to evaluate in common law because of the confusion of the notion of force majeure, "act of God" and hardship but is not as consistently discussed as unavoidability and unforeseeability. Further discussion on this topic can be found at section 4.1.2, above.
[365] *Supra* note 362; Yves Derains, "Case Comment on Case No 2139 (ICC)" (1975) 102 JDI 930.

enterprise expropriated foreign companies. The purchaser, threatened by the recently expropriated foreign companies, refused to accept the delivery of the raw materials from the nationalized state enterprise. The purchaser's main argument was to the effect that the threats constituted *force majeure*. The arbitral tribunal rejected the argument and concluded that the execution of the obligation was not impossible because other purchasers succeeded in performing the same obligation.[366]

The third similarity is the temporary character of the *force majeure* event and the requirement that the contractual obligations be resumed as soon as the *force majeure* event ceases.[367]

Fourth, the notion of risk is another commonality among the different legal orders. When a party enters into a contract, it accepts certain risks and as such, cannot invoke *force majeure* if these risks were foreseeable when the contract was concluded.[368]

Fifth, it is most important for the non-performing party to send notice of *force majeure* to its counterpart within a short delay of the *force majeure* event. The failure to provide

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[366] See also Case No 2142, *supra* note 362; Case No 1840 (1972), (1979) 4 YB Comm Arb 209 at 210 (ICC). See section 4.2.3, below, the application of article 79 CISG to hardship and the possible confusion it can create as to the factor of impossibility. It must be noted that in common law, the notion impossibility associated to *force majeure* is often linked with the "radically different circumstances" associated to frustration of purpose (see section 4.2.2, below).

[367] See e.g. Case No 8790, *supra* note 355 at 21; Case No 7539 (1995), (1996) 123 JDI 1030 at 1031 (ICC); Case No 1840, *supra* note 366; Case No 1703 (1971), (1976) 1 YB Comm Arb 130 (ICC) (hostilities/war); Robert Thompson, "Case Comment on Case No 1703 (ICC)" (1974) 101 JDI 895 at 895; Darankoum, "Application des Principes UNIDROIT", *supra* note 31 at 457.

[368] Yves Derains, "Case Comment on Case No 1782 (ICC)" (1975) 102 JDI 923 at 924; Case No 5617, *supra* note 353 at 1048; Werner Melis, "Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practices of the I.C.C. Court of Arbitration" (1984) 1 J Int'l Arb 214 at 215.

notification of the *force majeure* event in a timely manner may result in the non-performing party having to partly bear the responsibility for damages.[369]

Finally, parties can contractually agree to add their own restrictions to the mechanism that will trigger the *force majeure* defense.

These elements show that the concept of *force majeure* is restricted to situations in which obligation is impossible to perform rather than being merely more onerous.[370] They illustrate that the parties accept certain risks when entering into a contract and cannot invoke *force majeure* if these risks were foreseeable at the time the contract was concluded. The advantage of such a restrictive approach is in the fact that it avoids uncertainty in world trade, a concern that arbitral tribunals generally keep in mind when rendering a decision.[371] Indeed, regardless of whether the arbitral tribunal applies a domestic law or legislative *lex mercatoria* to the merits of the dispute, it often applies international trade usages or refers to other arbitral decisions.[372] Particularly, the ICC's arbitral tribunals take into consideration "any relevant trade usages" when judging the merits of the dispute.[373]

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[369] See e.g. Case No 2478 (1974), (1975) 102 JDI 925 at 926 (ICC); Case No 7197, *supra* note 357 at 1036-37; Case No 4237 (1984), (1985) 10 YB Comm Arb 52 at 57 (ICC); Case No 2763 (1980), (1985) 10 YB Comm Arb 43 (ICC) (the defaulting party can excuse itself if it proves its due diligence); Darankoum, "Application des Principes UNIDROIT", *supra* note 31 at 458.

[370] See e.g. Case No 8501, *supra* note 356 at 1167; Brunner, *supra* note 343 at 111.

[371] See e.g. Case No 4237, *supra* note 369 at 57.

[372] See e.g. Case No 5864 (1989), (1997) 124 JDI 1073 at 1074-75 (ICC) (the arbitral tribunal took into consideration the uses and practice of international commerce even if Libyan law was applicable to the merits of the dispute); Case No 3130 (1980), (1981) 108 JDI 932 at 933 (ICC) (the arbitral tribunal referred to ICC Incoterms even if French law was applicable to the merits of the dispute); Yves Derains, "Case Comment on Case No 3130 (ICC)" (1981) 108 JDI 935 at 936; Case No 7539, *supra* note 367 at 1031; Case No 10758 (2000), (2001) 128 JDI 1171 at 1172-73 (ICC) (the arbitral tribunal cites other arbitral decisions to support its

The similarity of the principle of *force majeure* between domestic laws and international commerce has been noted by various case comments.[374] Therefore, in cases of international commerce, nothing should prevent Canadian courts from referring to adjudicatory *lex mercatoria* when *force majeure* is raised. The main difficulty with the concept of *force majeure* is its confusion with the notion of hardship (or frustration).[375] Indeed, *force majeure* and hardship are both exceptions to the principle of *pacta sunt servanda* and share several characteristics. As such, they are often discussed together in *force majeure* clauses, thereby contributing to the confusion between both concepts.[376]

4.2 Hardship

Hardship and *force majeure* share some similar characteristics in that they both deal with unpredictable and uncontrollable situations that alter the possibility of performance of a contract.[377] Whereas *force majeure* generally makes an obligation impossible to perform, at least temporarily, hardship calls for a change in the contractual obligations of the parties.

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reasoning); Yves Derains, "Case Comment on Case No 7539 (ICC)" (1996) 123 JDI 1034 at 1035 [Derains, "Case Comment on ICC Case 7539"].

[373] Art 21(2) of the *2012 ICC Rules of Arbitration*.

[374] See e.g. Emmanuel Jolivet, "Case Comment on Case No 10527 (ICC)" (2004) 131 JDI 1263 at 1263-64 (*force majeure* in French law compared to *force majeure* in *CISG*); Emmanuel Jolivet, "Case Comment on Case No 8501 (ICC)" (2001) 128 JDI 1168 at 1170 (usages of commerce used similar to certain domestic laws); Yves Derains, "Case Comment on Case No 2478 (ICC)" (1975) 102 JDI 927 at 928 [Derains, "Case Comment on Case No 2478"] (not many differences between principles applied by arbitrators and domestic laws).

[375] See e.g. Case No 1512 (1971), (1974) 101 JDI 905 at 906-07 (ICC); Yves Derains, "Case Comment on Case No 1512 (ICC)" (1974) 101 JDI 909 at 910 [Derains, "Case Comment on Case No 1512"]; Derains, "Case Comment on Case No 7539", *supra* note 372 at 1034-35; Darankoum, "Application des Principes UNIDROIT", *supra* note 31 at 454-55; Osman, *supra* note 156 at 157-162; Brunner, *supra* note 343 at 391ff.

[376] *Terpstra*, *supra* note 328 at para 12.

[377] Julie Bédard, "Réflexions sur la théorie de l'imprévision en droit québécois" (1997) 42 McGill LJ 761 at 773-74.

This change is due to events beyond the control of the parties, which have rendered performance of the original contract by the parties more onerous than what was anticipated at the time of the conclusion of the contract.[378]

4.2.1 Concept in Civil Law (Quebec)

Hardship allows for the termination or revision of the contract with a view to restore the equilibrium between the parties if a legally redressable hardship exists. Hardship consists of a new and unpredictable event which renders the execution of the contract extremely onerous for one of the parties. For example, hardship could consist of a sharp increase in the price of gas.[379] Hardship is called "imprévision" in Quebec's civil law but has traditionally been rejected in this jurisdiction.[380] Some legal scholars have argued that principles of good faith and equity can provide the same solutions as hardship.[381] Hardship has generally not been recognized as a rule in Quebec although an attempt was made to

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[378] *Ibid.* See also Stephan Martin, "Pour une réception de la théorie de l'imprévision en droit positif québécois" (1993) 34 C de D 600.
[379] Jobin & Vézina, *supra* note 283 at para 454.
[380] *CTTJ*, *supra* note 326, *sub verbo* "frustration"; "Comment 2 under article 6.2.1", *UNIDROIT Principles 2004*, *supra* note 345 at 183 ["Comment 2 under article 6.2.1"]. See also Rosalie Jukier, "Special Issue - Navigating the Transsystemic: Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom" (2005) 50 McGill LJ 789 at 800; Baudouin & Deslauriers, *supra* note 312 at para 1-1363; Paul-A Crépeau, "La fonction du droit des obligations" (1998) 43 McGill LJ 729; Martin, *supra* note 378 at 604; Lluelles & Moore, *supra* note 285 at para 2230-31.
[381] Brigitte Lefebvre, "La bonne foi: notion protéiforme" (1996) 26 RDUS 321 at 340-54 citing Belgium legal scholar Baert who suggests that good faith has four functions: Auxiliary, limitative, adaptive & interpretative. See also Brigitte Lefebvre, "Liberté contractuelle et justice contractuelle: le rôle accru de la bonne foi comme norme de comportement" in *Développements récents en droit des contrats (2000)* (Cowansville, Que: Yvon Blais, 2000) 49; Martin, *supra* note 378 at 626ff; Jobin & Vézina, *supra* note 283 at paras 456, 459.

codify this principle in the CCQ.[382] In fact, in its report, the *Office de révision du Code civil* recommended this definition:

> La survenance de circonstances imprévisibles qui rendent l'exécution du contrat plus onéreuse ne libère pas le débiteur de son obligation.
>
> Exceptionnellement, le tribunal peut, nonobstant toute convention contraire, résoudre, résilier ou réviser un contrat dont l'exécution entraînerait un préjudice excessif pour l'une des parties, par suite de circonstances imprévisibles qui ne lui sont pas imputables.[383]

In its wisdom, the legislator preferred to ignore this recommendation because of its perceived infringement on the principle of *pacta sunt servanda*.[384] Despite the foregoing, since hardship provisions have not been expressly prohibited by law, parties can choose to include hardship provisions in their contracts and tribunals will uphold these provisions.[385]

Yet, some statutory exceptions are to be noted.[386] For example, Quebec has enacted special legislation in times of necessity, such as after the economic crisis of 1929.[387] Since then, hardship has been recognized in legislation in very few cases, such as donation with

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[382] *Québec (Procureur général)* c *Kabakian-Kechichian*, [2000] RJQ 1730 at para 60 (CA) [*Kabakian-Kechichian*]; *Walsh & Brais Inc* c *Montréal (Communauté urbaine de)*, [2001] RJQ 2164 at para 262 (CA) (autorisation de pourvoi à la Cour suprême rejetée). Interestingly, *Grant Mills Ltd* c *Universal Pipeline Welding Ltd*, [1975] CS 1203, often cited by legal scholars, is NOT an example of hardship, but of a mistake. The judge distinguishes two cases of hardship: Events after the contract was formed and events on an essential element of the contract at the moment of its formation. He then states that the events in this particular case did not occur after the formation of the contract but must have occurred during its formation. See Bédard, *supra* note 377 at 773, where this confusion is reported. Debates also occurred in France, where hardship is adopted sporadically. Jobin & Vézina, *supra* note 283 at paras 454ff; Pineau, Burman & Gaudet, *supra* note 314 at para 285; Baudouin & Deslauriers, *supra* note 312 at para 1-1363.

[383] Office de révision du Code civil, *Rapport sur le Code civil du Québec* (Montréal, Éditeur officiel, 1978), art 75. See also Ringuette, *supra* note 119 at 128.

[384] Crépeau, *supra* note 380 at 117; Lluelles & Moore, *supra* note 285 at para 2232. This lack of general recognition has been criticized by some scholars. See e.g. Pierre-Gabriel Jobin, "L'étonnante destinée de la lésion et de l'imprévision dans la réforme du code civil au Québec" [2004] RTD civ 693 at 696. *Contra*: Pineau, Burman & Gaudet, *supra* note 314 at para 285.

[385] Jobin & Vézina, *supra* note 283 at para 456; Lluelles & Moore, *supra* note 285 at para 2238.

[386] Jobin & Vézina, *supra* note 283 at para 455; Bédard, *supra* note 377 at 793-95.

[387] *Act to suspend the exigibility of hypothecary and other claims (An)*, SQ 1933, c 99; *Act respecting moratorium and safeguarding small property (An)*, SQ 1936, c 37; *Act to amend the Act to suspend the exigibility of hypothecary and other claims (An)*, SQ 1936, c 6. Martin, *supra* note 378 at 608.

charge[388], legacy with charge[389] and trust.[390] Some legal scholars[391] have suggested that hardship may apply in cases where the CCQ provides for termination "for a serious reason", such as in cases of contract of employment[392], contract of enterprise or for services[393] and mandate.[394] In the area of consumer protection, legislation allows courts to change the "terms and conditions of payment" to what is deemed reasonable in the circumstances or to temporarily suspend repayment of a loan.[395] Quebec caselaw has also applied hardship to a limited extent in some areas of federal jurisdiction, such as the *Divorce Act*.[396] However, there still exists a reluctance to extend hardship beyond the legislative exceptions provided above.[397]

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[388] Art 1834 CCQ; *Hatley (Municipalité de) c Court Good Cheer*, [1997] RDI 364 (Qc Sup Ct); *St-Jean c St-Jean*, [2002] RDI 99 (Qc Sup Ct); *Fabrique de la paroisse de Notre-Dame de la Paix c Ross (Succession de)*, 2011 QCCS 2283 at para 22.
[389] Art 771 CCQ.
[390] Art 1294 CCQ.
[391] See e.g. Jobin & Vézina, *supra* note 283 at para 454. A large discretionary power for courts can allow them to consider events that occurred after the formation of the contract when taking property in payment (art 2778 CCQ) or taking back possession in term sale (art 1749 CCQ).
[392] Art 2094 CCQ.
[393] Art 2126 CCQ; Antoine Leduc, "Le contrat de création et le contrat d'hébergement d'un site Web: éléments de négociation, de rédaction et d'interprétation" in *Développements récents en droit de l'Internet (2001)* (Cowansville, Que: Yvon Blais, 2001) 143 at 174 has even suggested that article 2107 CCQ recognizes hardship because it provides that, in a contract for enterprise or for service, a client must pay for the increase of price that the contractor or provider of services could not foresee at the conclusion of the contract.
[394] Art 2178 CCQ.
[395] *Protection Consumer Act*, RSQ, c P-40.1, ss 107, 117, 144 cited in Bédard, *supra* note 377 at 793. See also Jobin & Vézina, *supra* note 283 at para 455; *Crédit Mercedez Benz du Canada Inc c Champagne*, [1993] RJQ 1744 (CA).
[396] RSC 1985, c 3 (2d supp), s 17; *Droit de la famille – 2537*, [1996] RDF 735 at 737-38 (Qc CA); *DP c MG* (2003), AZ-50160288 (Azimut) at paras 19-22 (Qc Sup Ct), aff'd (2003), AZ-04019564 (Azimut) (Qc CA); *Droit de la famille – 2922* (1997), AZ-98026127 (Azimut) (Qc Sup Ct); Georges Massol, "La demande de révision des conventions suite à la rupture du mariage" in *Développements récents en droit familial (2001)* (Cowansville, Que: Yvon Blais, 2001) 101 (available on *La Référence*). See e.g. *RP v RC*, 2011 CSC 65; *LMP v LS*, 2011 CSC 64
[397] *Madden c Demers* (1920), 29 BR 505; Baudouin & Deslauriers, *supra* note 312 at para 1-1363; *Kabakian-Kechichian*, supra note 382 at para 60; *3030911 Canada Inc c Softvoyage Inc*, 2010 QCCA 1375 at para 51; *Banque Royale du Canada c Cliffs Mining Company*, 2009 QCCS 1986, aff'd *Cliffs Mining Company c Royal*

4.2.2 Concept in Common Law

Force majeure and hardship, both exceptions to the basic rule of *pacta sunt servanda*, are concepts which are often confused.[398] While legislation generally recognizes the legal elements for the qualification of an event as *force majeure*, courts show a universal trend to use a restrictive interpretation. However, common law jurisdictions are more willing to accept the defense of hardship when discharging contractual obligations.[399]

Formally known as the doctrine of impossibility in several common law jurisdictions, hardship has also been referred to often as "frustration of purpose".[400] For the doctrine of

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Bank of Canada, 2010 QCCA 1126 at para 7; *Transport Rosemont*, *supra* note 314 at paras 18-35; *Ste-Croix Pétrolier & Plus c Montréal (City)*, 2008 QCCS 1317 at paras 65-67, [2008] RDI 317; *Placements Claude Gohier Inc c Supermarché Le Blainvillois Inc* (2004), AZ-50221075 (Azimut) at para 57 (CQ (Civ Div)); Jobin, *supra* note 384 at 699-700.

[398] A *force majeure* clause can also lay out the rights and obligations of the parties when frustration occurs. *Terpstra*, *supra* note 328 at para 12; Angela Swan, Nicholas C Bala & Barry J Reiter, *Contracts: Cases, Notes & Materials*, 8th ed (Markham, Ont: LexisNexis, 2010) at 920.

[399] Jukier, *supra* mote 380 at 800; Guenter H Treitel, *The Law of Contract*, 11th ed (London, UK: Thomson/Sweet & Maxwell, 2003] at 880-87 [Treitel, *Law of Contract*]; Waddams, *Law of Contracts*, *supra* note 330 at paras 363-77; *UCC* § 2-615 (1995); *Restatement (Second) of the Law of Contracts* § 261-272 (1979). This excuse of non-performance is an exception to strict liability in contract law explained in *Paradine v Jane* (1647), Aleyn 26: "when the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity because he might have provided against it by his contract."

[400] Baudouin & Deslauriers, *supra* note 312 at para 1-1363. In some jurisdictions, particularly in England, frustration of purpose is opposed to frustration of contract, which refers generally to the doctrine of discharge by supervening events (i.e. it refers to the *legal effect* of supervening events, the discharge of the contract), frustration of adventure and frustrating breach. See Guenter H Treitel, *Frustration and Force Majeure*, 2d ed (London, UK: Thomson/Sweet & Maxwell, 2004) at paras 2-044-050 [Treitel, *Frustration and Force Majeure*]. For example, in American law, frustration of purpose is defined as: "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary"; *Restatement (Second) of the Law of Contracts* § 265 (1979). For a discussion on the distinction between impossibility, impracticability and frustration, see Waddams, *Law of Contracts*, *supra* note 330 at paras 363-77; Treitel, *Frustration and Force majeure*, *supra* note 400 at para 7-001. Many synonyms are used in French for frustration, such as "imprévision", "caducité", "inexécutabilité" and "impossibilité d'exécution". *CTTJ*, *supra* note 326, *sub verbo* "frustration of purpose". Also see "Comment 2 under article 6.2.1", *supra* note 380

frustration to apply, performance should be impossible or extremely difficult and not merely more difficult.[401] The supervening event must destroy the basis of the agreement, be of an unforeseen nature and be independent of the parties' will.[402]

One of the best examples of the doctrine of frustration of purpose is the English case of *Krell*.[403] This case is one of a group of cases known as the "Coronation cases" which arose from the events surrounding the coronation of King Edward VII in England in 1902.[404] The facts in *Krell*[405] are straightforward. The defendant contractually agreed to rent a flat located in a prime area for the purpose of watching the coronation procession of Edward VII scheduled on June 26 and 27, 1902. The contract was concluded on June 20, 1902 for the agreed sum of 75 pounds and the defendant paid a deposit of 25 pounds. However, the

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at 183; Jukier, *supra* note 380 at 800; Baudouin & Deslauriers, *supra* note 312 at para 1-1363, where imprévision is equivalent to frustration.

[401] "Courts have, however, interpreted impossibility of performance to encompass not only absolute impossibility but also impossibility in the sense of impracticality of performance due to extreme and unreasonable difficulty, expense, injury or loss." *Kesmat Investment Inc v Industrial Machinery Co* (1985), 70 NSR (2d) 341 at para 21 (available on WL Can) (CA) [*Kesmat Investment*]; *Luchuk v Sport British Columbia* (1984), 52 BCLR 145 at 151 (available on QL) (SC) [*Luchuk*]; *Mr Convenience Ltd v 040502 NB Ltd* (1993), 137 NBR (2d) 305 (available on WL Can) (CA). "Frustration" translated in French by "impossibilité d'exécution" in *Delphinium Ltée c 512842 NB Inc*, 2006, NBQB 346, 2006 NBBR 346 at para 109; 307 NBR (2d) 284.

[402] *Leitch Transport Ltd v Neonex International Ltd* (1979), 27 OR (2d) 363 at 371-72 (available on QL) (CA) [*Neonex*] citing *Cricklewood Property & Invt Trust Ltd v Leighton's Invt Trust Ltd*, [1945] AC 221 (HL) (Eng); *Kesmat Investment*, *supra* note 401 at para 7, 18 where frustration not recognized. *Teleflex Inc v IMP Group Ltd* (1996), 149 NSR (2d) 355 at para 49 (available on QL) (CA) [*Teleflex*]: The question to answer is whether the new circumstances "render the thing 'radically different' from that which was undertaken by the parties to the contract[?]"; Treitel, *Frustration and Force Majeure*, *supra* note 400 at para 2-047; Swan, Bala & Reiter, *supra* note 398 at 913ff.

[403] *Krell v Henry,* [1903] 2 KB 740 (Eng) [*Krell*].

[404] The "Coronation cases" refer to the disputes relating to the postponement of the coronation and two subsequent processions of King Edward VII, which were to occur on June 26-27, 1902. Unfortunately, on June 24, the king was diagnosed with appendicitis and the coronation and processions were postponed. See also Swan, Bala & Reiter, *supra* note 398 at 913ff; Treitel, *Frustration and Force Majeure*, *supra* note 400 at para 7-006.

[405] *Supra* note 403.

purpose of the rental was not explicitly stated in the contract itself. Due to the King's illness, the procession could not take place as originally scheduled. The defendant refused to pay the outstanding balance of 50 pounds and the landlord (the plaintiff) brought a lawsuit against the defendant to recover the balance and the plaintiff countersued to recover the deposit. The Court sought to examine whether there was an implicit (or implied) condition in the contract which ceased to exist thus rendering the contract void. According to the Court, the view of the procession was an implied condition and ruled in favour of the defendant.

The question of whether there exists an implied or underlying condition that thereby voids the contract upon the disappearance of the condition was also examined in the case of *Taylor v Caldwell*.[406] The Court concluded that while the contract could still be performed, such performance would no longer be necessary since the underlying condition ceased to exist.[407]

The Supreme Court of Canada follows England's definition of frustration of purpose[408]:

> Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was

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[406] (1863), 122 ER 309 (KB) (Eng).

[407] "Each case must be judged by its own circumstances. In each case, one must ask oneself, first, what, having regard to all circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract…" *Krell*, *supra* note 403; Swan, Bala & Reiter, *supra* note 398 at 918.

[408] *Peter Kiewit Sons' Co of Can Ltd v Eakins Const Ltd*, [1960] SCR 361 at 367-68 (available on QL).

> undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do. [...] It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for. [409]

In spite of the fact that performance is possible, frustration of purpose has the effect of discharging one of the parties from the obligation to perform because the parties' original purpose for entering the contract no longer exists.[410]

In Canadian common law jurisdictions, frustration of purpose is synonymous to frustration of contract. The question to ask is not "if the promised performance is impossible, but whether it ought to be excused."[411] Examples of cases when relief is granted include the "physical destruction of a thing necessary for the contemplated performance" or the subsequent illegality of a situation (when legality was expected to complete the contract).[412]

The courts must strive to give effect to the agreement that was entered into by the parties. However, frustration applies if, by holding the parties to their future performances, it alters the fundamental nature of the agreement with regards to the new circumstances.**[413]** To assess the presence of such an alteration, two sets of circumstances must be evaluated:

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[409] *Ibid* applies *Davis Contractors Ltd v Fareham Urban District Council*, [1956] AC 696 at 729 (HL) (Eng) in Canada. See also *Neonex*, *supra* note 402 at 372ff; *Kesmat Investment*, *supra* note 401 at para 17; *Victoria Wood Development Corp v Ondrey* (1978), 22 OR (2d) 1 (CA).

[410] *Luchuk*, *supra* note 401.

[411] Waddams, *Law of Contracts*, *supra* note 330 at para 368.

[412] There are no distinctive definitions: "[t]he doctrine that if a party's principal purpose is substantially frustrated by unanticipated changed circumstances, that party's duties are discharged and the contract is considered terminated." *Black's Law Dictionary*, 9th ed, *sub verbo* "frustration" applied for example in Canada by *Cassidy v Canada Publishing Corp* (1989), 41 BLR 223 at 237ff (available on WL Can) (BCSC) [*Cassidy*]. See e.g. *Luchuk*, *supra* note 401 at 151-52; *Lane v Lane*, [1936] 1 DLR 655 at 658-69 (available on WL Can) (Man KB) [*Lane*]; *Claude Neon Ltd v KDJ Enterprises Ltd* (1995), 136 Sask R 66 (available on QL) (QB) [*Claude Neon*] where *Krell*, *supra* note 403 is discussed but without reference to frustration of purpose.

[413] *Teleflex*, *supra* note 402 at paras 50-52.

First, the circumstances that existed when the agreement was concluded and, second, new circumstances existing due to the alleged supervening events. The Court must determine if an implied condition, on which the parties relied when the agreement was concluded, existed. Such an implied condition must be absent for the relief to be granted.[414] If the parties considered a change in this "implied condition" (i.e. if the change of circumstances was foreseeable), frustration will be rejected.[415]

In common law jurisdictions, when an agreement is said to be frustrated, parties can rely on legislation to address the effects of such frustration. For example, in common law, it is a recognized principle that parties are only liable for obligations that occurred before the frustrated event: they are thus discharged of "future performance" that occurred after such event. However, this can be problematic if one party's performance occurred before the frustrating event and the other party's performance was only due after such event. In that case, only one party would still have to complete its obligation.[416] To remedy this situation, every common law jurisdictions in Canada has adopted an act inspired from the 1943 *Law Reform (Frustrated Contracts) Act*[417] originally adopted in England.[418]

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[414] *Kesmat Investment*, *supra* note 401 at paras 17-21; *Tamplin* (*F.A.*) *Steamship Co v Anglo-Mexican Petroleum Products Co*, [1916] 2 AC 397 (HL) (Eng).
[415] *Lane*, *supra* note 412 at 658-69 considered in *Claude Neon*, *supra* note 412.
[416] Treitel, *Law of Contract*, *supra* note 399 at 910-12; Waddams, *Law of Contracts*, *supra* note 330 at para 381, 401.
[417] (UK), 1943 c 40; 6 & 7 Geo VI.
[418] *Frustrated Contract Act*, RSBC 1996, c 166; *Frustrated Contracts Act*, RSNWT 1988, c F-12; *Frustrated Contracts Act*, RSNWT 1988, c F-12, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28; *Frustrated Contracts Act*, SS 1994, c F-22.2; *Frustrated Contracts Act*, RSPEI 1988, c F-16; *Frustrated Contracts Act*, RSNL 1990, c F-26; *Frustrated Contracts Act*, RSNB 2011, c 164; *Frustrated Contracts Act*, RSA 2000, c F-27; *Frustrated Contracts Act*, RSO 1990, c F-34; *Frustrated Contracts Act (The)*, CCSM c

4.2.3 Concept in Legislative *Lex Mercatoria*

Contrary to civil law, common law recognizes hardship but refers to it sparingly.[419] Legislative *lex mercatoria* is found somewhere between these two different legal traditions and is influenced by both. Hardship was introduced in international commerce at the instigation of common law countries and was recognized by legislative *lex mercatoria*.[420] Thus, the concept of hardship encounters similar problems in both legislative *lex mercatoria* and common law.

For example, hardship is also often confused with *force majeure* in international trade. However, according to one legal scholar, the scope of hardship is narrower and more specific in international trade: Only "'impediments' (change of circumstances) are to be considered which 'fundamentally alter the equilibrium of the contract'."[421] In other words, in order for hardship to apply, the economy of the contract must be disturbed to an extent that would require a sacrifice from the non-performing party which was unforeseeable when the contract was concluded.[422] Whereas *force majeure* is an excuse for non-

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F190; *Frustrated Contracts Act*, RSY 2002, c 96. See e.g. *Doucette v Jones*, 2006 NBCA 38 at para 33 where "[...] no one disputes the application of the *Frustrated Contracts Act* if the contract is shown to have 'become impossible of performance or been otherwise frustrated.'" *Terpstra*, *supra* note 328 at para 15; *Cassidy*, *supra* note 412 at paras 31ff. For more distinctions between Canadian and English statutes, see Treitel, *Frustration and Force Majeure*, *supra* note 400 at para 15-049, n42; Waddams, *Law of Contracts*, *supra* note 330 at paras 401-03.

[419] Jukier, *supra* note 380 at 800.

[420] Darankoum, "Application des Principes UNIDROIT", *supra* note 31 at 470; Bruno Oppetit, "L'adaptation des contrats internationaux aux changements de circonstances: la « clause de hardship »" (1974) 101 JDI 794 at 797 [Oppetit, "Clause de hardship"]. For an example of a hardship clause in international trade, see Annex IV ICC Hardship Clause 2003.

[421] Brunner, *supra* note 343 at 221. See also Crépeau & Charpentier, *supra* note 291 at 119.

[422] Ringuette, *supra* note 119 at 128.

performance, hardship requires more flexible legal consequences. For example, renegotiations may be possible because the performance is excessively impracticable, not impossible.[423]

Both *CISG* and *UNIDROIT Principles* have recognized hardship. In *CISG*, it is described as follows:

> A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.[424]

It is interesting to note that, in *CISG*, hardship and *force majeure* are referred to in the same provision, which, to a certain extent, explains the confusion between these concepts.[425] The prevailing view is that by referring to the notion of an "impediment beyond control", *CISG* refers implicitly to both *force majeure* and hardship.[426] The main distinction is that hardship requires that the contractual equilibrium be significantly altered whereas *force majeure* requires that the obligation be impossible to perform.[427]

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[423] Brunner, *supra* note 343 at 398-400; Darankoum, "Application des Principes UNIDROIT", *supra* note 31; Juliette D'Hollander & Guy Lefebvre, "Le contrat international d'ingénierie-construction: étude comparée des contrats-types et de la pratique contractuelle des sociétés québécoises" (1998) 32 RJT 157 at 202-06; Scott D Slater, "Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG" (1998) 12 Fla J Int'l L 231 at 241.

[424] *CISG*, art 79 para 1.

[425] *Ibid*; Ugo Draetta, "Hardship and Force Majeure Clauses in International Contracts" [2002] Int'l Bus LJ 347 at 349 [Draetta, "Clauses"].

[426] Brunner, *supra* note 343 at 213ff lists a series of legal scholars who support this position. *Contra*: Jenkins, *supra* note 349 at 2025; Prujiner, "Pratique contractuelle", *supra* note 32 at 578.

[427] Some legal scholars claim that hardship is a subcategory of *force majeure*, Brunner, *supra* note 343 at 111, 390ff; Mauricio Almeida Prado, *Le hardship dans le droit du commerce international*, (Bruxelles: Bruylant, 2003) at 5 (theoretical distinctions not always applied in practice).

UNIDROIT Principles clarified the applicable test to trigger hardship.[428] In *UNIDROIT Principles*, hardship is an exception to the principle of *pacta sunt servanda*, applied in cases where the performance of contractual obligations becomes more arduous.[429] Accordingly, non-performance may exceptionally be excused in the following circumstances:

> There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and
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> (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
> (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
> (c) the events are beyond the control of the disadvantaged party; and
> (d) the risk of the events was not assumed by the disadvantaged party.[430]

Hardship may only be applied for if the above four conditions are fulfilled. This solution has the merit of preserving the principle of *pacta sunt servanda* while allowing the courts to order renegotiations. This is also known as the principle of *rebus sic stantibus* (as long as the conditions have not substantially changed).[431]

Canadian caselaw discussing hardship through legislative *lex mercatoria* does not exist.[432] The definition of hardship in Canada is very similar to the definition provided in the legislative *lex mercatoria*.[433] It can be deduced that the notion of change of circumstances

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[428] Brunner, *supra* note 343 at 106. *Contra*: Slater, *supra* note 423 at 255-60 (*UNIDROIT Principles* are not applicable to complete *CISG*'s provisions in regards to hardship).
[429] *UNIDROIT Principles*, art 6.2.1.
[430] *Ibid*; Gaillard, "Method of Decision Making", *supra* note 43 at 64-65; Ringuette, *supra* note 119 at 2.
[431] Crépeau & Charpentier, *supra* note 291 at 117-20; Ringuette, *supra* note 119 at 128-33.
[432] See note 277, above, where Canadian decisions discussing *CISG* are categorized.
[433] Jobin, *supra* note 384 at 696-97.

is fundamental in both, as it allows for the initial agreement to be radically altered and makes the performance extremely onerous and/or impracticable.[434]

Since the notion of hardship is not generally recognized in Quebec's civil law, similarities cannot readily be drawn with legislative *lex mercatoria*. In fact, some legal scholars have criticized Quebec's stand on hardship as outdated and isolated in a globalization context.[435] Legislative *lex mercatoria* has influenced, to a certain extent, Quebec's law. Some legal scholars have argued that, if the parties refer to *UNIDROIT Principles* as the applicable law in a purely domestic contract, hardship may be applied to the contract.[436] Moreover, hardship is a principle found in *CISG* and as such, the incorporation of *CISG* within Quebec's law[437] allows parties to whom *CISG* applies to raise the issue of hardship.[438]

4.2.4 Concept in Adjudicatory *Lex Mercatoria*

Adjudicatory *lex mercatoria* refers to hardship through the use of several terms: frustration, *rebus sic stantibus*, imprévision.[439] For instance, the principle of *rebus sic stantibus* is often

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[434] See section 4.2.2, above, for more on this topic.
[435] See e.g. Jobin, *supra* note 384 at 696-97; Rolland, *supra* note 32 at 602ff. *Contra*: Jobin & Vézina, *supra* note 283 at para 457.
[436] Lluelles & Moore, *supra* note 285 at para 2239.
[437] *CISG(Qc)*, *supra* note 276.
[438] Ringuette, *supra* note 119 at 144.
[439] See e.g. Case No 1512, *supra* note 375 at 907. Adjudicatory *lex mercatoria* does not always precise the applicable law, see Table 2: Statistics on Applicable Law in ICC Arbitration Provisions, above.

used in ICC arbitral awards, as an exception to *pacta sunt servanda*, to validate the adjustment in contractual performances due to an important change in circumstances.[440]

Arbitral decisions do not always specify the law applicable to the merits of a dispute.[441] In particular, legislative *lex mercatoria* and *UNIDROIT Principles* are sometimes used to supplement the applicable national law in an international commercial context: Arbitral tribunals will use legislative *lex mercatoria* to provide an additional transnational justification to a solution based on domestic law.[442] For example, in Case No 4761[443], an Italian consortium had to complete construction work on a number of buildings for a Libyan client but various events –including bad weather and non-conformity of plans- prevented the completion of the work in the delay specified in the contract. Libyan law was applicable to the merits of the dispute but *lex mercatoria* was used to complement it. However, in cases of hardship, the use of legislative *lex mercatoria* does not necessarily provide a transnational justification: Adjudicatory *lex mercatoria* is divided on the recognition of hardship as a general principle of law as illustrated below.

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[440] See e.g. Case No 8486 (1996), (1999) 24a YB Comm Arb 162 at 166-67 (ICC); Case No 1512, *supra* note 375 at 906-07; Case No 2404 (1975), (1976) 103 JDI 995 (ICC).
[441] Same reasoning as in *force majeure* cases, above, at 4.1.4.
[442] Hardship is not necessarily considered a codification of international practice in *UNIDROIT Principles*. See e.g. Case No 10422 (2003), (2003) 130 JDI 1142 at 1145 (ICC) cited in Emmanuel Jolivet, "The UNIDROIT Principles in ICC Arbitration" in *UNIDROIT Principles: New Developments and Applications*, [2005] ICCCA Bull (Special Supplement) 65 at 67 [Jolivet, "The *UNIDROIT Principles* in ICC Arbitration"]; Case No 11256 (2003), online: UNILEX.info <http://www.unilex.info/case.cfm?id=1423> (ICC); Draetta, "Clauses", *supra* note 425 at 351.
[443] (1987), (1987) 114 JDI 1012 (ICC).

In Case No 8486[444], a Turkish buyer wanted to buy a manufacturing plant from a Dutch manufacturer of non-specified products. The Turkish buyer encountered financial difficulties and submitted that the price of the non-specified products decreased dramatically on the Turkish market. The arbitral tribunal had to decide if, according to Dutch law -the applicable law-, this dramatic decrease constituted hardship. However, the arbitral tribunal considered the influence of "international contractual and arbitral practice, including *UNIDROIT Principles*" and referred to arbitral practice by using past arbitral decisions and *UNIDROIT Principles*.[445] It was noted that hardship must be applied restrictively in Dutch law and in international contractual and arbitral practice.[446] Similarly, in Case No 8873[447], a Spanish company (the defendant) and a French company (the plaintiff) entered into a contract for the construction of a road in Algeria and expressly chose Spanish law as the applicable law. Unforeseen events increased the cost of construction and the French company asked for the renegotiation of the contract due to hardship. The French company argued that even if the applicable law was the Spanish law (where hardship is recognized in a limited fashion), the arbitral tribunal had to take into account the *UNIDROIT Principles* (which recognizes hardship) as they codify international commercial usages. The arbitral tribunal rejected the argument of the French company and stated that *UNIDROIT Principles* do not recognize hardship as an international trade

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[444] *Supra* note 440.
[445] *Ibid* at 323, 325-26. The arbitral tribunal reiterated the principle of Case No 1512, *supra* note 375 at 907: "Caution is especially called for, moreover, in international transactions where it is generally much less likely that the parties have been unaware of the risk of a remote contingency or unable to formulate it precisely." [English translation available at (1976) 1 YB Comm Arb 128 at 129].
[446] Case No 8486, *supra* note 440 at 166-67.
[447] (1997), (1998) 125 JDI 1017 (ICC); Dominique Hascher, "Case Comment on Case No 8873 (ICC)" (1998) 125 JDI 1024.

usage.[448] However, in Case No 2291[449], to settle a dispute between a French transporter and an English company, the arbitral tribunal had to determine whether to increase or not the packing and transport costs of rolling mills. The French transporter argued that these costs must be increased because the higher than anticipated volume and number of pieces. A hardship clause had been agreed upon between the parties but there was no formal contract in due form. The arbitral tribunal issued a ruling based on the correspondence between the parties and general principles of law. One of these general principles of law was hardship. In fact, other arbitral decisions have stated that hardship derives from good faith and is found in various legal orders, and can thus be considered a general principle of law.[450]

4.2.5 Similarities of Hardship between Civil Law, Common Law, Legislative and Adjudicatory *Lex Mercatoria*

Regardless of whether hardship is a general principle of law in international trade, it is used only in exceptional cases. Hence just as in civil law, common law and legislative *lex mercatoria*, adjudicatory *lex mercatoria* uses a restrictive approach in determining the existence of hardship, which is defined similarly in each legal order.

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[448] See also Case No 11256, *supra* note 442 where the arbitral tribunal states that UNIDROIT Principles and trade usages have "different natures".
[449] *Supra* note 145; Yves Derains, "Case Comment on Case No 2291 (ICC)" (1976) 103 JDI 990.
[450] See e.g. Case No 7365 (*sub nom Cubic sentence*) (1997), (1999) 4:3 Unif L Rev 796 (ICC) analyzed in detail in Michael Joachim Bonell, "UNIDROIT Principles: A Most Significant Recognition by a United States District Court" (1999) 4:3 Unif L Rev 651 at 658-63.

Table 5: Hardship in Canada and *Lex Mercatoria*

Hardship					
		Civil law (Quebec) [When recognized]	**Common law (Canada-excluding Quebec)**	***Lex mercatoria***	
				Legislative *lex mercatoria*	**Adjudicatory *lex mercatoria***
1	**Application**	Not generally recognized Statutory exceptions	Applied restrictively		
	Distinction with *force majeure*	Clear distinction: *Force majeure* generally recognized	Frustration of purpose often linked with *force majeure* and "act of God"	Art 79 CISG often linked with both *force majeure* and hardship	Clear distinctions between *force majeure* and *rebus sic stantibus*
	Criteria	Unpredictable	Unforeseeable	Unforeseeable	Arbitral tribunal applies legislative *lex mercatoria* or a domestic law (civil law or common law)
		Execution of the contract extremely onerous for one party	Impossible or extremely difficult or purpose no longer exists	Equilibrium of the contract fundamentally altered	
		Impediment posterior to the conclusion of the contract			
2	**Notion of risk**	Hardship perceived as an infringement to *pacta sunt servanda*: Parties to a contract know the risks when they enter into an agreement	Radical change of circumstances: Implied condition on which contract was concluded ceased to exist	Risk not assumed by one party at the conclusion of the contract	Risk not assumed by one party at the conclusion of the contract/ Implied condition on which contract was concluded ceased to exist
3	**Clause**	No public order provisions: Parties can add their own restrictions in a clause			

The shades of grey show the similarities between the various legal orders.

As illustrated in the table above, the definition of and the conditions to recognize hardship are similar in each legal order. The main conceptual difficulty in common law and legislative *lex mercatoria* is the relationship between *force majeure* and hardship (whereas this distinction is hardly a problem in civil law and adjudicatory *lex mercatoria*)[451]. This confusion in common law and legislative *lex mercatoria* is not surprising as the

[451] This observation should be further investigated but is beyond the scope of this paper.

characteristics of hardship do not differ from the characteristics of *force majeure*, save impossibility.[452] Instead of impossibility, a radical change of circumstances is necessary.[453] This radical change of circumstances can be evaluated through objective criteria, such as an important aggravation of obligation, disequilibrium of the contractual obligations or loss of interest for the obligation or contract.[454] A subjective evaluation is also possible if the enforcement of the contract is contrary to good faith and equity and constitutes an abuse of right.[455] Hardship is not only quantifiable in terms of numbers but also as a qualitative element. For example, in the unreported Case No 3952[456], a radical change in the environmental legislation forced the parties to reassess their initial project. Case No 1512[457] reiterates that this test for hardship –the fundamentally different situation- is adapted to the reality and needs of international trade[458] although hardship must be evidenced in every case.[459]

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[452] Brunner, *supra* note 343 at 218; 391ff; Denis Philippe, "'Pacta sunt servanda' et 'Rebus sic stantibus'" in *Apport de la jurisprudence arbitrale* (Paris: ICC, 1986) 181 at 184ff.

[453] See e.g. Case No 6281 (1989), (1989) 116 JDI 1114 (ICC); Guillermo Aguilar Alvarez, "Case Comment on Case No 6281 (ICC)" (1989) 116 JDI 1119. The arbitral tribunal did not apply hardship (applicable under Yugoslavian law, which is similar to *CISG*) because there was no brutal change of circumstances. Similarly, Case No 1512, *supra* note 375 at 906-07 examined the concept of frustration under English law. The arbitral tribunal concluded that it must not only consider a radical change of the circumstances, but also a radical change in the obligations which alters the foundation of the contract.

[454] Case No 5195 (1986), (1988) 13 YB Comm Arb 69 at 75 (ICC): "Whether [performance will be excused] will usually depend upon such matters as the foreseeability, character, and expected duration of risk, *as they should have appeared to an objective, informed observer*" [emphasis added]. See also Case No 5277 (1987), (1988) 13 YB Comm Arb 80 (ICC).

[455] Philippe, *supra* note 452 at 187. See e.g. Case No 1512, *supra* note 375; Case No 2508 (1976), (1977) 104 JDI 939 at 939-40 (ICC) where the injured party had to present proof of the consequences of the impediment on its business. See also Ringuette, *supra* note 119 at 131-32, where the author suggests the application of both an objective and subjective *criterion* i.e. the application of a "modified" objective test.

[456] Ringuette, *supra* note 119 at 131 citing unreported Case No 3952 (ICC).

[457] *Supra* note 375.

[458] *Ibid* at 907.

[459] Ringuette, *supra* note 119 at 131-32; Case No 2508, *supra* note 455 at 940.

Other characteristics are identical for both hardship and *force majeure*. First, the impediment must be posterior to the conclusion of the contract.[460] Second, the impediment must not be imputable to the non-performing party (notion of risk).[461] The parties could have avoided the event by including a contractual clause to prevent it (e.g. indexation clause): Failure to foresee is not hardship.[462] If an event is foreseeable, it implies that the risk of the impediment has been assumed by one of the parties.[463] For example, in Case No 6281[464], Yugoslavian law -which shares similar characteristics to *CISG* regarding hardship- was applicable to a contract of sale of a certain quantity of steel. The price of steel increased by 13,16% from the time of the conclusion of the contract, which lead the plaintiff to raise hardship. The arbitral tribunal ruled that the price increase was reasonable and predictable and that the damage did not exceed "a reasonable entrepreneurial risk".[465] Hardship is also applied when the risk is "appreciably" greater than what would have been "reasonably" foreseen at the conclusion of the contract.[466] For example, in Case No 8486[467] mentioned above, the arbitral tribunal concluded that the devaluation of the value of the product combined with the unstable situation of the Turkish market -which was known to the parties- was foreseeable at the time of the conclusion of the contract and hardship was

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[460] Brunner, *supra* note 343 at 399; Prado, *supra* note 427 at 131; Philippe, *supra* note 452 at 184-85.
[461] Brunner, *supra* note 343 at 398.
[462] See e.g. Case No 2708 (1976), (1977) 104 JDI 943 (ICC); Yves Derains, "Case Comment on Case No 2708 (ICC)" (1977) 104 JDI 944 at 945.
[463] See e.g. Case No 8486, *supra* note 440 at 167; Case No 1512, *supra* note 375 at 907; Derains, "Case Comment on Case No 1512", *supra* note 375; Case No 2708, *supra* note 462; Paulsson, "Arbitrage CCI", *supra* note 39 at 87; Osman, *supra* note 156 at 152-53.
[464] *Supra* note 453.
[465] *Ibid* at 252.
[466] Case No 5195, *supra* note 454 at 75.
[467] *Supra* note 440 at 167.

denied. Similarly, in Case No 5617[468], the parties were connected through several contracts, with the ultimate goal of marketing a pharmaceutical drug (growth hormone). Subsequently, several secondary effects were discovered and the defendant terminated the business relationship, raising the defense of *force majeure* and hardship. The arbitral tribunal noted the similarities between the concepts and stated that in both cases, the risk of discovering secondary effects must not have been foreseeable when the contract was concluded. The arbitral tribunal concluded that secondary effects resulting from the development of pharmaceutical drugs are foreseeable risks assumed by the parties involved in the domain of chemistry, pharmacology, medicine, etc.

Despite the foregoing, a hardship clause in a contract can expressly provide for a different allocation of risk. The absence of such a provision deters arbitral tribunals from applying hardship regardless of the law applicable to the merits of the contract.[469] A hardship provision differs from a *force majeure* provision, although sometimes both concepts are defined in the same clause.[470] As noted above, a hardship provision is only applicable if a change of circumstances exists.[471]

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[468] *Supra* note 353.
[469] See e.g. Case No 8486, *supra* note 440 at 166; Case No 5195, *supra* note 454 at 78; Anne Rainaud, "Les aléas du débit de l'eau face à la rigueur financière du protocole additionnel à la convention relative à la protection du Rhin contre les chlorures: arbitrage sur la liquidation des comptes opposant les Pays-Bas et la France" (2004) 17:1 RQDI 97 at 115; Darankoum, "Application des Principes UNIDROIT", *supra* note 31 at 469 (It is easier for an arbitral tribunal to apply hardship and its legal consequences (such as renegotiations) if a hardship clause is included in the contract).
[470] Prado, *supra* note 427 at 121. It differs from a revision provision, which entails a periodical review of the contract without the presence of a change of circumstances.
[471] Derains, "Case Comment on Case No 2478", *supra* note 374 at 928-29; Oppetit, "Clause de hardship", *supra* note 420; Prado, *supra* note 427 at 4; A hardship clause can be written in various ways. Philippe, *supra*

In sum, whether the law applicable to the substance of a dispute is legislative *lex mercatoria*, domestic law or unknown, adjudicatory *lex mercatoria* applies hardship restrictively.[472] Indeed, arbitral tribunals usually try not to declare a change of circumstances that would lead to a modification of contractual provisions.[473] This caution is especially important in international trade, where the notion of certainty of the contract is of foremost importance and parties know the risks associated with the contracts they conclude.[474]

As with the concept of *force majeure*, cases involving hardship in international arbitration refer to one another.[475] Also, hardship in legislative and adjudicatory *lex mercatoria* is very similar to hardship in Canadian common law.[476] As such, Canadian common law could use adjudicatory *lex mercatoria* in matters of international trade. Quebec civil law does not recognize hardship but the restrictive approach used in Canadian common law as well as in adjudicatory and legislative *lex mercatoria*, demonstrates that even in legal orders where hardship is recognized, it is only applied in exceptional circumstances. As such, even if Quebec civil law was to recognize hardship as a general rule, the restrictive approach used in other jurisdictions shows that it would not constitute a great infringement upon *pacta sunt servanda*.

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note 452 at 218ff. See e.g. Annex IV ICC Hardship Clause 2003 for an example of a hardship clause in international trade.

[472] See e.g. Case No 2708, *supra* note 462; Case No 2508, *supra* note 455 at 939-40; Case No 8486, *supra* note 440; Rainaud, *supra* note 469 at paras 42-43.

[473] See e.g. Case No 1512, *supra* note 375.

[474] See e.g. Case No 2404, *supra* note 440 at 995; Brunner, *supra* note 343 at 418.

[475] See e.g. Case No 8486, *supra* note 440 at 167; Case No 10422*, supra* note 442 at 1145; Case No 2216, *supra* note 362; Case No 4761, *supra* note 443 at 1015.

[476] Jobin, *supra* note 384 at 696.

4.3 Mitigation of damages

The similarity between concepts of *force majeure* and hardship in Quebec civil law, Canadian common law as well as in legislative *lex mercatoria* and adjudicatory *lex mercatoria* is also observed when comparing the concept of mitigation of damages in these various legal orders. Mitigation of damages is applied in each legal order in a very similar manner and is based on the notion of good faith.

4.3.1 Concept in Civil Law (Quebec)

Article 1479 CCQ has codified the duty to mitigate damages in Quebec civil law (i.e. *réduction de la perte* or *minimisation des dommages*)[477] by stating that: "[a] person who is liable to reparation for an injury is not liable in respect of any aggravation of the injury that the victim could have avoided."[478] This provision codifies prior existing caselaw. The general principle is that a victim must minimize the damage sustained and a debtor must reimburse the damages that are immediate and direct. This principle ultimately finds its source in the principle of good faith.[479]

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[477] One can use, following the context, "obligation de limiter les dommages", "obligation de limiter le préjudice", "obligation de limiter les pertes", "limitation des dommages", "limitation du préjudice". *CTTJ*, *supra* note 326, *sub verbo* "mitigation of damages".

[478] Art 1479 CCQ; *Laflamme c Prudential-Bache Commodities Canada Ltd*, [2000] 1 RCS 638 at para 52 [*Laflamme*].

[479] *Commentaires du ministre de la Justice*, *supra* note 285 at 906 (the victim must take reasonable means not to aggravate the injury) ; Lluelles & Moore, *supra* note 285 at para 2965; Jobin & Vézina, *supra* note 283 at para 882; *Manufacture de Lambton Ltée c Scelco Inc*, 2008 QCCS 1338 at para 77; *Consoltex Inc c 155891 Canada Inc*, 2006 QCCA 1347 at para 57; *Hôpital Notre-Dame de l'Espérance c Laurent*, [1974] CA 543, rev'd for other grounds in [1978] 1 RCS 605. CCQ codified this existing caselaw.

Quebec Court of Appeal has also made it clear that the duty to mitigate is an obligation of means (i.e. *obligation de moyens*):[480]

> This obligation of moderation of damages is however not absolute: deemed equivalent to a simple obligation of means, the duty to mitigate damages cannot impose to the victim a burden that exceeds his or her possibilities. It must not be forgotten that the "debtor" of this obligation of mitigation of damages is, before and foremost, a creditor victim of the faulty behaviour of his or her co-contracting party.[481]

To determine whether the duty to mitigate is applicable, the courts use the standard of a reasonably prudent and diligent person who would have taken the same decisions in the same circumstances.[482] This standard is applied *in concreto*, taking into account the circumstances of each particular situation.[483]

The duty to mitigate is firmly rooted in Quebec civil law and applied in contractual and extracontractual matters.[484] In contractual law, it is found in rental agreements[485], commission agreements to sell shares,[486] the responsibility of a stockbroker, etc.[487] In extracontractual matters, it is found in cases of slander[488], delays in repairs[489], accidents[490],

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[480] Patrice Deslauriers, "Le préjudice comme condition de responsabilité" in *Responsabilité*, vol 4, Collection de droit 2010-2011 (Montreal: École du Barreau du Québec, 2010) 153 at 156; Jobin & Vézina, *supra* note 283 at para 882.
[481] Lluelles & Moore, *supra* note 285 at para 2966; *Financière Banque Nationale Inc c Dussault*, 2009 QCCA 1594 at para 56ff [*Dussault*] [translated by author].
[482] Pierre Deschamps, "L'exonération et le partage de responsabilité" in *Responsabilité*, vol 4, Collection de droit 2010-2011 (Montreal: École du Barreau du Québec, 2010) 73 at 75-76. In certain contractual cases, it can also become as restrictive as a duty to achieve a given result, Karim, *supra* note 316 at 1173.
[483] *Laflamme*, *supra* note 478 at para 52; Baudouin & Deslauriers, *supra* note 312 at para I-1302.
[484] Karim, *supra* note 316 at 1172.
[485] *GMAC Location Ltée c Plante*, [2002] RJQ 641 (CA).
[486] *BMO Nesbitt Burns Ltée c Dolmen (1994) Inc*, 2008 QCCA 851 at paras 103-10.
[487] *Dussault*, *supra* note 481 at para 70.
[488] *Maison du Parc Inc c Chayer* (2001), AZ-50187865 (Azimut) (Qc Sup Ct).

etc. It is also found in labour matters, when, in cases of illegal dismissal, an employee must make a reasonable effort to find another employment.[491]

4.3.2 Concept in Common Law

The duty to mitigate damages is also firmly rooted in Canadian common law.[492] Mitigation of damages can be expressed succinctly as follows: "[…] the plaintiff cannot recover for losses that could reasonably have been avoided."[493] The duty to mitigate is based on the principle of causation (i.e. losses that could have been reasonably avoided but for the plaintiff's inaction rather than by the defendant's wrongdoing) and the principle of avoiding economic waste.[494] Using these principles, the mitigation of loss doctrine can be defined as "[t]he principle requiring a plaintiff, after an injury or breach of contract, to make *reasonable efforts* to alleviate the effects of the injury or breach. If the defendant can show that the plaintiff failed to mitigate damages, the plaintiff's recovery may be reduced".[495]

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[489] Patrice Deslauriers, "L'indemnisation résultant d'une atteinte à un bien" in *Responsabilité*, vol 4, Collection de droit 2010-2011 (Montreal: École du Barreau du Québec, 2010) 163; *9135-5404 Québec Inc c ING Insurance Company of Canada*, 2006 QCCS 5541.
[490] *St-Maurice c Montréal (City of) (Société du parc des îles)* (2005), AZ-50305342 (Azimut) (Qc Sup Ct).
[491] Jobin & Vézina, *supra* note 283 at para 882. See e.g. *Leclerc c Stal Diffusion Inc*, 2010 QCCS 5599, *Bentamtam c Compagnie nationale Royal Air Maroc* (2000), AZ-50081257 (Azimut) (Qc Sup Ct), Karim, *supra* note 316 at 1177-81.
[492] Swan, Bala & Reiter, *supra* note 398 at 235-56; Jobin & Vézina, *supra* note 283 at para 882.
[493] Waddams, *Law of Contracts*, *supra* note 330 at para 753.
[494] For further discussion, see SM Waddams, *The Law of Damages*, loose-leaf (consulted on 22 October 2011), (Toronto: Canada Law Book, 2010), ch 15 at para 15.70 [Waddams, *Law of Damages*] [emphasis added]. It is also considered unfair for the plaintiff to be wasteful at the expense of the defendant (*Betancourt v R & B Airtech (London) Inc*, [2010] OJ no 2291 (QL) at para 169 (SC (Sm Claims Ct)); *Howell v Armour & Co* (1913), 9 DLR 125 at 128 (Sask SC)).
[495] *Black's Law Dictionary*, 9th ed, *sub verbo* "avoidable-consequences doctrine" [emphasis added].

The *Westinghouse* case[496] is often cited in common law provinces to illustrate the duty to mitigate damages.[497] It reads as follows:

> The fundamental basis [of assessing the quantum of damages for breach of contract] is thus compensation for pecuniary loss naturally flowing from the breech *(sic)*; but this first principle is qualified by a second, which imposes on a plaintiff the *duty of taking all reasonable steps to mitigate the loss consequent on the breach*, and debars hire from claiming in respect of any part of the damage which is due to his neglect to take such steps.[498]

Reasonableness, however, is a question of fact. In other words, it depends on particular circumstances of factual situations but the common trend is that the party claiming damages must take action to minimize its losses.[499] The corollary of the duty to mitigate is that the party claiming damages cannot "increase his damages by unreasonable conduct and, in this regard, he is bound to act with the defendant's interest in mind as well as his own".[500]

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[496] *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London, Ltd*, [1912] AC 673, [1911-13] All ER 63 (HL) (Eng) [*Westinghouse* cited to All ER].
[497] *British Columbia v Canadian Forest Products Ltd***,** 2004 SCC 38 at para 106, [2004] 2 SCR 74; *Cockburn v Trusts and Guarantee Co* (1917), 38 OLR 396 (SC (AD)) (available on QL); *Apeco of Canada Ltd v Windmill Place*, [1978] 2 SCR 385; *Caisse Populaire de Richibouctou Ltee v Savoie*, 75 NBR (2d) 38 at para 10 (available on QL) (CA); *Pitzel v Saskatchewan Motor Club Travel Agency Ltd*, [1986] SJ no 105 (QL) (CA).
[498] *Westinghouse*, *supra* note 496 at 69 [emphasis added].
[499] Waddams, *Law of Damages*, *supra* note 494 at para 15.140. See e.g. *Stringer's Plastering & Painting Co v Winsor* (1996), 138 Nfld & PEIR 17 at para 50 (Nfld Prov Ct) (available on QL).
[500] *Talon v Whalley* (1988), 63 OR (2d) 723 at 726 (available on QL) (CA) [references omitted].

4.3.3 Concept in Legislative *Lex Mercatoria*

Legislative *lex mercatoria*, similarly to civil law and common law, uses good faith to interpret the duty to mitigate damages.[501] The principle of mitigation of damages is expressed in the following manner in *CISG* and *UNIDROIT Principles*:

> [CISG]: A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.[502]
>
> [UNIDROIT Principles]: (1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.
>
> (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.[503]

Both *CISG* and the *UNIDROIT Principles* define the duty to mitigate in a similar manner and their interpretation is consistent with the definitions found in Quebec civil law and Canadian common law, albeit more restrictively.[504] Both insist on the fact that the injured party must take reasonable steps to reduce its loss of damages.[505]

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[501] *CISG*, art 7; Jacob S Ziegel & Claude Samson, "Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods" (July 1981), online: CISG Database, Pace Law School <http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html>.

[502] *CISG*, art 77. See generally Guy Lefebvre & Emmanuel S Darankoum, "La vente internationale de marchandises: la convention de Vienne et ses applications jurisprudentielles" in Denys-Claude Lamontagne, ed, *Droit spécialisé des contrats: les contrats relatifs à l'entreprise*, vol 2 (Cowansville, Que: Yvon Blais, 1999) 385 (available on *La Référence*); Djakhongir Saidov, "Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods" (2002) 14 Pace Int'l L Rev 307.

[503] *UNIDROIT Principles*, art 7.4.8; Stephan Reifegerste & Guillaume Weiszberg, "Obligation de minimiser le dommage et 'raisonnable' en droit du commerce international" [2004] Int'l Bus LJ 181 at 189.

[504] Jacob S Ziegel, "The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives" in Nina M Galston & Hans Smit, eds, *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (New York: Matthew Bender, 1984) 9-1 at 9-41.

[505] No differences noted on mitigation of damages in these jurisdictions by Ziegel & Samson, *supra* note 501.

As in Canadian common law and Quebec civil law, the purpose of article 7.4.8 of the UNIDROIT Principles "is to avoid the aggrieved party passively sitting back and waiting to be compensated for harm which it could have avoided or reduced. Any harm which the aggrieved party could have avoided by taking reasonable steps will not be compensated."[506] Limiting the extent of the initial loss by taking reasonable steps is thus a concept firmly rooted in legislative *lex mercatoria*[507]

4.3.4 Concept in Adjudicatory *Lex Mercatoria*

Mitigation of damages is well established in adjudicatory *lex mercatoria*.[508] Regardless of whether the decision comes from a domestic court or an arbitral tribunal, both apply the duty to mitigate in a similar manner when determining the quantum of damages.[509]

The common thread found in the decisions of the domestic courts and arbitral tribunals is the notion of "reasonableness"; the duty to mitigate is an obligation of means to evaluate

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[506] "Comments under article 7.4.8", *UNIDROIT Principles 2004*, *supra* note 345 at 244ff.
[507] Peter Riznik, "Article 77 CISG: Reasonableness of the Measures Undertaken to Mitigate the Loss" (10 November 2009), online: CISG Database, Pace Law School <http://cisgw3.law.pace.edu/cisg/biblio/riznik.html >.
[508] Case No 6281, *supra* note 453 at 1118-19; Yves Derains, "Case Comment on Case No 3344 (ICC)" (1982) 109 JDI 983 [Derains, "Case Comment on Case No 3344"]; Hugues Kenfack, *Droit du commerce international* (Paris: Dalloz, 2006) at 11. It originated from common law jurisdictions (particularly England and USA) before being incorporated in most civil law jurisdictions, Reifegerste & Weiszberg, *supra* note 503 at 182
[509] Felix Praendl, "Measure of Damages in International Commercial Arbitration" (1987) 23 Stan J Int'l L 263 at 265-67. The author criticizes arbitral tribunals for using their discretion to overrule legal rules and using non-legal consideration (whereas a judge exercises its discretion under legal rules and use legal considerations). Again, some decisions illustrate the conflict of laws with the application of damages, based on national law, trade customs, general principles of law, *lex mercatoria* or equity. *Ibid* at 270.

whether the party behaved prudently. This was detailed as follows by legal scholars Reifegerste & Weiszberg:

> The duty of a party to mitigate its loss is well established in international law and in most domestic legal systems, as well as in the laws of the State [party in question]. The analysis of the behaviour of the party in question does not require *a posteriori* examination of this party's final results. The analysis is more connected to the management: whether it was prudent and whether the party in question acted reasonably and fairly from a commercial and financial point of view.[510]

When applying the notion of reasonableness, the arbitral tribunal will analyze the party's actions -or inaction- using the criterion of a "normal, loyal, appropriate and reasonable behaviour".[511] The difficulty lies in the application of this "reasonable behaviour" *in concreto*, but four common principles can be determined from arbitral cases analysis.[512]

First, the duty to mitigate implies considering -or accepting- other available alternatives when damages are certain. In Case No 5885[513], a sales contract case governed by English law, the claimant was obligated to provide a product and the defendant, letters of credit. The claimant rejected the letters of credit provided by the defendant, terminated the contract and sued for damages. Subsequently, the claimant had received a firm offer from a third party to buy the product, which was still valid after the termination of the contract with the defendant. The arbitral tribunal found that the claimant could have avoided the

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[510] Reifegerste & Weiszberg, *supra* note 503 at 186: Case No 5514 (1990), (1992) 119 JDI 1022 (ICC); Yves Derains, "Case Comment on Case No 5514 (ICC)" (1992) 119 JDI 1029.
[511] Reifegerste & Weiszberg, *supra* note 503 at 186. See e.g. Case No 2216, *supra* note 362.
[512] Praendl, *supra* note 509 at 297. For practical application of the duty to mitigate, reasonable effort is necessary and must be product specific. See e.g. Case No 3880, *supra* note 352 at 46; Case No 2478, *supra* note 369 at 926-27.
[513] (1989), (1991) 16 YB Comm Arb 91 (ICC).

financial loss if he had accepted the third party's offer. Similarly, in Case No 2478[514], a French company had granted a licensing agreement to an American company, whereby the American company could place its name and trademark on the manufactured products of the French company. The American company was obligated to pay a percentage of sales (turnover) to the French company for three years but only paid the agreed amount for the first year. The arbitral tribunal found that the French company could have mitigated its damages if it established new business relationships once all prospects of negotiation and discussion with the American company were ruled out.[515]

The duty to mitigate damages does not imply the acceptance of any available offer or an investment in a risky venture. For example, in Case No 5865[516], in a contract for the sale of petrol, the seller did not have to accept any price to mitigate his damages, but a reasonable price at which the petrol could have been sold as determined by independent expert's reports. As such, some legal scholars propose to modify the concept of the duty to mitigate

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[514] *Supra* note 369 where the arbitral tribunal referred to general principles of law to conclude that the French company should have accepted the offer of the Romanian company even if the price was much lower than on the global market. Even if the French company disagreed with this increase, their acceptance would have mitigated their damages before referring the matter to arbitration to maintain the contractual price.) See Derains, "Case Comment on Case No 2478", *supra* note 374 at 928-29; Ringuette, *supra* note 119 at 133ff; Reifegerste, *supra* note 503 at 182; Case No 2520 (1975), (1976) 103 JDI 992 (ICC); Yves Derains, "Case Comment on Case No 2520 (ICC)" (1976) 103 JDI 993; Case No 2404, *supra* note 440 at 996.

[515] Case No 2103 (1972), (1974) 101 JDI 902 (ICC); Yves Derains, "Case Comment on Case No 2103 (ICC)" (1974) 103 JDI 903 [Derains, "Case Comment on Case No 2103"]. See also Case No 2142, *supra* note 362 where the claimant could have mitigated his losses by contacting other buyers.

[516] (1989), (1998) 125 JDI 1008 (ICC); Dominique Hascher, "Case Comment on Case No 5865 (ICC)" (1998) 125 JDI 1015 where mitigation of damages is a general principles of law admitted in international commerce (reference to *CISG* and *UNIDROIT Principles*) including the applicable law in this case, Algerian law. Case No 5418 (1987), (1988) 13 YB Comm Arb 91 at 100-01 (ICC): When the prospects of increased sales are very uncertain compared to the capital investment, a party who declines to invest in such a venture does not fail to mitigate its losses.

so that it refers to a "*reasonable trader of the same capacity and placed in the same situation as the victim*".[517]

Second, the duty to mitigate depends on the subject-matter of the contract. The duty to mitigate may vary according to whether the object of the contract consists of perishable goods or if quantities are limited. For example, in Case No 12193[518], in a distribution contract for the promotion and distribution of dairy products in Lebanon, the distributor destroyed the stock following the termination of contract by the franchisor. The arbitral tribunal ruled that the distributor failed to mitigate its damages by destroying the stock without giving the franchisor the option to buy it.[519] In Case No 5910[520], the buyer could not deliver the agreed-upon 500 tons of zinc to the recipient and, to mitigate damages, sold the zinc to another party, action which was deemed proper mitigation by the arbitral tribunal. In Case No 3880[521], the arbitral tribunal had to decide if fashionable boots could be obtained elsewhere to mitigate damages. The fashionable boots were kept in small reserves because of the quick turnover in fashion trends. Also, the defendant did not notify the claimant in a timely fashion that he could not supply more boots. The arbitral tribunal concluded that the claimant did not fail to mitigate its damages. The claimant could not reasonably be expected to obtain similar fashion boots (a very specific product) elsewhere at the last minute.

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[517] Reifegerste, *supra* note 503 at 185 [emphasis in the original].
[518] (2004), (2007) 134 JDI 1276 (ICC).
[519] *Ibid* at 1285; Eduardo Silva Romero, "Case Comment on Case No 12193" (2007) 134 JDI 1286 at 1290. Even if the applicable law was a domestic law (Lebanese law), the arbitral tribunal referred to *lex mercatoria*.
[520] (1988), (1988) 115 JDI 1216 at 1216, 1219-20 (ICC); Yves Derains, "Case Comment on Case No 5910 (ICC)" (1988) 115 JDI 1220 at 1222-23.
[521] *Supra* note 352 at 46.

Third, the injured party must take action when damages are foreseeable. For example, in Case No 8782[522], in the sale of a fish-sorting machine by the defendant, the creditor should have relieved the defendant from its obligation to deliver the machine when he was "confronted with the possibility to prevent or limit damages especially [since the] detrimental results of the performance of the machine [was] foreseen".[523]

Fourth, once alleged, the duty to mitigate must be proven. In Case No 7331[524], the party claiming damages failed to present evidence of the price he obtained for the resale of a supposedly defective product, thereby contravening article 77 of the *CISG*. The failure to provide evidence of mitigation of damages in another case was ruled as contrary "to international arbitration jurisprudence".[525]

4.3.5 Similarities of Mitigation of Damages between Civil Law, Common Law, Legislative and Adjudicatory *Lex Mercatoria*

Mitigation of damages is recognized as a general principle of law in international trade. Similarly as in civil law, common law and legislative *lex mercatoria*, adjudicatory *lex*

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[522] (1997), (2003) 28 YB Comm Arb 39 (ICC).
[523] *Ibid* at 49. The same result would have occurred under Danish law or art 77 *CISG*. See also Case No 5721, (1990) 117 JDI 1020 at 1023, 1025-26 (ICC) (the arbitral tribunal applies good faith, *lex mercatoria* and trade usages but notes that the application of a domestic law would yield the same results); Case No 2103, *supra* note 515 at 903 where the arbitral tribunal ruled that if the claimant had sought new business relationships after the termination of the contract with the defendant, the claimant could have reduced its damage by half.
[524] (1994), (1995) 122 JDI 1001 at 1005 (ICC); Dominique Hascher, "Case Comment on Case No 7331 (ICC)", (1995) 122 JDI 1006. The arbitral tribunal applied identical provisions relating to the novation of contract, from Italian law, French law and ex-Yugoslavian law.
[525] Case No 3344 (1981), (1982) 109 JDI 978 at 983 (ICC); Derains, "Case Comment on Case No 3344", *supra* note 508 at 986 [translated by author].

mercatoria uses similar criteria to determine if a party mitigated its damages, as illustrated in the table below.

Table 6: Mitigation of Damages in Canada and *Lex Mercatoria*

Mitigation of damages					
		Civil law (Quebec)	**Common law (Canada-excluding Quebec)**	***Lex mercatoria***	
				Legislative *lex mercatoria*	**Adjudicatory *lex mercatoria***
1	**Criteria**	Avoidance of any aggravation of the injury	Losses must be reasonably avoided	Reduce harm/Reasonable measures to mitigate losses	Steps evaluated *in concreto*. Product specific or subject matter.
		Reasonably prudent and diligent person in the same circumstances	Notion of reasonableness	Notion of reasonableness	Normal, loyal, appropriate and reasonable behaviour
2	**Timing**	Measures taken when damages foreseeable			
3	**Basis**	Good faith			
4	**Lack of Effort**	Reduction of damages for the injured party			

The aforementioned decisions clearly show that arbitral tribunal seeks ways to mitigate damages, which are similar to the approaches developed in Quebec civil law, Canadian common law and legislative *lex mercatoria*.[526] The arbitral tribunal takes into consideration the facts of each case to appraise the conduct of the parties. When confronted by a lack of reasonable effort to mitigate by the parties, arbitral tribunals do not hesitate to reduce damages sought by the injured party, who must then assume part of the loss.[527] This

[526] Reifegerste, *supra* note 503 at 182; Case No 2103, *supra* note 515 at 903; Derains, "Case Comment on Case No 2103", *supra* note 515 at 904.
[527] Case No 4462, *supra* note 352 at 77-78; Case No 5910, *supra* note 520; Case No 4761, *supra* note 443; Craig, Park & Paulsson, *supra* note 11 at 646.

approach is similar to the one found in Quebec civil law, Canadian common law as well as legislative *lex mercatoria*.

4.4 Recapitulation: Concepts of *Force Majeure*, Hardship and Mitigation of Damages in Civil Law, Common Law, Legislative and Adjudicatory *Lex Mercatoria*

The study of *force majeure*, hardship and mitigation of damages in civil law, common law as well as in legislative and adjudicatory *lex mercatoria* demonstrates the similarity of these principles in an international commerce context. Even when a divergence exists, such as hardship in Quebec civil law, legal scholars use legislative and adjudicatory *lex mercatoria* to mitigate the impact of such differences. These similarities show that adjudicatory *lex mercatoria* could be used by Canadian courts as an interpretative tool.

Table 7: Comparison of Transnational Principles in Various Jurisdictions

<table>
<tr><th rowspan="2">Civil law (Quebec)</th><th rowspan="2">Common law (Canada-excluding Quebec)</th><th colspan="2">Lex mercatoria</th></tr>
<tr><th>Legislative lex mercatoria</th><th>Adjudicatory lex mercatoria</th></tr>
<tr><td>Force majeure</td><td>Force majeure clauses: Act of God/Frustration</td><td colspan="2">Force majeure</td></tr>
<tr><td>Hardship not recognized</td><td colspan="3">Hardship/Frustration/Rebus sic stantibus</td></tr>
<tr><td colspan="4">Mitigation of damages</td></tr>
</table>

The shades of grey show the similarities between the various legal orders.

As such, the unequal reception of international law in Canada and the lack of consistency associated with *stare decisis* in international arbitration should not prevent the use of arbitral decisions in international commercial cases submitted to Canadian courts.

Conclusion

Global law emerges from various globalizations processes which are independent from domestic laws.[528] Yet, as this paper demonstrates, one should expect interlegality or a relationship between these legal orders. From the outset, a basis for comparison must be determined to study this relationship and in doing so, this paper applies a two-fold approach. First, it clarifies the many misconceptions associated with transnational law, most particularly the terminology issues linked with transnational law and *lex mercatoria*. Second, it provides a methodological framework for *lex mercatoria*, which traditionally was perceived as a mass of general principles and rules, to allow for its coherent and systematic development. Calliess and Zumbansen's transnational model provides such a methodological framework and has the benefit of removing much of the stigma associated with *lex mercatoria*. Moreover, its classification of the sources of the legal norms in legislative and adjudicatory components bears similarity to the classification of the sources of law in a domestic legal order (i.e. statutes and caselaw).[529]

The importance of Calliess and Zumbansen's model lies in the fact that it allows for a comparative study of interlegality between state and non-state normative systems. The concept of interlegality can be described as the "different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions, either on occasions of

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[528] Teubner, "Global Bukowina", *supra* note 164 at 4.
[529] See chapter 2 above, for more on this topic.

qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life."[530] Indeed, a relationship between state and non-state legal orders is to be expected in international commerce, where a plurality of actors and norms are present.[531] In fact, this interlegality is present in any context where legal pluralism is conceived in terms of the coexistence of two or more legal orders. For example, this interlegality is present in Canada, where common law and civil law jurisdictions borrow from one another even if, strictly speaking, they constitute different legal orders.[532] Similarly, legislative and adjudicatory *lex mercatoria* must, to some degree, borrow from one another. Ultimately, it is this interaction that provides coherence to transnational commercial law.[533]

In the same way, one would expect some degree of interlegality to exist between state legal orders (i.e. civil law or common law systems) and non-state legal orders (i.e. Calliess and Zumbansen's methodological *lex mercatoria*). As seen, Calliess and Zumbansen's model appears in conflict against the Westphalian model which advocates that international law must be incorporated into domestic law and where domestic legal orders can be part of the international legal system to the degree they choose by consenting to particular rules. However, as a former Justice of the Supreme Court of Canada stated, the Westphalian model is not suitable for the realities of a transnational commerce in an era of globalization:

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[530] Bonaventura de Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization, and Emancipation*, 2d ed (Markham, Ont: Butterworths LexisNexis, 2002) at 437.
[531] Wai, "Interlegality", *supra* note 19 at 108-09.
[532] See chapter 4 above, for more on this topic.
[533] Jolivet, "The *UNIDROIT Principles* in ICC Arbitration", *supra* note 442 at 72 (mainly on *UNIDROIT PRINCIPLES* but applicable on all of legislative *lex mercatoria*).

> [L]e contexte international marque de plus en plus l'évolution du droit [et] se manifeste […] au plan du droit commercial […]. Les développements scientifiques et l'internationalisation du débat sur les grandes questions morales ajoutés à la mobilité des populations ont transformé le contexte socio-politique qui conditionne la formulation des normes juridiques.[534]

Yet, the Westphalian model cannot be ignored, as it allows states to control the extent of the application of international law within their borders. In particular, dualism emphasizes "the separate identity and autonomy of domestic political communities over an undefined international community whose role in law-making and law-enforcement continues to suffer from problems of legitimacy and which is challenged by what some would term the instrumentalization by a hegemon."[535] *A contrario*, part of the success of implementation of international law in Canada is based on how much it reflects the "deeper values" articulated in this country.[536] Notwithstanding the fact that these "deeper values" may be similar in the international legal order and in the domestic legal order, the impact of international commercial legislation (i.e. legislative *lex mercatoria*) and/or international arbitral awards (i.e. adjudicatory *lex mercatoria*) on domestic law is, at best, limited.

It is noteworthy that the study of interlegality does not seek to fill in the gap between the international legal order and the domestic legal orders. The international commercial legal order applies the domestic law agreed to by the parties and the domestic legal orders apply

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[534] Michel Bastarache, "Les défis nouveaux du bijuridisme" (1998) 29 RGD 241 at 245. See also Stéphane Beaulac, "Interlégalité et réception du droit international en droit interne canadien et québécois" in Stéphane Beaulac & Jean-François Gaudreault-DesBiens, eds, *JurisClasseur – Droit constitutionnel* (Toronto: LexisNexis, 2011) 23/1 at paras 1-2; Geoffrey Palmer, "Human Rights and the New Zealand Government's Treaty Obligations" (1999) 29 VUWLR 57.

[535] Janne Nijman & André Nollkaemper, "Beyond the Divide" in Janne Nijman & André Nollkaemper, eds, *New Perspectives on the Divide Between National and International Law* (Oxford: Oxford University Press, 2007) 341 at 341.

[536] Chios Carmody, "Introduction" in Carmody, *supra* note 258, 3 at 11

the norms developed by the national legislature.[537] Calliess and Zumbansen's hybrid model of *lex mercatoria* is confronted to this dichotomy.

Hence legal principles developed in international commercial law have varying impacts on domestic law, depending on whether they are codified in an international treaty or an international restatement, or discussed in arbitral awards. As demonstrated in this paper, principles such as *force majeure*, hardship and mitigation of damages are defined similarly in CIGS, *UNIDROIT Principles* and in arbitral awards. For example, *force majeure* is defined in the same manner in *CISG*, *UNIDROIT Principles* and in arbitral awards. Nonetheless, despite the fact that all three sources relied on one another to develop the principle of *force majeure* in international trade law, public instruments of legislative *lex mercatoria*, such as *CISG,* is likely to bear more influence on domestic law than arbitral awards (adjudicatory *lex mercatoria*) or private instruments of legislative *lex mercatoria*, such as *UNIDROIT Principles*.

This paper's overall objective is to verify to what extent Canadian courts can use adjudicatory *lex mercatoria* to interpret similar concepts. Legislative *lex mercatoria* is more permeable to civil law than to common law, because both legislative *lex mercatoria* and civil law are deductive processes. The hypothesis at the heart of this paper is that international arbitral awards should be incorporated to a greater extent in Quebec civil law

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[537] Beaulac, "International Treaty Interpretation", *supra* note 240 at 310.

because of the predominance of legislative *lex mercatoria* in this jurisdiction.[538] The discussion attempted to substantiate this argument in a two-part analysis. First, by comparing the principles of *force majeure*, hardship and mitigation in civil law, common law and *lex mercatoria*, this paper sought to demonstrate that these principles bear more similarities than differences and are developed in the same way, with the notion of food faith being at its cornerstone.[539] This was done by studying the similarities between legislative *lex mercatoria*, Quebec civil law and Canadian common law. It was demonstrated that the use of legislative *lex mercatoria* by Canadian domestic courts and legal scholars is, at best, limited. However, it must be noted that legal scholars are more prone to be influenced by *UNIDROIT Principles* in Quebec civil law than in Canadian common law.[540]

Second, by applying each principle to a variety of cases in civil law, common law and *lex mercatoria*, this paper demonstrates that the study of arbitral awards may provide for an understanding of the concrete application of any given principle and its ramifications within international trade. It was further demonstrated that these ramifications bear similarity to the way in which the same principle was treated within domestic legal orders. For example, in civil law, common law and *lex mercatoria*, domestic courts and arbitral tribunals apply *force majeure* in a variety of cases bearing in mind to reduce the infringement on *pacta sunt servanda*. Similarly, both the domestic courts and the arbitral tribunals examine the good

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[538] Carbonneau & Firestone, *supra* note 20 at 55.
[539] See chapter 4, above, for more on this topic.
[540] See chapter 3, above, for more on this topic.

faith of the parties when evaluating if mitigation of damages occurred *in concreto*. In cases where a principle is not recognized within a particular legal order, such as hardship in Quebec civil law, it has been argued that legislative *lex mercatoria* can be used as a tool of comparison and that adjudicatory *lex mercatoria* can illustrate a concrete application of this principle. The analysis shows that international arbitral awards have a limited impact within a domestic legal order, regardless of its legal tradition (civil law or common law).

This lack of influence of arbitral awards within domestic law may be explained by two factors. The first reason is with respect to the unequal footing of international instruments and international arbitral decisions. In Quebec civil law and Canadian common law, in matters of substantive law, domestic courts will tend to rely on written legislative instruments rather than on arbitral awards. The preferred status of international written instruments is a direct consequence of the dichotomy between the domestic legal orders and the international legal order as per the Westphalian model of international relations. Arbitral tribunal are perceived as distinct *fora* from domestic courts and as such, the latter will not use international arbitral awards, regardless of whether they are in presence of the same fact patterns or if the same principles are examined. Yet, as demonstrated, arbitral awards provide a concrete application of various principles (such as *force majeure*, hardship and mitigation of damages) in transnational commercial law. To allow greater interaction between court decisions and arbitral awards, it is of utmost importance to demonstrate that any principle will yield the same results in any given forum. One potential solution may consist in the study of all the norms applicable in a specific industry with the

aim to better understand non-state norms, which might convince state systems to resort to them.[541]

The second reason is the absence of an appellate court in transnational commercial law. Indeed, traditionally, courts of appeal provide a degree of comfort as to the coherent application of substantive law. Given the absence of an appeal procedure in adjudicatory *lex mercatoria*, there seems to be an anxiety associated to the arbitral procedure because it is often associated with an *ad hoc* solution to a particular case. However, a study of ICC's arbitral decisions in relation with *force majeure*, hardship and mitigation of damages within civil law, common law and *lex mercatoria* shows that arbitral tribunals follow a reasoning that is similar to that of domestic courts. Furthermore, the review by the ICCCA ensures that the arbitral awards are coherent without having to deal with the intricacies of a formal court of appeal, where it is to be remembered, the standard of review for appeals is restricted to an error of law, fact, or procedure.

As a final concluding point, to foster influence, transnational commercial law must move well beyond its classical definition of "all law which regulates actions or events that transcend national frontiers."[542] The future of transnational commercial law lies in its ability to affect, influence and bolster state laws and hence it must be redefined as a methodological model. The application of this methodological model to *lex mercatoria* provides an opportunity to compare and contrast legal norms in state and non-state legal

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[541] See e.g. Konradi, *supra* note 8, where the author studies state and non-state norms in the timber industry.
[542] Jessup, *supra* note 129 at 2.

orders. While legislative *lex mercatoria* provides a basis of comparison with Canadian statutes, its concrete application is found in adjudicatory *lex mercatoria*. As such, Canadian domestic courts should consider arbitral awards as an important source of law on international trade. In the context of the globalization of markets, the application of international arbitral awards by Canadian courts would ensure that Canada remains at the forefront of international commerce. With its bijuridical traditions, Canada can play a leading role in the creation of an international law of trade.

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Annex I *Force majeure*, Hardship and Mitigation of Damages in *UNIDROIT PRINCIPLES 1994, 2004 & 2010*

	UNIDROIT PRINCIPLES 1994	*UNIDROIT PRINCIPLES 2004*	*UNIDROIT PRINCIPLES 2010*
Force majeure	**ARTICLE 7.1.7** *(Force majeure)* (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract. (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt. (4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.	**ARTICLE 7.1.7** *(Force majeure)* (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract. (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt. (4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.	**ARTICLE 7.1.7** *(Force majeure)* (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract. (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such nonreceipt. (4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

Hardship	**ARTICLE 6.2.2** *(Definition of hardship)* There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.	**ARTICLE 6.2.2** *(Definition of hardship)* There is hardship where the occurrence of fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.	**ARTICLE 6.2.2** *(Definition of hardship)* There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.
Mitigation of damages	**ARTICLE 7.4.8** *(Mitigation of harm)* (1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps. (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.	**ARTICLE 7.4.8** *(Mitigation of harm)* (1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps. (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.	**ARTICLE 7.4.8** *(Mitigation of harm)* (1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps. (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.

Annex II Incorporation of the *Model Law* in Canada

ACT	Incorporation of *Model Law* within the domestic legal order	Interpretation of the *Model Law*
Federal *Commercial Arbitration Act*, RSC 1985, c 17 (2d Supp)	s 2 *"Code"* means the *Commercial Arbitration Code*, based on the model law adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in the schedule;	s 4 (1) This Act shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. (2) In interpreting the Code, recourse may be had to (*a*) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, held from June 3 to 21, 1985; and (*b*) the Analytical Commentary contained in the Report of the Secretary General to the eighteenth session of the United Nations Commission on International Trade Law.
Ontario *International Commercial Arbitration Act*, RSO 1990, c I-9	s 1(1) Model Law" means the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in the Schedule.	s 13 For the purpose of interpreting the Model Law, recourse may be had, in addition to aids to interpretation ordinarily available under the law of Ontario, to, (a) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (June 3-21, 1985); and (b) the Analytical Commentary contained in the Report of the Secretary General to the eighteenth session of the United Nations Commission on International Trade Law, as published in The Canada Gazette, Part I, Vol. 120, No. 40, October 4, 1986, Supplement.
New Brunswick *International Commercial Arbitration Act*, RSNB 2011, c 176	s 1 "International Law" means the Model Law On International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in Schedule B. (Loi internationale)	s 13(1) This Act shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Act in their context and in the light of its objects and purposes. 13(2)In applying subsection (1) to the International Law, recourse may be had to the following documents as published by the Queen's Printer: (a) the Report of the United Nations Commission on International Trade Law on the work of its 18th session (June 3 -21, 1985); and (b) the International Commercial Arbitration Commentary on Draft Text of a Model Law on International Commercial Arbitration.

Nova Scotia *International Commercial Arbitration Act*, RSNS 1989, c 234	s 2 (1) (b) "International Law" means the Model Law On International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on the twenty-first day of June, 1985, as set out in Schedule B. (2) Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the Convention and the International Law, as the case may be. R.S., c. 234, s. 2.	s 13 (1) This Act shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Act in their context and in the light of its objects and purposes. (2) In applying subsection (1) to the International Law, recourse may be had to (a) the Report of the United Nations Commission on International Trade Law on the work of its 18th session (June 3 - 21, 1985); (b) the International Commercial Arbitration Commentary on Draft Text of a Model Law on International Commercial Arbitration, as published in the Royal Gazette. R.S., c. 234, s. 13.
Newfoundland and Labrador *International Commercial Arbitration Act*, RSNL 1990, c I-15	s 2 (1) (b) "international law" means the Model Law On International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on June 21, 1985 , as set out in Schedule B. (2)Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the convention and the international law.	s 13 (1) This Act shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Act in their context and in the light of its objects and purposes. (2) In applying subsection (1) to the international law, recourse may be had to (a) the Report of the United Nations Commission on International Trade Law on the work of its 18th session, June 3-21, 1985 ; and (b) the International Commercial Arbitration Commentary on Draft Text of a Model Law on International Commercial Arbitration, as published in the *Gazette*.
Prince Edward Island *International Commercial Arbitration Act*, RSPEI 1998, c. I-5	s 1 (b) "International Law" means the Model Law on International Law Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in Schedule B. (2) Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the Convention and the International Law, as the case may be.	12. (1) This Act shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Act in their context and in the light of its objects and purposes. (2) In applying subsection (1) to the International Law, recourse may be had to (a) the Report of the United Nations Commission on International Trade Law on the work of its 18th session (June 3 - 21, 1985); (b) the International Commercial Arbitration Commentary on Draft Text of a Model Law on International Commercial Arbitration.
Manitoba *International Commercial Arbitration Act*	s 1(1) In this Act, "International Law" means the Model Law On International	s 12(2) In applying subsection (1) to the International Law, recourse may be had to (a) the Report of the United Nations Commission on

(The), SM 1986-87, c 32, CCSM c C151	Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in Schedule B. (« Code ») 1(2) Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the Convention and the International Law, as the case may be.	International Trade Law on the work of its 18th session (June 3 - 21, 1985); (b) the Analytical Commentary contained in the Report of the Secretary General to the 18th Session of the United Nations Commission on International Trade Law; as published in the *Canada Gazette*.
Saskatchewan *International Commercial Arbitration Act*, SS 1988-89, c 10.2	s 2(1) In this Act: (a) court means Her Majesty's Court of Queen's Bench for Saskatchewan; (b) International Law means the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in the Schedule to this Act. (2) Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the International Law.	s 11(1) This Act shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Act in their context and in the light of its objects and purposes. (2) In applying subsection (1) to the International Law, recourse may be had to: (a) the Report of the United Nations Commission on International Trade Law on the work of its 18th session (June 3 21, 1985); (b) the International Commercial Arbitration Commentary on Draft Text of a Model Law on International Commercial Arbitration; as published in Part I of The Canada Gazette on October 4, 1986.
Alberta *International Commercial Arbitration Act*, RSA 2000, c I-5;	s 1(1) In this Act, (b) "International Law" means the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in Schedule 2. (2) Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the Convention or the International Law, as the case may be.	s 12(1) This Act shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the Act in their context and in the light of its objects and purposes. (2) In applying subsection (1) to the International Law, recourse may be had to (a) the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3-21, 1985), and (b) the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, which shall be published in The Alberta Gazette.

Yukon *International Commercial Arbitration Act*, RSY 2002, c 123	s 1(1) In this Act, "*International Law*" means the Model Law On International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in the Schedule. (2) Words and expressions used in this Act have the same meanings as the corresponding words and expressions in the International Law.	**10**(1) This Act shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Act in their context and in the light of its objects and purposes. (2) In applying subsection (1) to the *International Law*, recourse may be had to (a) the Report of the United Nations Commission on International Trade Law on the work of its 18th session (June 3-21, 1985); and (b) the International Commercial Arbitration Commentary on Draft Text of a Model Law on International Commercial Arbitration.
North West Territories *International Commercial Arbitration Act*, RSNWT 1988, c I-6	s 1(1) In this Act, "International Arbitration Law" means the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in Schedule B. (2) Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the Convention and the International Arbitration Law, as the case may be.	s 2 (1) This Act shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Act in their context and in light of its objects and purposes. (2) In applying subsection (1) to the International Arbitration Law, recourse may be had to (a) the Report of the United Nations Commission on International Trade Law on the work of its 18th session (June 3-21, 1985), and (b) the analytical commentary contained in the report of the Secretary-General to the 18th Session of the United Nations Commission on International Trade Law (June 3-21, 1985), as published in the *Northwest Territories Gazette*.
Nunavut *International Commercial Arbitration Act*, RSNWT 1988, c I-6, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28;	s 1 (1) In this Act, "International Arbitration Law" means the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in Schedule B. (2) Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the Convention and the International Arbitration Law, as the case may be.	s 2 (1) This Act shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Act in their context and in light of its objects and purposes. (2) In applying subsection (1) to the International Arbitration Law, recourse may be had to (a) the Report of the United Nations Commission on International Trade Law on the work of its 18th session (June 3-21, 1985), and (b) the analytical commentary contained in the report of the Secretary-General to the 18th Session of the United Nations Commission on International Trade Law (June 3-21, 1985), as published in the *Northwest Territories Gazette*.

British Columbia *International Commercial Arbitration Act*, RSBC 1996, c 233	Preamble AND WHEREAS the United Nations Commission on International Trade Law has adopted the UNCITRAL Model Arbitration Law which reflects a consensus of views on the conduct of, and degree and nature of judicial intervention in, international commercial arbitrations; [Dispositions of *Model Law* integrated to the text] s 6 In construing a provision of this Act, a court or arbitral tribunal may refer to the documents of the United Nations Commission on International Trade Law and its working group respecting the preparation of the UNCITRAL Model Arbitration Law and must give those documents the weight that is appropriate in the circumstances.
Quebec art 940.6 CCP	Where matters of extraprovincial or international trade are at issue in an arbitration, the interpretation of this Title [arbitration proceedings], where applicable, shall take into consideration (1) the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985; (2) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session held in Vienna from 3 to 21 June 1985; (3) the Analytical Commentary on the draft text of a model law on international commercial arbitration contained in the report of the Secretary-General to the eighteenth session of the United Nations Commission on International Trade Law.

Annex III ICC *Force Majeure* Clause 2003

Clause reproduced from Christoph Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2009) at 565-67.

(1) Unless otherwise agreed in the contract between the parties expressly or impliedly, where a party to a contract fails to perform one or more of its contractual duties, the consequences set out in paragraphs 4 to 9 of this Clause will follow if and to the extent that that party proves:
   (a) that its failure to perform was caused by an impediment beyond its reasonable control; and
   (b) that it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract; and
   (c) that it could not reasonably have avoided or overcome the effects of the impediment.

(2) Where a contracting party fails to perform one or more of its contractual duties because of default by a third party whom it has engaged to perform the whole or part of the contract, the consequences set out in paragraphs 4 to 9 of this Clause will only apply to the contracting party:
   (a) if and to the extent that the contracting party establishes the requirements set out in paragraph 1 of this Clause; and
   (b) if and to the extent that the contracting party proves that the same requirements apply to the third party.

(3) In the absence of proof to the contrary and unless otherwise agreed in the contract between the parties expressly or impliedly, a party invoking this Clause shall be presumed to have established the conditions described in paragraph 1 [a] and [b] of this Clause in case of the occurrence of one or more of the following impediments:
   (a) war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile attack, blockade; military embargo), hostilities, invasion, act of a foreign enemy, extensive military mobilization;
   (b) civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience;
   (c) act of terrorism, sabotage or piracy;

(d) act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation;
(e) act of God, plague, epidemic, natural disaster such but not limited to violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought;
(f) explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged break-down of transport, telecommunication or electric current;
(g) general labour disturbance such but not limited to boycott, strike and lock-out, go-slow, occupation of factories and premises.

(4) A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from its duty to perform its obligations under the contract from the time at which the impediment causes the failure to perform if notice thereof is given without delay, or if notice thereof is not given without delay, from the time at which notice thereof reached the other party.

(5) A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from any liability in damage or any other contractual remedy for breach of contract from the time indicated in paragraph 4.

(6) Where the effect of the impediment or event invoked is temporary, the consequences set out under paragraph 4 and 5 above shall apply only insofar, to the extent that and as long as the impediment or the event invoked impedes performance by the party invoking this Clause of its contractual duties. Where this paragraph applies, the party invoking this Clause is under an obligation to notify the other party as soon as the impediment or listed event ceases to impede performance of its contractual duties.

(7) A party invoking this Clause is under an obligation to take all reasonable means to limit the effect of the impediment or event invoked upon performance of its contractual duties.

(8) Where the duration of the impediment invoked under paragraph 1 of this Clause or of the listed event invoked under paragraph 3 of this Clause has the effect of

substantially depriving either or both of the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party.

(9) Where paragraph 8 above applies and where either contracting party has, by reason of anything done by another contracting party in the performance of the contract, derived a benefit before the termination of the contract, the party deriving such a benefit shall be under a duty to pay the other party a sum of money equivalent to the value of such benefit.

Annex IV ICC Hardship Clause 2003

Clause reproduced from Christoph Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2009) at 571.

(1) A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

(2) Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:

(a) the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that
(b) it could not have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event.

(3) Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract.