

TESTING THE HARMONISATION AND UNIFORMITY OF THE UNCITRAL
MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT

Testing The Harmonisation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration

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The 1985 UNCITRAL Model Law attempts to introduce uniformity into the procedural aspects of international commercial arbitration and has been adopted by 97 jurisdictions. This thesis tests the achievement of this objective in Australia, Hong Kong and Singapore in respect of Article 34 (and its equivalent in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) which empowers a court to set aside an arbitral award. Uniformity in law is generally considered a matter of function and degree, with absolute uniformity not being required for the achievement of the appropriate degree of functional similarity. An internationalist approach to the interpretation of the Model Law is expressed in Article 2A, which was introduced in 2006, although this was required from the outset.

The achievement of uniformity is tested by analysing how the legislators and courts have implemented (textual uniformity) and applied (applied uniformity) the Model Law. Significant textual dissimilarities are identified in how the three jurisdictions adopt an internationalist approach and some potentially significant textual dissimilarities in the adoption of Article 34/V. An analysis of over 300 cases shows, by reference to internationalist norms ('I-Norms'), that an internationalist approach has been present throughout, but in particular in the last 10 years or so in Singapore and the last 5 years in Australia. Applied uniformity is also tested by a method which identifies principles of law which pursuant to the internationalist approach are able to be cited cross border albeit not in a binding way ('I-Ratios' derived from International *Ratio Decidendi*). This analysis demonstrates numerous citations of decisions from other jurisdictions but few adoptions of their I-Ratios. The jurisdictions analysed are thus shown to have achieved what can be considered to be a constantly developing degree of textual and applied uniformity.

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LIST OF ABBREVIATIONS

AGP - World Trade Organisation, Agreement on Government Procurement¹

CISG - Convention on the International Sale of Goods²

CLOUT - Case Law on UNCITRAL Texts³

Digest - UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration⁴

FIDIC - International Federation of Consulting Engineers

HKAO - Hong Kong Arbitration Ordinance Cap. 341⁵

HKNAO - Hong Kong Arbitration Ordinance Cap. 609⁶

ICC - International Chamber of Commerce

ICSID - International Centre for Settlement of Investment Disputes

IAA - International Arbitration Act (Australia)⁷

Mainland – The Peoples Republic of China (excluding the Hong Kong and Macau Special Administrative Regions)

NGO - Non-Government Organisation

¹ Available at <https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm> accessed 7 March 2015.

² Available at <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html> accessed 7 March 2015.

³ Available at <http://www.uncitral.org/uncitral/en/case_law.html> accessed 7 March 2015.

⁴ Available at <http://www.uncitral.org/uncitral/en/case_law/digests/mal2012.html> accessed 7 March 2015.

⁵ Available at <<http://www.wipo.int/edocs/lexdocs/laws/en/hk/hk163en.pdf>> accessed 7 March 2015.

⁶ Available at

<[http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/\\$FILE/CAP_609_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/$FILE/CAP_609_e_b5.pdf)> accessed 7 March 2015.

⁷ Available at <http://www5.austlii.edu.au/au/legis/cth/consol_act/iaa1974276/> accessed 7 March 2015.

NYC - New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁸

SIAA - Singapore International Arbitration Act Cap. 143A⁹

UML - UNCITRAL Model Law on International Commercial Arbitration¹⁰

UN - United Nations

UNCITRAL - United Nations Commission on International Trade Law

UNIDROIT - International Institute for the Unification of Private Law

VLCT - Vienna Convention on the Law of Treaties¹¹

⁸ Available at <<http://www.newyorkconvention.org/texts> accessed 7 March 2015.

⁹ Available at

<<http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=DocId%3A%22fdb4f13d-0fdb-4083-806a-0c16554efd0b%22%20Status%3Ainforce%20Depth%3A0;rec=0>> accessed 7 March 2015.

¹⁰ Available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 7 March 2015.

¹¹ Available at <<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>> accessed 7 March 2015.

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CHAPTER 1 – INTRODUCTION

[T]he widespread adoption of the UNCITRAL Model Law has promoted unprecedented harmonisation of national laws governing international arbitration.¹²

1.1 Aims and Objectives

This thesis concerns the testing of the accuracy of the above statement by Chief Justice Menon of Singapore in his Keynote address to the ICCA Congress in Singapore in 2012. This harmonisation, it is suggested ‘will be effected through reliance on the Model Law and the development of its principles when necessary through the courts of Model Law countries. This will result in conformity in legal application and understanding among its adopters.’¹³ In testing the achievement of harmonisation consideration will be given to both legislative and judicial approaches in selected jurisdictions which have adopted the UML.

International commercial arbitration is, as its name suggests, intended to be international and this requires cross border involvement, whether it be parties from different states or the venue of the arbitration or the relevant contract’s applicable law (*lex contractus*) or the law of the seat of the arbitration or, as it is known, the curial law (*lex arbitri*) being in different states to the parties (or one or some of them). International commercial arbitration is not governed by purely domestic rules or laws and it is the inevitable transnational element of the process which is arguably the source of its biggest advantage over domestic litigation, certainly from the point of view of the foreign businessman.¹⁴

The transnational benefit of the harmonisation of international commercial arbitration was recognised many years ago and in furtherance of this it was felt worthwhile to regulate the more important transnational aspects concerning the sanctity of party

¹² S Menon, ‘International Arbitration: The Coming of a New Age for Asia (and Elsewhere)’ in Van den Berg (ed), *International Arbitration: The Coming of a New Age* (Wolters Kluwer 2013) 6 para 12.

¹³ J Lew, ‘Increasing Influence of Asia in International Arbitration’ (2014) Asian DR 4, 6.

¹⁴ There are of course purely practical advantages of international commercial arbitration over litigation, such as its speed and confidentiality.

autonomy in the selection of the arbitral process and the requirement of an enforceable award. Thus the NYC was adopted by the United Nations in 1958. This Convention has been adopted by 154 jurisdictions¹⁵ and though not the first attempt at promoting harmonisation in international commercial arbitration,¹⁶ it was the first significant and ‘most effective instance of international legislation in the entire history of commercial law’.¹⁷ However the NYC’s harmonisation objectives were limited in scope to recognition of arbitration agreements and enforcement of arbitral awards.

Almost 30 years after the NYC the second significant attempt at harmonisation of international commercial arbitration came into being, this time not a Convention but a model law, adopted by the international body specifically formed to promote harmonisation of international trade laws, UNCITRAL. This model law, the UML, is the focus of this thesis. The UML has been adopted by 67 States and a total of 97 jurisdictions.¹⁸

UNCITRAL’s overall objective is the development of ‘harmonious international economic relations’ and with the UML it seeks to do this by establishing ‘a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.’¹⁹ The UML is a model law which countries can adopt in full or in part or adopt in full and add to it. Countries can also promulgate legislation which is

¹⁵ As at 3 March 2015 the list of which is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html accessed 3 March 2015.

¹⁶ That was the Protocol on Arbitration Clauses of 1923 (Geneva Protocol) which has been ratified by numerous countries and obliges recognition of an arbitration agreement but enforcement only in the State in which the award is rendered available at http://www.interarb.com/vl/g_pr1923 accessed 7 January 2014; see also P Tercier, ‘The 1927 Geneva Convention and the ICC Reform Proposals’ (2008) DRI 2, 19.

¹⁷ M Mustill, ‘Arbitration: History and Background’ (1989) 6 J. Int’l Arb. 43.

¹⁸ As at 3 March 2015 the list of which are available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html accessed 3 March 2015.

¹⁹ General Assembly Resolution 40/72 11 December 1985 available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/477/79/IMG/NRO47779.pdf?OpenElement> accessed 13 September 2014.

in part inspired by the UML but is not sufficiently based on the law to be able to be considered a UML jurisdiction.²⁰

The key concepts in this study are harmonisation and uniformity and the key aim is to test the extent to which these concepts, and their practical implemented consequences, have been recognised and promoted by selected jurisdictions which have adopted the UML and in particular the legislators and courts of those jurisdictions. The focus of this study will be on Article 2A (interpretation) and Article 34 (setting aside) of the UML. The objectives of this study are, first to identify a standard or benchmark for the UML objectives of uniformity and harmonisation including to identify the approach to interpretation that courts should adopt in dealing with applications made under the UML. Secondly to examine whether the legislatures and the courts of Hong Kong, Singapore and Australia have adopted a uniform or harmonious approach to implementation of the UML and its interpretation. To aid this analysis various methodological tools will be developed that could be used to consider similar questions with other jurisdictions.

1.2 Literature Review

There has been very little academic work done in this area. At the recent International Bar Association event in Sydney it was suggested that ‘domestic courts approach the enforcement or setting aside of awards very differently in terms of errors of fact or law, or public policy’ and ‘more consideration should be given to harmonisation, particularly on how different judiciaries approach enforcement issues’.²¹

This study considers legal uniformity, harmonisation and interpretive methodology for uniform law instruments. Within this second category a review of a large body of literature concerning the CISG has been undertaken as well as treaty interpretation, both on the basis of analogous comparison with the UML. A very broad range of literature

²⁰ For example England and Wales adopted parts of the UML and the Saudi Arabian Arbitration Law of 2012 appears to have been inspired by the UML but neither yet appear on the UNCITRAL website as having legislation based on the UML.

²¹ K Karadelis, ‘Calls for Convergence across the Asia-Pacific’ GAR (2014) 9(1) 45 referring to the suggestion by Sunil Abraham.

has been reviewed on the subject of legal uniformity and harmonisation and to some extent it has overlapped with that relating to interpretive methodology, specifically that relating to the CISG.

Honnold and Andersen have considered at great length what uniformity means generally in uniform law and specifically as regards the CISG.²² Mistelis and Rosett have considered harmonisation and uniformity generally in international trade and arrived at similar conclusions as Honnold and Andersen.²³ Their conclusion that uniformity in law is functional (being objective and results based, albeit requiring textual expression similarity) and a matter of degree and, in the case of Honnold and Andersen, that the CISG does not require absolute uniformity, is apposite to this study. However a model law such as the UML must be distinguished from a convention like the CISG. A convention is generally adopted in the same form by the jurisdictions that adopt it but a model law can be tailored by each State to suit its own requirements. This distinction, which on closer analysis (in Chapter 3) relates to structural differences between the two types of instrument does not significantly devalue an application of Andersen's work to the UML and the same can be said for those that broadly follow her or whom she has followed: Kritzer, Mazzacano, Ferrari, Zeller, Flechtner and Schlechtriem.²⁴ All of these writers also consider that Article 7 of the CISG (which is

²² J Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer 1999); CB Andersen, 'The Uniformity of the CISG and its Jurisconsultorium: An Analysis of the Terms and a Closer Look at Examination and Notification' (PhD Thesis, Aarhus School of Business, 2006).

²³ A Rosett, 'Unification, Harmonisation, Restatement, Codification, and Reform in International Commercial Law' (1992) 40 *Am.J.Comp.L.* 683; L Mistelis, 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations' (2000) 34 *Int'l Law* 1055.

²⁴ A Kritzer and L Mistelis, 'Taming the Dragons of Uniform Law: Sharing the Reasoning of Courts and Arbitral Tribunals – English Case Texts and Translated Case Texts' (2001) 5 *Vindobona Journal* 282; P Mazzacano, 'Harmonizing Values, Not Laws: The CISG and the Benefits of a Neo-Realist Perspective' (2008) *Nordic Journal of Commercial Law* 1; For example P Schlechtriem, 'Uniform Sales Law – the Experience with Uniform Sales Laws in the Federal Republic of Germany' (1991/92) 2 *Juridisk Tidskrift* 1, 27; H Flechtner, 'The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)' (1998) 17 *J.L. & Com.* 187; F Ferrari, 'Applying the CISG in a Truly Uniform Manner: *Tribunale de Vigevano* (Italy) 12 July 2000' (2001) 6 *Unif. L. Rev.* 203; B Zeller, 'Four-Corners – The Methodology for

very similar to Article 2A of the UML) requires autonomous interpretation of the CISG by courts and promotes the achievement of uniformity. There are some detractors from this movement in the form of Bailey, Bridge and Cross.²⁵ This study does not attempt to resolve the issue but instead uses the differences between the two schools of thought in the analysis of Article 2A.

There has been a limited amount of scholarly work on model laws and even more limited work on the harmonisation objectives of the UML. Sanders and Hunter briefly consider the degree to which textual uniformity is required of the UML;²⁶ Amissah tends to consider the degree of uniformity that can be achieved by a model law as not large, but that it can help harmonisation of legal frameworks or structures.²⁷ Rose and Rossett also suggest that harmonisation rather than uniformity is the reasonable objective of a model law.²⁸ Sanders did do some work on comparative textual aspects but 20 years ago when there were only 22 States that had adopted the UML.²⁹ Binder has completed a fairly detailed comparative textual analysis now in its third edition.³⁰ Recently there has also been work done on assessing the harmonisation tendencies of

Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods' May 2003 available at <<http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>> accessed 15 March 2014.

²⁵ J Bailey, 'Facing the Truth: Seeing the Convention on Contracts for the Sale of Goods as an Obstacle to a Uniform Law of International Sales' (1999) 32 Cornell Int'l L.J. 273; M Bridge, 'Uniformity and Diversity in the Law of International Sale' (2003) 15 Pace Int'l L.Rev. 55; K Cross, 'Parol Evidence Under the CISG: The "Homeward Trend" Reconsidered' (2007) 68 Oh.S.L.J. 133.

²⁶ P Sanders, 'Unity and Diversity in the Adoption of the Model Law' (1995) 11 Arb. Int'l 1; M Hunter, 'An Analysis of the UNCITRAL Model Law on International Commercial Arbitration' presented at Meeting to Review the Hong Kong Arbitration Ordinance and the UNCITRAL Model Law 26 June 1990 at Hong Kong Club; M Hunter and A Banerjee, 'National Arbitration Legislation: One Act or Two?' (2014) 80 Arb. 62.

²⁷ R Amissah, 'Revisiting the Autonomous Contract: Transnational contracting, trends and supporting structures' (draft document) available at <<http://www.jus.uio.no/lm/autonomous.contract.2000.amissah/doc.html>> accessed 15 March 2014.

²⁸ A Rose, 'The Challenges for Uniform Law in the Twenty-First Century' (1996) 1 Unif.L.Rev. 9; Rosett (n 23).

²⁹ Sanders (n 26).

³⁰ P Binder, *International Commercial Arbitration and Conciliation in Model Law Jurisdictions* (3rd edn, Sweet & Maxwell 2010).

the UML on arbitral practice in Asia-Pacific (rather than on the courts).³¹ None of these authors however identify a benchmark or standard for achieving an acceptable degree of harmonisation before a model law can be considered as successful in any particular adopting jurisdiction. This thesis seeks to do just that and thus makes a contribution in this regard.

Most authors concerned with the UML, including Holtzman and Newhaus, Sanders,³² Broches, Binder and Honnold, have proceeded on the assumption that the UML requires harmonisation but, other than the mere adoption of the UML, have not substantively addressed how that harmonisation can be achieved (including the approach required to achieving that harmonisation in terms of the interpretation and application of the UML).³³ This study aims to fill that gap. The position was the same for the NYC as that treaty does not contain any legislative guide. The UML introduced an interpretation guide in 2006 in the form of Article 2A and this has given rise to some commentary on the approach to interpretation following its introduction. However this commentary, until recently limited to Binder and in the context of Hong Kong, Choong and Weeramantry, is superficial.³⁴ Only when Bachand published his excellent recent works was there any attempt to theoretically analyse the proper juridical basis for an appropriate method of interpretation to the UML.³⁵ Even Bachand's work appears in its gestation. Moreover Bachand does not elaborate upon the theoretical juridical

³¹ S Ali, *Resolving Disputes in the Asia-Pacific Region: International Arbitration and Mediation in East Asia and the West* (Routledge 2011).

³² Pieter Sanders played an important role in both the NYC and UML: see W Rowley, 'Remarks on "Pieter Sanders at 95: Reflections on the New York Convention"' [2008] 2 DRI 13.

³³ H Holtzman and J Newhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer 1994); P Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (2nd edn, Kluwer 2004); A Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer 1990); Binder (n 30); For example J Honnold, 'Uniform Laws for International Trade: Early "Care and Feeding" for Uniform Growth' (1995) 1 ITBLJ 1.

³⁴ Binder (n 30); J Choong and J Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Sweet & Maxwell 2011) 49-53.

³⁵ F Bachand, 'Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism' (2012) J.Disp.Resol. 83; F Bachand, 'Judicial Internationalism and the Interpretation of the Model Law: Reflections on Some Aspects of Article 2A' in F Bachand and F Gelinat (eds), *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (JurisNet 2013).

justification for the correct approach to interpretation of the pre-Article 2A UML although does justify it from a pro-international arbitration viewpoint. There has also been an excellent recent article by Loh examining the Singapore court's approach to judicial internationalism but this is not a comparative work.³⁶ Of course there are comparative works on international commercial arbitration such as Born's treatise.³⁷ Given that these works cover the whole gamut of international commercial arbitration, they inevitably cover the topics dealt with in this thesis in brief and tend to address the main cases and main themes. Gelinas has recently stated that: 'in spite of its obvious importance for the effectiveness of the Model Law, the difficult question of harmonious interpretation has not received as much attention as one might expect.'³⁸ This thesis will therefore make a contribution to the thinking on the approach to interpretation of the UML (both pre and post Article 2A).

On a textual uniformity level Peter Binder has produced the authoritative comparative record of the adoption of the UML.³⁹ This thesis however goes into a far more detailed analysis of Article 34 than Binder has attempted, which is understandable given that Binder compares every article of the UML in his treatise. No analysis of the approach to interpretation (whether express or implied) or of Article 34 published so far has explored these matters in the same depth as this thesis and no tools for testing textual and applied uniformity of the type contained in this thesis have been published.

On an applied uniformity level there have been a number of articles and books published dealing with decisions on the UML by the courts of the selected jurisdictions including Binder, Moser, Choong and Weeramantry, Merkin and Hjalmarsson.⁴⁰ These analyses focus on the courts' decisions in individual jurisdictions rather than any

³⁶ Q Loh, 'The UNCITRAL Model Law and the Pro-arbitration Approach: Judicial Internationalism and International Interpretation – The Singapore Experience' in Bachand F and Gelinas F (eds), *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (JurisNet 2013).

³⁷ G Born, *International Commercial Arbitration* (Kluwer 2014).

³⁸ F Gelinas, 'From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives' in Bachand F and Gelinas F (eds), *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (JurisNet 2013) 261.

³⁹ Binder (n 30).

⁴⁰ Binder (n 30); M Moser (ed), *Arbitration In Asia* (2nd edn, Jurisnet 2013); Choong and Weeramantry (n 34); R Merkin and J Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (Informa 2009).

comparative analysis with decisions from other jurisdictions and the only in depth comparative text is the Digest. The Digest is part of the UML global jurisconsultorium and a useful starting point for any analysis of applied uniformity. However neither the Digest nor any of the other publications offer any analysis of whether the courts have adopted the appropriate methodology for interpreting the UML or whether in doing so they have achieved the uniformity or harmonisation benchmark objectives of the UML.

This thesis will therefore fill a significant gap in the literature on the UML, in particular by investigating the appropriate approach to interpreting the UML and whether, in the case of Hong Kong, Singapore and Australia, there can be said to be a convergence of approaches and decision making in furtherance of the objectives of the UML.

1.3 Methodology

1.3.1 The Comparative Methodology and its Justification

The UML was born out of the objective of harmonisation of international commercial arbitration. In this case harmonisation is attempted through a model law and the study will test whether the objective has been achieved, albeit within the context of two necessary limitations explained later, namely geographical and scope. Testing the achievement of the objective requires study and comparative analysis of a number of jurisdictions' legal systems and their adoption and application of the UML and the NYC (because of the close relationship between Article V of the NYC and Article 34 of the UML). This research project is accordingly essentially a comparative study, although possibly not in the strict traditional sense. It is therefore worth pausing here to contemplate the nature of comparative legal study because this may impact on the validity of the methodology employed in this study.⁴¹ There has been much debate about the nature and status of comparative law.⁴² Nevertheless a general working

⁴¹ Caution is necessary because if the methodology is suggested to be invalid because it depends on an inappropriate application of comparative method, it could invalidate the conclusions of this thesis.

⁴² For example: P Legrand, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht J. Eur. & Comp.L. 111; I Stewart, 'Critical Approaches in Comparative Law' (2002) 4 Oxford U Comparative L Forum 2; C Valke, 'Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems' (2004) 52 Am.J.Comp. L. 713.

definition of comparative law can be suggested for the purpose of this study, that it is a technique or method by which legal orders, systems or traditions (including case law) are compared in pursuit of solutions to academic (and practical) legal problems. In other words it seeks to identify whether they have each achieved the objects or functions of the particular normative instruments being compared. It will be referred to in this thesis as ‘comparative method’.

The study of how different jurisdictions treat the same or similar rules is a comparative study. Some authors have expressed doubt as to whether the study of how different legal systems treat the same set of rules can properly be regarded as a comparative study.⁴³ The comparative method can however apply to the study of similarities as well as the study of differences.⁴⁴ Eberle attractively cuts through the obscurity of much writing in this area: ‘The key act in comparison is looking at one mass of legal data in relationship to another and then assessing how the two lumps of legal data are similar and how they are different.’⁴⁵ That is the approach followed in this thesis.

This methodology is well suited to a study about international commercial arbitration⁴⁶ and in particular harmonisation and uniformity, the express objectives of the UML. The UML has the function of a harmonising or unifying tool, which is the underlying philosophy that some require for comparative studies.⁴⁷ Each jurisdiction that adopts the UML therefore pursues a similar objective or function. This is harmonisation and uniformity in the interest of the domestically and internationally shared objective of encouraging international trade. Ancel states that the aim of harmonisation is the ‘functional apprehension of social and economic reality’, which refers to the underlying

⁴³ Legrand (n 42).

⁴⁴ V Curran, ‘Comparative Law and Language’ in R Zimmermann and M Reimann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006); R Schlesinger, ‘The Past and Future of Comparative Law’ (1995) 43 *American Journal of Comparative Law* 477, 477; Valke (n 42); although like Legrand (n 42) Siems considers the study of similarities ‘pointless’: M Siems, ‘The End of Comparative Law’ (2007) 2 *JCL* 133.

⁴⁵ E Eberle ‘The Method and Role of Comparative Law’ Roger Williams University School of Law Research paper 67 available at <<http://ssrn.com/abstract=1265659>> accessed 15 August 2014.

⁴⁶ E Gaillard, ‘The Use of Comparative Law in International Commercial Arbitration’ (1989) 55 *Arb.* 263.

⁴⁷ W Ewald, ‘Comparative Jurisprudence (I): What Was It Like to Try a Rat?’ (1994-95) 143 *U.Pa. L. Rev.* 1898.

objective in the case of the UML of improvement to international trade.⁴⁸ This is crucial, as Zweigert and Kötz indicate that ‘functionality’ is the basic principle of the comparative method: ‘Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfill the same function.’⁴⁹ Similarly Mistelis has referred to ‘New comparative law’ as ‘functional and, if properly used, produces remarkable results’.⁵⁰

This study engages comparisons in a number of ways; first in Chapter 3 it compares the meanings of the same or similar provisions contained in different harmonising tools (Article 2A of the UML with Article 7 of the CISG). Both provisions have the same or similar function (approaches to interpretation) and moreover the provisions represent an obvious example of a legal transplant, albeit from one model international normative instrument to a State.⁵¹ Zweigert and Kötz suggest that to ‘juxtapose without comment the law of the various jurisdictions is not comparative law: it is just a preliminary step’.⁵² In Chapter 3 there is of course much comment about the results of the functional comparison and much comment about whether the respective provisions might achieve their domestic functionality. Secondly the study compares how the selected jurisdictions have adopted the UML in their domestic legislation, whether they have included Article 2A and what changes have been made by each to Article 34, the specific Article selected for study. It also compares Article 34 with the equivalent provision (for enforcement of arbitration awards) in the NYC. This is done because the respective provisions are almost identical and, as will be seen in Chapters 5 and 6, the courts regularly refer to decisions on the NYC when deciding cases on the UML and vice versa.

Finally this study compares how the courts of each jurisdiction approach the interpretation of the two international normative instruments and how they have interpreted Article 34 (and its NYC equivalent). This should help in understanding the

⁴⁸ M Ancel, ‘From the Unification of Law to its Harmonization’ (1976-1977) 51 Tul.L.Rev. 108.

⁴⁹ K Zweigert and H Kötz, *Introduction to Comparative Law* (3rd edn, Clarendon Press 2011) 34.

⁵⁰ Mistelis (n 23) 1059.

⁵¹ Shen refers to the transplants of the UML: W Shen, *Rethinking the New York Convention* (Insentia 2013) Chapter 5, Public Policy and the New York Convention 292.

⁵² Zweigert and Kötz (n 49) 43. See also R Goode, H Kronke and E McKendrick (eds), *Transnational Commercial Law: Text, Cases and Materials* (OUP 2007) para 4.50.

actual interpretations of these articles adopted by the courts. Importantly, it will also become apparent whether the underlying function of the UML affects the way the courts interpret the law and in particular whether an active and present harmonising function has the ability to override textual dissimilarities.

This comparison, which focuses on the applications of the norms, is squarely within the comparative method.⁵³ Each of the comparisons undertaken in this study focuses on the achievement of the harmonising function of the UML and is thus a traditional comparative study as understood by Zweigert and Kötz. These and other leading comparativists recognise the utility of the comparative method in the production of unified laws (with model laws the ‘most suitable method’),⁵⁴ consider that comparative method is ‘extremely useful’ in interpreting treaties,⁵⁵ and specifically refer to the method the courts should adopt in interpreting international normative instruments (although falling short of expressly stating that the study of this is done by comparative method).⁵⁶ Van den Berg also identifies the importance of comparative method to the uniformity process⁵⁷ and Gardiner recognises the need for a comparative study to assess how uniform the rules relating to treaty interpretation are.⁵⁸ Foster and Van den Berg emphasise the importance of comparative law for assessing harmonizing instruments:

“[H]armonisation” is enjoying unrivalled popularity. The list of harmonization initiatives and other areas in which the concept is relevant is too long to be set out here. However, two vital and controversial issues are only rarely discussed by harmonisers. Is harmonisation desirable? Is harmonisation achievable? Comparative law is an essential tool for the achievement of harmonization. Many

⁵³ Ewald (n 47) 1889.

⁵⁴ Zweigert and Kötz (n 49) 24-25; Honnold describes the preparation of unified law as ‘comparative law in action’: J Honnold, ‘The United Nations Commission on International Trade Law: Mission and Methods’ (1979) 27 Am.J.Comp.L. 201; see also S Sucharitkul, ‘Unification of Private Law and Codification of International Law’ (1998) 3 Unif.L.Rev. 693.

⁵⁵ Zweigert and Kötz (n 49) 8; see also M Gebauer, ‘Uniform Law, General Principles and Autonomous Interpretation’ (2000) 5 Unif.L.Rev. 683, 690.

⁵⁶ Zweigert and Kötz (n 49) 27-28.

⁵⁷ A Van den Berg, *The New York Arbitration Convention of 1958* (1981 Kluwer) 3. See also Goode (n 52) paras 4.42-4.44.

⁵⁸ R Gardiner, *Treaty Interpretation* (OUP 2008) Preface.

harmonisers do not even ask themselves these questions and proceed on the assumption that it is both necessary and possible.⁵⁹

It should not be forgotten that the success of judicial unification of interpretation is in particular the result of the comparative case law method.⁶⁰

The comparative method is therefore ideally suited to the objectives of this study. This thesis investigates whether the harmonisation objective (or function) which gave birth to the UML is being achieved. The question can only be considered and a possible answer identified through a comparative analysis of the fate of the UML in a number of jurisdictions. In testing the achievement of the objective study of a number of jurisdictions and their adoption and application of the UML will be necessary. The comparative method will therefore be fundamental as the research project is essentially a comparative study. Although the comparative method and comparative law are complex, contested and multifaceted, they are at the same time a well-established feature of the landscape of legal research methodology. In particular it is clear that whatever one might think about the limits of comparative method and some of the more ambitious claims made in its name, it is an appropriate methodology for exploring whether legal harmonisation has in fact been achieved.

1.3.2 Scope of Research

This study is highly selective, both in targeting only a single UML article and in focusing on a limited number of jurisdictions. The reasons for this are as follows.

1.3.2.1 Jurisdiction Selection

An initial global ambition for the study has given way to some realism. It would not be feasible to research all of the 97 jurisdictions that have adopted the UML in the depth of analysis required for a doctoral study. A selection had to be made. This could have

⁵⁹ N Foster, 'The Journal of Comparative Law; A New Scholarly Resource' (2006) 1 JCL 1; see also P Norman, 'Comparative Law' available at <www.nyulawglobal.org/globalex/Comparative_law1.htm> accessed 31 March 2014.

⁶⁰ A Van den Berg, 'Striving for Uniform interpretation' at New York Convention Day, Enforcing Arbitration Awards under the New York Convention: Experience and Prospects' 10 June 1998 41 available at <<http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>> accessed 26 May 2015.

been done based on a broad global coverage with jurisdictions from each continent. Alternatively an approach based on jurisdictions from the same part of the world could be adopted and this is the selection made. The Asia Pacific region is a vast area covering numerous jurisdictions with increasing influence in international arbitration.⁶¹ However the adoption of the UML is not so extensive in this area and with twelve relevant jurisdictions a comparative study is potentially feasible. The jurisdictions potentially available for selection were: Australia, New Zealand, Indonesia, Singapore, Malaysia, Thailand, Viet Nam, Macau, Hong Kong, Japan, South Korea and the Philippines. Some of these jurisdictions are new to adopting the UML and the scope they provide for study is thus very limited. Others present linguistic and/or research difficulties with very limited access to court decisions or court decisions in English. However there are more than enough mature English language UML jurisdictions for a robust in-depth study.⁶² The jurisdictions which are mature and provide reasonable opportunity for study are Hong Kong (the UML adopted in 1990), Singapore (the UML adopted in 1994), New Zealand (the UML adopted in 1985) and Australia (the UML adopted in 1989). These jurisdictions all have common law legal systems based on the English legal system. This enhances their comparability and reduces the range of variables requiring investigation. Of these four it is considered that an in depth study of three is sufficient to test the aims of this thesis. Hong Kong, Singapore and Australia have been selected. These represent three quite different jurisdictions (in terms of geography, culture and methods and details of the UML adoption), which will therefore provide a useful and valid cross section of common law jurisdictions. In addition these jurisdictions ‘offer some of the most up-to-date and progressive arbitration legislation in the world’⁶³ providing a similar legislative base from which to make comparison.

⁶¹ Lew (n 13).

⁶² Some consider Asia to have the highest concentration of countries that have based their laws on the UML: L Nottage and J Weeramantry, ‘Investment Arbitration in Asia: Five Perspectives on Law and Practice’ Paper for Panel B-1 (Investment Treaty Arbitration) at the Asian Society of International Law Conference Tokyo 1-2 August 2009 available at <<http://asiansil-jp.org/wp/wp-content/uploads/2012/07/weeramantry.pdf>> accessed 31 March 2014; Lew (n 13) 6. However most of them have little relevant case law. For example F Simoes, ‘Recognition and Enforcement of Foreign Arbitral Awards in Macau’ (2014) 44 HKLJ 563, 584 describing case law in Macau on arbitration as ‘Inexistent’.

⁶³ M Moser, ‘Introduction’ in Moser (n 40) xxiii (R 6: December 2014).

1.3.2.2 Article Selection

The UML has thirty-six articles covering every aspect of international commercial arbitration. To try to reach a conclusive position on harmonisation and uniformity by analysing each of the UML articles would have been self-defeating for a doctoral study. In successive reviews the number of articles for study has been progressively reduced to just two: Article 2A and Article 34. However, these articles were carefully selected to ensure that the study would yield meaningful results: given the importance of the ability to set aside an arbitral award and the body of case law on setting aside and the directly related area (and articles) of enforcement (which is directly relevant because the wording of the articles empowering a court to set aside an arbitral award were copied from the NYC grounds for resisting enforcement of an arbitral award),

Much of the UML requires interpretation and application by arbitrators. This makes a study very difficult as there is little in the way of published decisions of arbitrators (other than ICC Awards on a selective basis). For published materials therefore recourse must be had to court decisions. This limits the number of articles that could be studied, as there are only ten instances in the UML where the courts may intervene.⁶⁴ Article 34 is arguably the most important one and will provide a most useful source for the present study. Article 2A is a core article of the UML directing the manner of interpretation of the UML and therefore is potentially critical to how Article 34 is to be interpreted and applied.

1.4 Chapter Contents: a Roadmap of the Thesis

The analysis pursued in this thesis will be contained in six chapters. Chapter 2 will provide first an overview of scholarly work on the concepts of harmonisation and uniformity in the context of international trade law, including international commercial arbitration. It will look at the factors affecting harmonisation and uniformity and explore what is contemplated by the terms in the context of international trade.

⁶⁴ Articles 8 (court to refer court action to arbitration), 9 (interim measures of protection), 11 (default appointment of arbitrator), 13 (arbitrator challenge), 14 (replacement of arbitrator), 16 (challenge to jurisdiction), 17H (enforcement of interim measures), 27 (assistance in taking evidence), 34 (setting aside of award), 35 (enforcement of award).

Chapter 3 will continue with the examination of harmonisation and uniformity but in the context of the UML. It will consider the meaning of the terms in the context of the UML and what the UML requires as regards the approach to interpretation of the UML in order to achieve the objectives of harmonisation and uniformity. It will introduce in detail Article 2A of the UML and consider what is required by that provision, introducing the ‘internationalist’ approach to interpretation and considering whether the same or similar method is required by the UML absent Article 2A. It will also introduce the benchmark for testing the harmonisation of juristic methodology, the Internationalist Norms (or I-Norms).

Chapter 4 considers textual uniformity. It will first consider the categorisation of possible differences in the adoption of the UML between the three selected jurisdictions introducing ‘model textual uniformity’ and ‘comparative textual uniformity’. It will then examine how each of the selected jurisdictions has adopted the UML and their required methodology for the interpretation of the UML. In particular whether the ‘internationalist’ approach identified in Chapter 3 is required. It introduces the provision of the UML selected for comparative analysis and testing; namely Article 34, which deals with recourse against an award and compares this with Articles 35 and 36 dealing with enforcement of awards and the NYC (the relevance of which has been explained above). The chapter will also introduce the jurisdictions selected for comparative analysis; namely Hong Kong, Singapore and Australia. It will then catalogue the textual similarity in the respective adoptions of the UML with respect to Article 34 (and related provisions). The chapter will conclude with a clear idea of the expected approach of the selected jurisdictions courts to the interpretation of the UML and with a tool facilitating the assessment of the significance of identified differences between the texts when examining applied uniformity in Chapter 6.

Chapter 5 is the first of two chapters that considers applied uniformity. It takes the idea of an internationalist approach to interpretation from Chapter 3 and the degree of textual uniformity achieved by the selected jurisdictions in this regard from Chapter 4 to a review and analysis of decisions of the selected jurisdictions’ courts on cases dealing with the UML and NYC. It will consider on qualitative and quantitative levels whether the selected jurisdictions have been consistent in their approaches and the significance of differences in the respective degrees of textual similarity.

Chapter 6 further reviews and analyses decisions of the selected jurisdictions' courts to consider the degree of applied uniformity achieved in respect of the substance of challenges under Article 34 (and related provisions). This will draw extensively on decided cases in each of the selected jurisdictions and will also adopt a qualitative and quantitative method of analysis.

Chapter 7 summarises the conclusions reached in Chapters 2 to 6 and suggests some propositions arising out of this thesis.

CHAPTER 2: HARMONISATION AND UNIFORMITY IN INTERNATIONAL TRADE

First, Schmittoff highlights similarity not uniformity. It may be argued that it is the similarity and the functional comparison that should be addressed by legal scholars and practitioners and not the issue of uniformity, which is as difficult to achieve as it is desired. Similarity and a functional comparative approach can lead to convergence which in most cases will be synonymous with uniformity.⁶⁵

2.1 Defining Uniformity

2.1.1 Literal Meaning of Uniformity

English language dictionaries have very similar meanings of the word ‘uniform’.⁶⁶ These can refer to the use of the word as a noun and as an adjective, but with a link between the uses. As a noun the word refers to the clothes worn by the military or civil forces of police, hospital etc. or even by school children. The key feature is that the clothes will be the same for defined ranks or age groups. This links to the use of the word as an adjective, meaning the same or similar. As a non-controversial first step therefore it can be stated with confidence that discussing something which is ‘uniform’ is a reference to something which is the same or similar.

However the word ‘uniform’ is meaningless when used by itself or by reference to a single item when used in its adjective form. Clearly it is not used in its noun form when in the context of a uniform norm. Therefore there must be a comparative aspect to the use of the word in the context of a uniform norm. In other words it is necessary to identify what it is that is intended to be uniform with what, in the context of the norm. This entails a journey through the historical development of uniform norms.

⁶⁵ L Mistelis, ‘Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law’ in Fletcher, Mistelis and Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2001) para 1-012.

⁶⁶ For example *Collins Concise Dictionary and Thesaurus* (2nd edn, rep 2000) defines the adjective as ‘regular and even throughout’ and gives alternative words; ‘consistent, constant, equable, even, regular, smooth, unbroken, unchanging, undeviating, unvarying’ and ‘alike, equal, identical, like, same, selfsame, similar’.

2.1.2 Early Development of Uniform Laws

It is commonly thought that uniformity of law is a subject borne out of the birth and development of nation States and the need for those States to trade with each other.⁶⁷ Roman law was arguably the first uniform law as the Romans spread it across its empire and as the *ius gentium* formed the basis, in nature if not substance, of the legal systems of those jurisdictions that utilised a civil law system.⁶⁸ Similarly the common law system can be said to be the result of the spread of the British Empire as almost all of the World's countries using a common law system today were at one time a Colony or Dominion of Great Britain. However the real birth of uniformity of law can surely be traced further back in time than these suggest. There is no reason why uniformity of law must be considered only in the context of nation States. Even in the context of a single nation State in its earliest years of formation the elite of the State must have considered the desirability of having laws that applied universally to all parts of that State.⁶⁹ Thus the concept of uniformity may be no more than the functional desirability of all subjects of a State being subjected to the same laws when they go about their daily business. Clearly the development of trade would have been a catalyst for the formalisation of these laws to give those involved in trade a measure of predictability and commercial security. For example Bodenheimer refers to 'The Laws and Customs of England' by Henry de Bracton as an important factor in the development of a unified law of England.⁷⁰ When countries started to trade with each other this brought with it the contemporary problems of predictability, security and disputes⁷¹ but in a more difficult

⁶⁷ See generally R Goode, H Kronke and E McKendrick (eds), *Transnational Commercial Law: Text, Cases and Materials* (OUP 2007) chapter 1.

⁶⁸ LJ Kennedy, 'The Unification of Law' (1909) 10 J. Soc'y of Comp. Legis. 212, 214; F Ferrari, 'Uniform Interpretation of The 1980 Uniform Sales Law' (1994-95) 24 Ga.J.Int'l. & Comp.L. 183; W Tetley, 'Mixed Jurisdictions: common law vs civil law (codified and uncoded)' available at <www.cisg.law.pace.edu/cisg/biblio/tetley.html> accessed 22 August 2014.

⁶⁹ M Ancel, 'From the Unification of Law to its Harmonization' (1976-1977) 51 Tul.L.Rev. 108, 109; R Goode, 'Reflections on the Harmonisation of Commercial Law' (1991) Unif. L.Rev. 54.

⁷⁰ E Bodenheimer, 'Doctrine as a Source of the International Unification of Law' (1986) 34 Am.J.Comp.L. Supplement 67, 72.

⁷¹ D Roebuck, 'The Prehistory of Dispute Resolution in England' (2006) 72 Arb. 93; D Roebuck, 'Neil Kaplan – Patron of Learning' in C Bao and F Lautenschlager (eds), *Arbitrators' Insights: Essays in Honour of Neil Kaplan* (Sweet & Maxwell 2012) 317.

scenario. This gave birth to the *lex mercatoria* which can be traced back to the Middle Ages.⁷²

2.1.3 The *Lex Mercatoria*

The medieval *lex mercatoria* is suggested to have been a law of merchants ‘free of the rigours of the law of evidence of the civil law’,⁷³ comprising a ‘relatively sophisticated and efficient form of self regulation’.⁷⁴ Given the limitations of the domestic court systems in medieval times and the lack of any formal framework for international trade (in particular enforcement of judgments), the *lex mercatoria* would have provided an informal framework for the codification of trade rules brought about by usage and resolution of disputes and was an ingenious solution which allowed and no doubt promoted international trade between merchants who were prepared to abide by the informal procedures of the law. By the seventeenth century the *lex mercatoria* may have evolved into a system of substantive trade law,⁷⁵ at least for maritime trade.⁷⁶ Foster however describes the medieval *lex mercatoria* as a ‘foundation myth’ and drawing on a number of researches suggests that there was no unified trade rules comprising a *lex mercatoria*, only an approach of a procedural nature for resolving merchant disputes. He doubts therefore that the medieval *lex mercatoria* can be relied upon as a valuable precedent for the creation of a new *lex mercatoria*.⁷⁷

Despite doubt over whether the medieval *lex mercatoria* existed at all a number of scholars have written about its nature and existence with Lew describing it as ‘the *lex*

⁷² Goode (n 67).

⁷³ A Cordes, ‘The Search for a medieval *Lex mercatoria*’ (2003) Oxford U Comparative L Forum 5.

⁷⁴ B Cremades and S Plehn, ‘The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions’ (1983-84) 2 B.U.Int’l L.J. 317.

⁷⁵ Cordes (n 73); see also G De Malynes, *Consuetudo, Vel Lex Mercatoria, or the Ancient Law-Merchant* (1622).

⁷⁶ Goode (n 67) para 1.21; but see Cordes (n 73) who cautions against assumptions of uniformity with the early *lex mercatoria*.

⁷⁷ N Foster, ‘Foundation Myth as legal formant: The Medieval Law Merchant and the New Lex Mercatoria’ Forum Historiae Iuris available at < <http://www.forhistiur.de/en/2005-03-foster/?l=en> > accessed 30 August 2014. See also Goode (n 67) para 1.21.

mercatoria of those times'.⁷⁸ For present purposes it is important to note the claimed existence of the medieval law, it being a reflection of the most basic desirability of security and certainty for merchants engaged in international trade and that it aimed to achieve uniformity by a common body of law applied across borders supplanting national laws.

2.1.4 Development of Uniform Municipal Laws

Some scholars suggest that the next step in the evolution of uniform laws was the codification of the *lex mercatoria* conceptual framework into the municipal laws of a number of countries thereby displacing the medieval *lex mercatoria* as 'national laws maintained the international character of commerce only to a limited extent'.⁷⁹ The French Commercial Code and the German Uniform Commercial Code may have been incorporations of the *lex mercatoria* as well as the simplification of commercial procedures in England as an incorporation of the *lex mercatoria* into the common law of England.⁸⁰

2.1.5 Effect of Globalisation on Development of Uniform Laws

The start of the process of formalisation of international uniform laws can be seen in the 20th Century. The catalyst may be 'globalisation'. The modern view tends to be that the desirability of uniformity of laws has certainly intensified with globalisation and paradoxically it has enhanced the growth of globalisation.⁸¹

⁷⁸ J Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) *Arb Int'l* 179,183; See also Goode (n 67) chapter 1.

⁷⁹ C Stoeker, 'The Lex Mercatoria: To what Extent does it Exist?' (1990) 7 *J.Int'l Arb.* 101.

⁸⁰ L Nottage, 'The Procedural Lex Mercatoria: The Past, Present and Future of International Commercial Arbitration' (2006) Sydney Law School Research Paper No. 06/51 1-2 available at <<http://ssrn.com/abstract=838028>> accessed 5 November 2013; P Osborne, 'Unification or Harmonisation: A Critical Analysis of the United Nations Convention on Contracts for the International Sale of Goods' (LLM Dissertation, University of Hull 2006) available at <<http://www.cisg.law.pace.edu/cisg/biblio/osborne.html+Osborne&ct=clnk>> accessed 14 September 2014.

⁸¹ G Walker and M Fox, 'Globalisation: An Analytical Framework' (1996) 3 *Indiana Journal of Global Legal Studies* 375; B Zeller, 'The Development of Uniform Laws – a Historical Perspective' (2002) 14 *Pace Int'l L.Rev.* 164.

[T]he need for certainty and predictability, or indeed uniformity, is topical. Convergence of legal systems or harmonization of commercial law will, in the long run, stabilize and strengthen national economies and will create a healthy competitive environment.⁸²

Uniformity of laws between countries was a functional aspect arising out of the desirability of trade between those countries.⁸³ Trade between countries may have been the start of globalisation but the word does not seem to have been coined until the twentieth century,⁸⁴ long after the process of the development of uniformity of laws had commenced. It is suggested by some that globalisation did not really commence until after World War Two.⁸⁵ Inevitably however the modern view can be justified by the inexorable increase in world trade irrespective of whether this is termed globalisation or internationalism.⁸⁶ But this thesis does not intend to explore the meaning of globalisation because the real point is that it is the economic desirability or even necessity and inevitability of trade between countries which demands uniformity; the speed at which trade can take place and its various methods, which some suggest is what globalisation describes,⁸⁷ is not the catalyst. It must be accepted though that globalisation ultimately requires a harmonisation process and this process is itself symbiotically promoted by globalisation.⁸⁸ Amissah puts it thus:

As economic activities become increasingly global, to reduce transaction costs, there is a strong incentive for the “law” that provides for them, to do so in a similar dimension. The appeal of transnational legal solutions lies in the potential

⁸² L Mistelis, ‘Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations’ (2000) 34 Int’l Law 1055, 1066.

⁸³ Kennedy (n 68) 214.

⁸⁴ Mistelis (n 82) (n 11).

⁸⁵ A Seita, ‘Globalization and the Convergence of Values’ (1997) 30 Cornell Int’l L. J. 429, 437.

⁸⁶ This being the cooperative activities of national actors, which can be distinguished from globalisation which in breaking down barriers denotes denationalisation: Walker and Fox (n 71).

⁸⁷ Walker and Fox (n 81) (n 17).

⁸⁸ Seita (n 85) 430. Walker and Fox (n 81) 34; R Amissah, ‘Revisiting the Autonomous Contract: Transnational contracting, trends and supporting structures’ (draft document) available at <<http://www.jus.uio.no/lm/autonomous.contract.2000.amissah/doc.html>> accessed 15 March 2014; for a contrary view see J Smits, ‘Comparative Law and its Influence on National Legal Systems’ in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006).

reduction in complexity, more widely dispersed expertise, and resulting increased transaction efficiency.⁸⁹

Boutros Boutros-Ghali, perhaps understandably, also links harmonisation with global trade development,⁹⁰ whilst Koch suggests, in his visionary work, that globalisation will eventually lead to the ultimate uniformity of governments and global tribunals.⁹¹

2.1.6 Development of International Arbitration and the New *Lex Mercatoria*

If globalisation has a symbiotic relationship with the growth of uniform laws it must be considered as directly responsible for the large growth in international commercial arbitration in recent decades.⁹² This growth demonstrates the foresight of UNCITRAL in focusing member countries' attention on the potential benefits of a strong regulatory framework for arbitration and, for most countries with undeveloped arbitration

⁸⁹ Amissah *ibid*; see also D Jimenez-Figueres, 'Are we Beyond the Model Law – or is It Time for a new One' Kluwer Arbitration Blog 24 May 2013 available at <http://www.kluwerarbitrationblog.com/blog/author/jimenez-figueres> accessed 11 July 2013; for an alternative view see J Smits, 'The Practical Importance of Harmonization of Commercial Contract Law' in *Modern Law for Global Commerce* (Collation of papers presented at the UNCITRAL Congress 9-12 July 2007 Vienna) available at <http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf> accessed 30 August 2013.

⁹⁰ B Boutros-Ghali, 'Uniform Commercial Law in the Twenty-First Century' Proceedings of the Congress of the United Nations Commission on International Trade Law New York 18-22 May 1992 1-3 available at <http://www.uncitral.org/pdf/english/texts/general/Uniform_Commercial_Law_Congress_1992_e.pdf> accessed 9 September 2014.

⁹¹ K Koch, 'Envisioning a Global Legal Culture' (2003) 25 Mich.J.Int'l L 1; 'Globalization will necessarily lead to an ever-stronger union of constituent states under an increasingly empowered supranational government. Judicial institutions will develop in this government. Global tribunals will become increasingly more like courts over the years.' 74.

⁹² T Carbonneau, 'National Law and the Judicialization of Arbitration: Manifest Destiny, Manifest Disregard or Manifest Error' in R Lillich and C Brower (eds), *International Arbitration in the 21st Century. Towards Judicialisation and Uniformity?* (Transnational Publishers 1994) 116; F Gelinas, 'Arbitration and the Global Economy: the Challenges Ahead' (2000) 17 J. Int'l Arb. 117; F Nariman, 'East Meets West: Tradition, Globalization and the Future of Arbitration' (2004) Arb Int'l 123, 126; D McLean, 'Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration' (2009) 30 U. Pa. J. of Int'l L. 1087.

frameworks, the adoption of the UML is a fast and effective way of joining the international arbitration club.⁹³

Merchants have never wanted to have disputes because disputes are costly and the courts (if they existed)⁹⁴ unpredictable. In attempting to limit disputes, merchants thought it would be helpful if there was a procedural law to govern their trading activities and disputes. This trend began in the days of slow communication and much unrest between the trading countries of the day, primarily in Europe. Merchants therefore could expect little help from governments and, as seen above, may have taken matters into their own hands with the medieval *lex mercatoria*. The 'New Lex Mercatoria' is the subject of much discussion and debate.⁹⁵ However Mustill considers that the new *lex mercatoria* 'has nothing to do with the harmonisation of international trade law'⁹⁶ because the merchants simply wished to have their disputes dealt with in a manner that provides certainty. They have no collateral intention of harmonising laws with which they are not concerned. This suggests that an autonomous legal order or system of law or 'transnational norm'⁹⁷ or whatever the *lex mercatoria* may be called, is not a harmonizing tool. This also suggests a more restrictive scope of harmonisation and more support for distinguishing the *lex mercatoria* in identifying an understanding of uniformity.

The *lex mercatoria* is an anational norm which seeks so far as possible to denationalise or delocalise arbitration. It is therefore a practical embodiment of the delocalisation or autonomous theory of the nature of international arbitration. This theory suggests that the curial law of an arbitration (the *lex fori*) is irrelevant to the arbitration, which

⁹³ For a view that suggests that adoption of the UML is not a factor in success as an international arbitration venue see H Dundas, 'The Arbitration (Scotland) Act 2010: Converting Vision into Reality' [2010] 76 Arb. 1, 2; see also HL Yu, 'A Departure From the UNCITRAL Model Law – The Arbitration (Scotland) Act 2010 and Some Related Issues' (2010) 3 Contemp. Asia Arb.J. 283.

⁹⁴ In Hong Kong's early years arbitration was used by merchants because there was no court; see D Roebuck and C Munn, '"Something So Un-English": Mediation and Arbitration in Hong Kong, 1841-1865' (2010) 26 Arb Int'l 87.

⁹⁵ See generally Goode (n 67) paras 1.39-43; 1.60-67.

⁹⁶ M Mustill, 'The New Lex Mercatoria: The First Twenty-five Years' (1988) 4 Arb. Int'l 87, 88.

⁹⁷ W Park, 'Non-Signatories and the New York Convention' (2008) 2 DRI 84.

essentially floats and is governed only by the agreed rules applicable to the arbitration with court intervention necessary only where an award is sought to be enforced.⁹⁸

However there is a difference between the *lex mercatoria* and a model law because the latter does not attempt to supplant the *lex fori*. Moreover as to whether the *lex mercatoria* tends to produce similar results is impossible to test as arbitration awards are generally confidential and if they have truly denationalised, domestic courts are not involved. The application of a model law however can be tested both textually and in its application.

If the new *lex mercatoria* can be useful, it may be to identify the similarity in objective and method between the proponents of the *lex mercatoria* and UML, namely the adoption of international norms or standards to improve the resolution of disputes in international trade by arbitration. This objective is part of the overall objective or function of uniformity in international commercial law. As the *lex mercatoria* is an anational norm it must be interpreted without regard to any national domestic considerations in an autonomous or internationalist manner. This approach is also applicable under the autonomous theory of the nature of international arbitration. It can also be proposed that this may apply to a model law despite the difference between a model law and the *lex mercatoria* referred to above. This will be returned to in Chapter 3.⁹⁹

⁹⁸ A good discussion about this is contained in J Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 ICLQ 358. More recently see generally Goode (n 67) paras 17.79-109; HL Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration' (2008) 1 Contemp. Asia Arb.J. 255; L Mistelis, 'Delocalisation and Its Relevance in Post-Award Review' in F Bachand and F Gelinas (eds), *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (2013 JurisNet); M Ahmed, 'The Influence of the Delocalisation and Seat Theories upon Judicial Attitudes Towards International Commercial Arbitration' (2011) 77 Arb. 406; M Secomb, 'Shades of Delocalisation – Diversity in the Adoption of the UNCITRAL Model Law in Australia, Hong Kong and Singapore' (2000) 17 J. Int'l Arb. 123.

⁹⁹ Yu (n 98) summarises the 'autonomists' theory, 278-282. It has its conceptual difficulties highlighted by the practical need for domestic court intervention; see for example F Mann, '*Lex Facit Arbitrum*' reprinted in (1986) 1 Arb. Int'l 241, the discussion about this in Yu (n 98) 258-259; see also Ahmed (n 98) 411.

2.2 The Modern Notion of Uniformity: Modern Uniform Laws

Modern uniform laws take a number of different forms: Conventions (Treaties), Model Laws, ‘laws’ published by international organisations such as the UNIDROIT Principles and standard form contracts. The leading institution for uniform laws is UNCITRAL, which was itself borne out of a feeling, primarily of Clive Schmittoff, that the organisations that were formulating uniform laws were not cooperating adequately.¹⁰⁰

2.2.1 Conventions and Treaties

Mistelis describes conventions as international legislation consisting of normative rules devised internationally and introduced into municipal laws by municipal legislation.¹⁰¹ Conventions can be the highest level of uniform law as once ratified by a State a convention is binding on that State. It thus forms a binding multilateral agreement. However on analysis it is not always clear what ‘binding’ means in this context. A distinction must be made between treaties such as arms limitation treaties and international commercial trade treaties such as the AGP. This multi-lateral agreement provides for level playing field government procurement of services, ensuring, or at least attempting to ensure, that local parties are not given more favourable treatment than foreign parties. This is ‘binding’ in two ways. First, it is enforceable by the other signatories to the AGP within the framework of the WTO. Secondly and more relevant to the present subject matter the AGP is incorporated as part of the municipal law of the State whereby it can be enforced by bidders for any procurement who feel that they have been a part of a procurement which has been carried out in breach of the AGP.¹⁰² It is apparent that uniformity, of the text at least, is achieved simply by means of the ratification of the same set of words by each State.

¹⁰⁰ Mistellis (n 65) para 1-019.

¹⁰¹ Mistelis (n 65) para 1-027.

¹⁰² In some cases, including in Hong Kong, ‘enforcement’ may be putting it too high as the procedures provide for a non-binding appeal procedure relying on the host Government to abide by decisions of the appellate body.

The CISG is another convention as is the NYC. As with the UML these conventions have the express objective of harmonisation and uniformity of commercial law. Although these documents allow for reservations whereby a State can opt out of some part of the convention's rigours, they nevertheless can be said to have the objective of a high level of textual uniformity. Some conventions must also be incorporated as part of a State's municipal law before a commercial party can enforce its provisions, for example the NYC, whilst some are capable of self-execution, for example the CISG. Enforcement of both types however will take place through the State's municipal courts which must apply the provisions of the convention.

The NYC has many volumes written about it, in particular concerning whether it has succeeded in achieving applied uniformity. The conclusions are varied with some suggesting it has fallen short of success:¹⁰³

After 50 years of the Convention's application, it is clear that many difficulties and differences in its application and interpretation were expressed in court decisions. Hundreds of articles were written by professors and lawyers supporting conflicting views about its application and interpretation.¹⁰⁴

Many others suggest it has been very successful with the only real problem being that of a uniform application of the 'public policy' exception to enforcement.¹⁰⁵ Some have

¹⁰³ For example Gillen, who views corruption and lack of respect for the Rule of Law as giving rise to enforcement problems in many countries; N Gillen, 'Practical Perspectives: Obstacles to Arbitration in the Developing World' (2008) 2 DRI 143; Van den Berg identified the problem in his treatise in 1981: 'A review of the court decisions on the Convention shows that such a uniform interpretation is lacking in several respects.' A Van den Berg, *The New York Convention of 1958* (1981 Kluwer) 1. See also M Mangan, 'With the Globalisation of Arbitral Disputes, is it time for a New Convention?' (2008) Int. A.L.R. 133; T Kendra, 'The International Reach of Arbitral Awards Set Aside in their Country of Origin: a Turning Point' (2012) IBLJ 35; A Redfern and M Hunter with N Blackaby and C Partasides, *Law and Practice of International Commercial Arbitration* (5th edn, OUP 2009) para 1-140.

¹⁰⁴ M Aboul-Enein, 'The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards: What Needs to be Done for the Future?' (2008) 2 DRI 178.

¹⁰⁵ For example M Hunter and G Silva, 'Transnational Public Policy And its Application in Investment Arbitrations' in Sixth IBA International Arbitration Day Sydney February 13 2003; K Bockstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement' (2008) 2 DRI 123; A Changaro, 'International Arbitration – A Consensus on Public Policy Defences' (2008) 4 A.I.A.J. 143; D Dushyant, 'Practical Perspectives on Recognition and Enforcement in a Modern World: A Review of

suggested that a uniform interpretation was not the object or purpose of the NYC in any event¹⁰⁶ although Van den Berg states otherwise: ‘it was believed that the text and structure ensured uniformity’.¹⁰⁷

The CISG has received probably an even greater amount of scholarly treatment despite its relative youth, again with mixed reviews as to its success.¹⁰⁸ Although neither of these Conventions demands absolute textual uniformity (and thus are to a limited extent similar to model laws), the scholarly writings will be seen in Chapter 3 to generally test the success of the conventions by reference to a very high degree or benchmark of applied uniformity. For present purposes however it is sufficient to note that the requirement alone of municipal court application of the conventions dictates that absolute or strict uniformity may be difficult to achieve. Indeed it is difficult for applied uniformity of any law to be achieved even within a single jurisdiction because, if it were easy, appellate courts would not be required. If absolute uniformity is difficult to be achieved within a single jurisdiction it surely is utopian to think it can be achieved throughout hundreds of jurisdictions.¹⁰⁹

Most Common Grounds for Refusing Enforcement Including ‘Public Policy’ (2008) 2 DRI 133; A Bhatnagar, ‘Public Policy and the Enforcement of International Arbitral Awards’ in UNCITRAL-SIAC Conference, *Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration* (SIAC 2006) 136, 146.

¹⁰⁶ U Mayer, ‘The Enforcement of Annulled Arbitral Awards: Towards a Uniform Judicial Interpretation of the 1958 New York Convention’ (1998) 3 Unif. L. Rev. 583; J Paulsson, ‘Enforcing Arbitral Awards Notwithstanding Local Standard Annulments’ (1998) 6-2 APLR 1.

¹⁰⁷ A Van den Berg, ‘Striving for Uniform interpretation’ at New York Convention Day, Enforcing Arbitration Awards under the New York Convention: Experience and Prospects’ 10 June 1998 41 available at <<http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>> accessed 26 May 2015.

¹⁰⁸ For example CB Andersen, ‘Furthering the Uniform Application of the CISG: Sources of Law on the Internet’ (1998) 10 Pace International Law Review 403; CB Andersen, ‘Recent Removals of Reservations under the International Sales Law-Winds of Change Heralding Greater Unity of the CISG’ (2012) 8 Journal of Business Law 698; CB Andersen, ‘The Global Jurisconsultorium of the CISG Revisited’ (2009) 13 Vindobona Journal 1; J Bailey, ‘Facing the Truth: Seeing the Convention on Contracts for the Sale of Goods as an Obstacle to a Uniform Law of International Sales’ (1999) 32 Cornell International Law Journal 273.

¹⁰⁹ Andersen, ‘Furthering’*ibid* 404.

2.2.2 Model Laws

A model law is as its name suggests a model instrument; a soft law that is designed for adoption by host countries either unaltered or with changes as required by the host State. Unlike many conventions and treaties a model law will not usually suggest possible reservations,¹¹⁰ instead allowing any number of changes to the model law to suit the host jurisdiction's requirements. Therefore a model law cannot be said to require even textual uniformity although this may be achieved to the degree countries adopt a model law unaltered and may otherwise be achieved to the degree of specific articles contained within the model law.¹¹¹ Complete textual uniformity throughout all adopting countries however is most unlikely¹¹² and therefore complete or absolute applied uniformity is even less likely although it is suggested by Broches that a model law must be 'widely adopted in substantially unchanged form' to achieve its harmonisation objective.¹¹³ Amissah however is more realistic about the goals of model laws:

The model law approach for example, is based on ensuring that the law of different countries has a similar recognizable structure and essential elements. This is used where structural similarity is desirable but uniformity is not essential, or where the achievement of greater uniformity would prove difficult or impossible due to differences in national law.¹¹⁴

¹¹⁰ Such as the NYC's commercial and reciprocity available reservations.

¹¹¹ A possible downside to many changes from a model law is the danger of being regarded as having departed from the fundamental principles of the model law and thus no longer attracting the international commercial trade prestige of having adopted the model law.

¹¹² This statement is difficult to substantiate but the fact is that there is widely different adoptions of the text of the UML as shown by Binder's work: P Binder, *International Commercial Arbitration and Conciliation in Model Law Jurisdictions* (3rd edn, Sweet & Maxwell 2010).

¹¹³ A Broches, 'The 1985 UNCITRAL Model Law on International Commercial Arbitration: An Exercise in International Legislation' 18 NYIL 3 (1987).

¹¹⁴ R Amissah, 'The Autonomous Contract: Reflecting the Borderless Electronic-Commercial Environment in Contracting' available at <<http://www.cisg.law.pace.edu/cisg/biblio/amissah2.html>> accessed 30 August 2014; see also CB Andersen, 'Defining Uniformity in Law' (2007) 12 Unif.L.Rev. 5; see also A Rose, 'The Challenges for Uniform Law in the Twenty-First Century' (1996) 1 Unif.L.Rev. 14.

When UNCITRAL refers to the objectives of the UML in terms of harmonisation and uniformity it cannot be taken to mean absolute textual or applied uniformity. It must be something less, the parameters of which will be examined in Chapter 3. This does not however mean that uniformity is not a valid study in the context of a model law or that a model law cannot achieve uniformity. If the degree of non-strict or non-absolute uniformity which can be achieved by the UML will nevertheless serve to facilitate the more efficient conduct of international trade it may have successfully achieved a functional uniformity objective or requirement.¹¹⁵ Rosett is a proponent of these criteria albeit using the word ‘harmonisation’ rather than uniformity:

The test of successful law harmonization is the quality of the results to which it leads in specific cases. Successful harmonization enhances economic efficiency and vindicates the reasonable expectations of the parties to transactions.¹¹⁶

Hunter goes further and considers the UML achieves an acceptable degree of harmonisation if ‘the fundamental principles of the Model Law are taken into national laws in a consistent way’¹¹⁷ whilst another view was expressed by Dervaird:

While certain changes to the Model Law are necessary in every country in order to accommodate it to the legal structures of that country, the main object of the Model Law is to provide a framework for arbitration which is readily understandable by people of very different legal cultures. Accordingly, the Committee recommends that any legislation to give effect to its proposals should depart from the language of the Model Law only where essential. This is the

¹¹⁵ This reflects the goals of UNCITRAL. See also H Holtzman and J Newhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer 1994) 2; Abascal refers to UNCITRAL giving ‘uniform guidance to the world’: J Abascal, ‘Effects of Annulment’ [2008] DRI 2 133.

¹¹⁶ A Rosett, ‘UNIDROIT Principles and Harmonisation of International Commercial Law: Focus on Chapter Seven’ (1997) 2 Unif. L. Rev. 442.

¹¹⁷ M Hunter, ‘An analysis of the UNCITRAL Model Law on international commercial arbitration’ presented at Meeting to Review the Hong Kong Arbitration Ordinance and the UNCITRAL Model Law 26 June 1990 at the Hong Kong Club.

course of action which has been taken in those countries which have already adopted the Model.¹¹⁸

These types of qualitative criteria may be seen as a sort of threshold or minimum degree of uniformity necessary before a model law can be accepted as achieving uniformity or at least achieving the degree of uniformity that is the objective of the model law.¹¹⁹ Faria suggests for example ‘Despite the adjustments and adaptations made by various enacting jurisdictions, it can be said that there is a high degree of substantive uniformity in the implementation of the UNCITRAL Model Arbitration Law.’¹²⁰ No evidence is given for this sweeping statement however and some who have analysed the implementation of the UML in limited geographical areas suggest otherwise.¹²¹ It is of course the objective of this thesis to test this.

2.2.3 Uniformity via Non-Government Organisations

A number of NGOs have produced their own uniform laws the most notable of which is the UNIDROIT Principles, which are a set of contractual principles, representing a non-binding way of trying to achieve harmonisation or formalizing rules as a *lex mercatoria*.¹²² The principles share the flexibility enjoyed by model laws and this can

¹¹⁸ Lord Dervaird, ‘Scotland and the UNCITRAL Model Law: the Report to the Lord Advocate of the Scottish Advisory Committee on Arbitration Law’ (1990) 6 Arb. Int’l 63, 67. Considered by Slate, Lieberman, Weiner and Micanovic as an ‘adequate’ summary of how the UML can be modified; W Slate, S Lieberman, J Weiner, and M Micanovic, ‘UNCITRAL Its Workings in International Arbitration and a New Model Conciliation Law’ (2004-05) 6 Cardozo Journal of Conflict Resolution 73.

¹¹⁹ Andersen recognises this minimum standard in the context of a model law and appears to place a low threshold before a model law will achieve uniformity: ‘[I]f the similarity is very slight, then there is no uniformity, in other words, a minimum standard for using the term.’ Andersen (n 114) 35; she also recognises that each uniform law will set its own level of the degree of uniformity required.

¹²⁰ J Faria, ‘Legal Harmonization Through Model Laws: The Experience of the United Nations Commission on International Trade Law (UNCITRAL)’ available at <http://www.justice.gov.za/alraesa/conferences/2005sa/papers/s5_faria2.pdf> accessed 30 August 2014.

¹²¹ For example M Sadah and S Norton, ‘The Application of UNCITRAL Model Law Principles in the Middle East Region’ (2008) 22 ALQ 219.

¹²² P Brazil, ‘Reception of Uniform Law into National Law: an Exercise in Good Faith and Progressive Development of the Law’ (1998) 3 Unif. L. Rev. 314; M Bonell, ‘Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts’ (1992) 40 Am.J.Comp.L. 617; A Dimolitsa, ‘The Codification of International Rules and Practices-The UNIDROIT

be argued to give more prospects of a better degree of harmonisation than by the implementation of conventions.¹²³ However little research appears to have been carried out about the success or failure of the UNIDROIT Principles as a tool of harmonisation. They are perhaps best considered as a potential part of the new *lex mercatoria*.

Many NGOs produce standard form contracts and a number of these are designed to be used in the international context. In particular in the area of engineering and construction there are numerous standard form contracts, the most well known of which are the numerous FIDIC forms.¹²⁴ The forms are designed with a degree of textual uniformity in mind with supplemental standard provisions to allow amendments or additions to the general provisions. Whilst the forms may have been designed with uniform or autonomous interpretation in mind, no attempt has been made to influence the jurisdictional interpretation of the forms of contract. The contracting parties are required to insert the governing law of the contract and the provisions therefore fall to be interpreted in accordance with municipal law. Whilst court decisions on the same provisions from other jurisdictions will usually be considered by the arbitral tribunal dealing with a dispute,¹²⁵ these will not be binding and this approach is of course subject to any express municipal law or, in the case of a common law jurisdiction, subject to any decided relevant case in the relevant jurisdiction. Again the practical

Principles of International Commercial Contracts’ presented at 6th IBA International Arbitration Day International Commercial Arbitration and Globalisation 13 February 2003 Sydney; A Trahan, ‘The International Institute for the Unification of Private Law: An Overview of the Organisation and its Work’ (Justice to Order: Adjustment to Changing Demands and Co-ordination Issues in the justice System in Canada 1998) available (for a fee) at <<http://www.ciaj-icaj.ca/en/events/past-annual-conferences/289-1998-justice-to-order-adjustment-to-cha>> accessed 21 September 2014.

¹²³ R David, ‘The Methods of Unification’ (1968) 16 Am.J.Comp.L. 13, 19; A Farnsworth, ‘Unification and Harmonization of Private Law’ (1996) 27 Can.Bus.L.J. 48; A Rosett, ‘Unification, Harmonisation, Restatement, Codification, and Reform in International Commercial Law’ (1992) 40 Am.J.Comp.L. 683; S Dean and C Kelly, ‘Introduction: Ruling the World’ (2009) 34 Brook.J.Int’l L. 597; R Ashby Pate, ‘The Future of Harmonization: Soft Law Instruments and the Principled Advance of International Lawmaking’ (2010) 13 Touro Int’l Law Rev. 142

¹²⁴ A description of the Forms is available at <<http://www.fidic.org>> accessed 21 March 2014.

¹²⁵ Although these are rare given that the forms of contract contain arbitration agreements.

objective of a varying degree of functional uniformity can be observed¹²⁶ and Schmittoff long ago appeared to consider them a useful tool of harmonisation.¹²⁷

2.3 Features of Uniformity

Some clear concepts or features relating to uniformity are now emerging from the initial idea resulting from involuntary and market driven means, that there must be functional similarity; that this is applicable in the context of international trade and that international trade has prompted the formulation of various types of voluntary international norms which are designed to promote uniformity.

2.3.1 Functional Similarity

The examination of modern uniform laws suggests that uniformity can help international trade where it is represented by similarity of rules or laws that can govern commercial relationships between those who trade so that they can have a measure of predictability and security in their dealings. This may be referred to as the desire for functional similarity of the rules of international trade. The similarity has the function of the harmonisation of international trade laws. With this desire for uniformity or functional similarity emerged various methods to its attainment, some of which were natural or market driven and some designed. Of the market driven or natural ones the foremost are ‘Diffusion’ and ‘Convergence’.

2.3.1.1 Diffusion as a Method of Functional Similarity

Diffusion is a term introduced by Twining to describe the practice of the laws of one country being adopted by another via various methodologies: ‘when one legal order, system or tradition influences another in some significant way’.¹²⁸ The most prominent

¹²⁶ Described by Cremades and Plehn (n 74) as a ‘permanence and stability that goes far beyond any particular transaction’.

¹²⁷ C Schmitthoff, ‘The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions’ (1968) 17 Int’l & Comp. L.Q. 552.

¹²⁸ W Twining, ‘Diffusion of Law: A Global Perspective’ (2004) XX J Legal Plur 4-5.

of the diffusion methodologies is probably the one Watson named ‘legal transplants’.¹²⁹ When diffusion occurs it is highly unlikely that it will result in perfect reflection of norms as even if a law was transplanted word for word there are a myriad of other factors which are likely to affect the way the law is applied and interpreted by the courts. Whilst textual uniformity is therefore theoretically possible via diffusion, applied uniformity, tested with any strict interpretation, is unlikely to be achieved leaving aside the possibility of a *faux amis* if there are municipal laws which impact on the meaning of the transplanted norm. In fact examples of transplanted textual uniformity are difficult to identify and even where British colonies transplanted laws they rarely did so without a degree of local adaptation.¹³⁰

2.3.1.2 Convergence as a Method of Functional Similarity

Convergence is not so much a method of achieving similarity as a description of how legal systems may naturally over time become more similar: ‘the phenomenon of similar solutions in different legal systems’.¹³¹ It is thus usually a natural result of Diffusion. Convergence is relevant to this analysis to the extent that it demonstrates the informal measures adopted in the early days of the harmonisation movement.¹³² It is generally considered that international commercial arbitration procedures have converged over the last two decades also recognising the role in this played by the NYC and the UML.¹³³ It is also relevant in that arguably the harmonising effect of the UML is an example of convergence:

¹²⁹ A Watson, *Legal Transplants*, (Scottish Academic Press 1973); A Watson, ‘Legal Transplants and European Private Law’ vol 4.4 E.J.C.L. (December 2000) available at <<http://www.ejcl.org/44/art44-2.html>> accessed 21 March 2014.

¹³⁰ For example the arbitration laws of the colonies were based on the Arbitration Act 1950 and usually had a measure of local adaption which increased in successive modifications of arbitration laws, whether before or after decolonisation. By way of example this can be seen in the laws of Hong Kong, Singapore, Malaysia, India, Australia and Cyprus.

¹³¹ Mistelis (n 82) 1069.

¹³² Although Rosett believes that it is the only true form of uniformity (n 123).

¹³³ Redfern and Hunter (n 103).

The digest recently published by UNCITRAL and discussed in this collection of essays has revealed a significant degree of convergence in judicial decisions that interpret and apply the provisions of the Model Law.¹³⁴

The first concept is the functional similarity required by the sharing of international norms. It is the functional similarity of shared norms which is the objective and although this is a descriptor of an objective rather than the meaning of a word, this may actually be the best way of defining the word in the context of international trade. Mazzacano masterfully tests the meaning of uniformity by analogy of the criticism of rules as laws by the Legal Realists.¹³⁵ The Legal Realists' criticism of domestic laws focuses on the open textured and indeterminate nature of rules and, of course, the theory is that it is the underlying social interests and public policy which dictate judicial decision-making. By analogy the Legal Realists would also be critical of conventions or treaties as uniform law instruments as the judicial decision-making would depend less on the words and more on social interests and public policy which can differ from country to country.¹³⁶ Uniformity is thus an impossible objective for the Legal Realist unless the world progresses to a utopian single State with universal social interests and public policy. Mazzacano circumvents the argument by relying on Honnold's concept of *lingua franca*,¹³⁷ the provision of an 'international acceptance of similar norms'. He calls this the 'Neo-Realist approach' which:

[I]dentifies the values and norms underlying the technical rules of international sale of goods law. From this perspective, the CISG would be an attempt to harmonize not just rules, but more importantly, the values about the conduct of international sales transactions.

¹³⁴ F Bachand and F Gelinas, 'Introduction' in F Bachand and F Gelinas (eds), *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (JurisNet 2013).

¹³⁵ P Mazzacano, 'Harmonizing Values, Not Laws: The CISG and the Benefits of a Neo-Realist Perspective' (2008) *Nordic Journal of Commercial Law* 1.

¹³⁶ The need for the judicial development of a restrictive definition of 'public policy' for the purposes of the NYC rather proves this point in a very limited context.

¹³⁷ J Honnold, 'The Sales Convention in Action – Uniform International Words: Uniform Application?' (1988) 8 *J.L. & Com.* 207.

This leads Mazzacano to his conclusion of functional uniformity which he does not define dogmatically but instead suggests that it ‘must be differentiated from ‘absolute’ or ‘strict uniformity’. It is closer to the concept of ‘harmonization’ in that the goal is to lessen the legal impediments to international trade.’¹³⁸ This provides a strong indicator of how uniformity could be tested save that it is necessary to establish the degree of uniformity achieved which will qualify as a functional uniformity (Mazzacano also refers to the concept as ‘relative uniformity’). However, there is still some uncertainty as to precisely what is anticipated by a functional uniformity test. A linkage to the commercial objective could help:

One criterion for evaluating any codification of international legal norms is the degree to which the effort enhances certainty -- a quality of law that facilitates common understanding among parties to international contracts and fosters uniform application of international law in national courts.¹³⁹

But there is no methodology to evaluate or harder still to identify ‘the degree to which the effort enhances certainty’. The criterion suggests a test of predictability which is hard to test. It is necessary to identify objective criteria. This leads to the second concept.

2.3.2 Textual Uniformity

The second concept is the requirement for uniformity of the written word or ‘textual uniformity’. This is very important because if the objective is to have the same or a similar result this will be unlikely if there is no textual uniformity. It should be considered therefore as the first step in the achievement of an objective of functional uniformity and must inevitably feature in this thesis’ assessment of whether the UML is achieving functional uniformity.

It is clear that complete or strict textual uniformity is difficult to achieve. The closest it comes is with treaties or conventions and even then it is usually possible for

¹³⁸ Mazzacano (n 135) 2 (n 10).

¹³⁹ Law Student, ‘Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods’ (1984) 97 Harv.L.Rev. 1984, 1985.

reservations to be made. If uniformity is considered in the context of its various practical applications above, it must be accepted that it cannot be given a strict or absolute interpretation. If textual uniformity is part of the process toward applied uniformity, there seems no reason why the matter of degrees of similarity which it is suggested by Andersen forms part of the definition of applied uniformity cannot also apply to textual uniformity and the objective of functionality is equally applicable to the analysis of textual uniformity:

Textual uniformity is thus not uniformity at all, but an expressed goal towards it. Only the application of textual uniformity will reveal whether similar results are reached and whether the goal of uniformity, of varying degrees, is reached and the textual uniformity thus becomes actual. But it must be noted that textual uniformity is also a question of degrees of similarity, just like applied uniformity, and not an absolute.¹⁴⁰

2.3.2.1 Perceived Limitations of Textual Uniformity

It is clear of course that textual uniformity is only the first step. Amissah suggests: ‘The selection of uniform rules and uniform laws is not enough, as this does not ensure their uniform application, without which the purpose of establishing uniform law is largely defeated.’¹⁴¹ Andersen states that ‘any drafted text purporting to be a uniform law is nothing until it is applied uniformly as law. It is in the sphere of application that uniformity is created, not in that of drafting’.¹⁴² Implicit in this view is that uniformity is primarily or even purely a result-focused analysis. In other words only applied uniformity is equal to uniformity in law.¹⁴³ However, it will be impossible to assess the achievement of uniformity where there are no examples of application by a State’s courts of texts and given the desirability of achievement of uniformity to promote international trade it cannot have been the intention of drafters of international norms (or fair or motivating to them and others) that the success of their efforts was to be judged purely by the results in terms of the courts’ decision making. Moreover laws

¹⁴⁰ Andersen (n 114) 44.

¹⁴¹ Amissah (n 114) 24.

¹⁴² Andersen (n 114) 41.

¹⁴³ For example Andersen (n 114) who sees the similarity of a text as a necessary first step towards its uniform application.

exist not only to guide courts and arbitrators but also those who are subject to them. In this way there is an intrinsic value in textual uniformity itself. Textual uniformity is therefore not only important as a step toward applied uniformity but also as a motivating factor toward the growth of uniformity of laws in international trade. Therefore it can be fairly assessed whether textual uniformity (to a degree) has been achieved and it can be fairly assessed whether textual similarity has given forth to applied uniformity or whether in a uniform law's application the courts have undone its textual uniformity. In Chapters 4 to 6 of this thesis the relationship between textual and applied uniformity will be considered and in particular whether textual uniformity is a prerequisite of applied uniformity.

2.3.3 Requirement of Flexibility for Uniformity

Rose suggests that the flexibility provided by a model law is actually a positive for the pursuit of uniformity. First, it will allow the adopting domestic legislation to take place in situations where a treaty is not possible. Secondly, the judiciaries may then interpret laws in a harmonising way (whether they do so is the 'acid test'). If they do so the model law has a harmonising effect:

The outcome of adopting a more flexible approach may in the minds of the purist uniform lawyer not be in a strict or rigorous analytical sense uniformity of law but it is more likely in a practical sense, and often over shorter periods of time, to achieve a much closer and workable alignment of internal private law - a harmonisation at least.¹⁴⁴

Arbitration commentators commonly use the term uniformity in a rather loose manner and clearly consider uniformity not in a strict or absolute sense. For example in the Goff Lecture of 2007 Brower stated: 'The past two decades undoubtedly have seen an increase in uniformity of both arbitration rules and national legislation.'¹⁴⁵ He could not have been referring only to the NYC. His reference to 'arbitration rules and national legislation' must refer to the increasing adoption of the UML and the increased use of uniform rules such as the ICC and UNCITRAL Rules. His implicit reference to the

¹⁴⁴ Rose (n 114) 14.

¹⁴⁵ C Brower, 'Whither International Commercial Arbitration? The Goff Lecture 2007' (2008) 24 Arb. Int'l 181, 184.

adoption of the UML being concerned with uniformity suggests that he does not consider uniformity is limited to absolute, or even applied, uniformity. David goes further and suggests that flexibility is even a requirement of the achievement of what he refers to as the ‘international unification of law’, which he distinguishes from ‘uniformization of the rules of law’. He considers it necessary because to ignore national or cultural differences between countries ‘would be the worst enemy of the progress of unification of law’.¹⁴⁶ His views appear similar to the notion of the impossibility of the utopian ideal of the *ius commune*; uniform laws applied uniformly; instead implicitly suggesting that something short of this is acceptable.

It must also be remembered that a uniform law should not solely be tested by how many consistent court decisions have occurred in a number of jurisdictions. A uniform law might have achieved absolute uniformity in its clarity and observance without any need for judicial intervention. This might be utopian but strict uniformity is a utopian concept.¹⁴⁷ If a law is as clear as to be beyond dispute it may have achieved a strict uniformity. This may be unlikely but a uniform law might nevertheless achieve a very high degree of uniformity according to the Andersen definition.

Uniform law international norms can be flexible or vague and still promote textual uniformity.¹⁴⁸ The UNIDROIT Principles (or the *lex mercatoria*) and model laws are inherently subject to modification. They are nevertheless correctly classified as uniform law tools that give rise to a degree of functional textual similarity. This in itself is not necessarily a hindrance to the harmonisation process. Brazil refers to this as a paradox, ‘that schemes of unification that are not binding can be expected to command, or at least to be eligible for, universal acceptance. The liberalization of world trade and the other aspects of globalisation both reinforce and require this kind of rapprochement.’¹⁴⁹ It is also suggested that the flexibility of a model law is more likely to achieve a level of at least textual uniformity.¹⁵⁰ Whilst noting that deviations from the UML by

¹⁴⁶ David (n 123) 15, 19.

¹⁴⁷ J Hobhouse, ‘International Conventions and Commercial Law: the Pursuit of Uniformity’ (1990) 106 L.Q.R. 539.

¹⁴⁸ M Gotti, ‘Vagueness in the Model Law on International Commercial Arbitration’ in V Bhatia, J Engberg, M Gotti, and D Heller (eds), *Vagueness in Normative Texts* (Peter Lang AG 2005) 234, 248.

¹⁴⁹ Brazil (n 122) 314.

¹⁵⁰ Cremades and Plehn (n 74) 323.

implementing States are ‘rare’, Hermann suggests that ‘the built in flexibility of a model law...need not lead to unacceptable degrees of disparity’.¹⁵¹

2.3.4 Applied Uniformity

The fourth feature of uniformity in the context of international legislation is the perceived need for uniformity of interpretation or applied uniformity. Zhang Yuqing eloquently puts it:

The adoption of a uniform legal instrument on international trade implies that we have merely reached the halfway mark along the path to the unification of law in that field. Our objectives have not yet been fully achieved. It is only when a uniform law has been widely and uniformly applied, and accurately and uniformly interpreted, that the intentions and objectives behind the unification of law are ultimately achieved.¹⁵²

This feature, as demonstrated by the discussion about textual uniformity above, may be the least controversial although the most difficult to achieve.¹⁵³ Textual uniformity (or textual functional similarity) is the first step toward uniformity. However other than at possibly the highest theoretical (utopian) level and for the reasons above, absolute

¹⁵¹ G Herrmann, ‘The UNCITRAL Arbitration Law: a Good Model of a Model Law’ 1998 3 Unif.L.Rev. 483, 499; G Herrmann, ‘Does the World Need Additional Uniform Legislation on Arbitration?’ (The Freshfields Lecture) (1999) 15 Arb. Int’l 211.

¹⁵² Z Yuqing, ‘Principles of Interpretation of a Uniform Law and Functions of *Travaux Préparatoires*, Commentaries and Case Collections for Interpretation of a Uniform Law’ (Uniform Commercial Law in the Twenty-First Century, Proceedings of the Congress of the United Nations Commission on International Trade Law, New York, 18-22 May 1992, 41 available at <http://www.uncitral.org/pdf/english/texts/general/Uniform_Commercial_Law_Congress_1992_e.pdf> accessed 3 September 2014).

¹⁵³ ‘Whenever two languages and/or legal systems come into contact with each other, problems in the interpretation of statutes and regulations and in the translation of legal intentions from one language and/or system to the other assume serious importance....The underlying issues in relation to statutory interpretation in many of these cases could either be traced back to differences between the two drafting systems, which may include differences in languages, legal systems, or other socio-cultural factors.’ V Bhatia, C Candlin and J Engberg, ‘Concepts, Contexts and Procedures in Arbitration Discourse’ in V Bhatia, C Candlin and J Engberg (eds), *Legal Discourse across Cultures and Systems* (Hong Kong University Press 2008) 3.

uniformity is not considered a requirement to achieve uniformity in the context of whatever international norm is being assessed. Andersen is surely correct when she states that the goal of uniformity is a question of varying degrees, which will depend on the norm being assessed. This does give rise to a question about how applied uniformity is tested where there is a flexible, varying degrees, test of application. This will be considered in the context of the UML in Chapter 3. It has been seen in the context of CISG that Honnold considers it necessary for a uniform law to harmonise values and norms underlying the text.¹⁵⁴ If this is done when a uniform law is being drafted it will incidentally enhance the likelihood of a uniform interpretation of the law because, if the underlying values and norms have not been taken into account in the drafting of the law, they are likely to compromise a uniform application, although depending on whether in any particular jurisdiction the courts apply a Realist theory. Leaving aside theoretical matters, what is clear is that it is dangerous to make assumptions as to how a uniform law will be interpreted.¹⁵⁵

There are other reasons why courts from different jurisdictions might interpret a uniform law differently, all related to legal methodology. Bodenheimer has identified this as ‘widespread differences in the interpretation of statutes,’¹⁵⁶ utilization of precedents and techniques of argumentation.’ He explains it as follows:

Suppose some jurisdictions applying a unified system of law interpret statutes literally and refuse to extend legislative provisions in a proper case by analogous application, while other jurisdictions are governed in their interpretative approach by the purpose and spirit of statutes rather than by their literal text. In that event, an identical statute used by these two jurisdictions might produce totally divergent and irreconcilable results in its application in a litigated case. Suppose, further, that the courts of one jurisdiction in a unified system of law would strictly enforce the doctrine of stare decisis (as the English courts did before 1966), while the courts of another jurisdiction would feel free to overturn precedents felt to be antiquated or inadequately reasoned; in that event an initial semblance of legal

¹⁵⁴ Honnold (n 137).

¹⁵⁵ V Bhatia and C Candlin, ‘Analysing Arbitration Laws across Legal Systems’ *Hermes Journal of Linguistics* vol 32 (2004) 13, 33.

¹⁵⁶ See also Mazzacano (n 135) 21.

unity would tend to erode quickly. Suppose, lastly, that some jurisdictions operating under a unified law accept only argument based on a formalized source of law, while the courts of another jurisdiction permit arguments of policy, equity, and justice to enter into the decision in certain types of cases: this again would be a causative factor in an ultimate failure of the unification effort.¹⁵⁷

Bonell also identifies the risk of inconsistent applications of a uniform law but recognises the incorporation of provisions such as Article 7 of the CISG or Article 2A of the UML could mitigate this risk.¹⁵⁸

2.3.5 Uniformity and Harmonisation

The words uniformity and harmonisation have tended to be used in this thesis either interchangeably without any clarity whether they mean the same thing. This thesis is not alone in this as there is not much scholarly analysis of the difference, if any, between the terms. Andersen, referring to Spanogle¹⁵⁹ and Goode,¹⁶⁰ suggests a difference:

Another term which is frequently used in the context of globalisation, but is not as widely defined as legal diffusion is harmonization, which is often wielded as a collective descriptor in legal disciplines for all attempts to bring about some form of legal similarity, including uniformity. Uniform laws are perceived as a sub-category for some scholarly attempts to categorise harmonization techniques, with the uniform laws as the goal and the harmonization as the process.¹⁶¹

¹⁵⁷ Bodenheimer (n 70) 77.

¹⁵⁸ M Bonell, 'International Uniform Law in Practice – Or Where the Real Trouble Begins' (1990) 38 Am. J.Comp.L. 865, 866; Law Student also doubts whether the courts of one jurisdiction will respect the decisions of another (n 139) 1998; Mazzacano identifies such a lack of respect of the Canadian courts in their application of the CISG: P Mazzacano, 'Canadian Jurisprudence and the Uniform Application of the UN Convention on Contracts for the International Sale of Goods' (2006) 18 Pace Int'l L.Rev. 3.

¹⁵⁹ J Spanogle, 'The Arrival of Private International Law' (1991) 25 George Washington Journal of International Law and Economics 477.

¹⁶⁰ R Goode, 'Reflections on the Harmonisation of Commercial Law' in Cranston and Goode (eds), *Commercial and Consumer Law, National and International Dimensions* (Clarendon Press 1993).

¹⁶¹ Andersen (n 114) 28. See also D Leebron, 'Claims for Harmonization: A Theoretical Framework' (1996) 27 Can.Bus.L.J. 63, 67.

UNCITRAL itself does not seem to attach great significance to any difference between the two terms. In the General Assembly Resolution which introduced the UML there is reference to both terms.¹⁶² The resolution suggests that a unified legal framework can achieve harmonious international economic relations. In other words a unified legal framework achieves harmonisation. This may not accord with those, including Andersen, who suggest that uniformity is or may be a sub-category of harmonisation. However perhaps this actually reconciles the views as both Andersen and UNCITRAL have harmonisation as the higher-level concept.¹⁶³

Mustill differentiates the concepts and his approach to the meaning of these terms could therefore dictate that uniformity can only mean absolute uniformity¹⁶⁴ with harmonisation therefore relegated to something less than uniformity. Logically it could be suggested that something less equates with Andersen's definition of similarity to varying degrees. It is certainly possible to approach the relationship between these terms in this way, with the test of uniformity being in absolute terms, and a secondary test of uniformity in varying degrees, also known as harmonisation. However the UML is not intended to provide absolute uniformity and it is not helpful to identify what might be minor differences in its application and conclude it is not uniform. Mustill's idea of uniformity might be better described as the pursuit of a unified law rather than the pursuit of the international unification of law. Moreover if the objective of uniformity is harmonisation of laws leading to a functional improvement of international trade, it may not matter whether the conclusions relate to the achievement

¹⁶²General Assembly Resolution 40/72 11 December 1985 available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NRO/477/79/IMG/NRO47779.pdf?OpenElement> accessed 13 September 2014 para 1.4.

¹⁶³Andersen (n 114); M McIlwrath, 'Anti-Arbitration: Would you Prefer a Harmonized Approach or Just a Better One?' Kluwer Arbitration Blog, 22 Dec 2011 available at <<http://kluwerarbitrationblog.com>> accessed 4 January 2012 considers harmonisation in the context of arbitration to be the mixing of practices between jurisdictions to achieve a balance.

¹⁶⁴ See for example Page 23 above; see also for example T Keily, 'Harmonisation and the United Nations Convention on Contracts for the International Sale of Goods' Nordic Journal of Commercial Law 2003 1 available at <http://www.njcl.utu.fi/index.php?issue=1_2003> accessed 3 September 2014. Paulsson also differentiates between 'common' and 'harmonized' rules in the context of the UML: J Paulsson, *The Idea of Arbitration* (OUP 2013) 175.

(or not) of uniformity or harmonisation provided that it is clear what functional similarity is desired in the context of the UML.

2.4 Summary of Conclusions to Take Forward

The trends toward uniformity considered in this chapter do not pretend to have an objective of absolute uniformity and all can be said to have been successful to a degree in achieving a measure of functional similarity (at least at the textual level); that is they are sufficiently similar in their texts to help achieve their function, in the case of the UML, of harmonisation of international commercial arbitration laws. The indicator therefore is that uniformity of law in the context of international trade is functional, a matter of degree and not absolute. Andersen defines the term as ‘the varying degree of similar effects on a phenomenon across boundaries of different jurisdictions resulting from the application of deliberate efforts to create specific shared rules in some form.’¹⁶⁵

Therefore, in the context of commercial international trade relationships, as contemplated by the origins of modern uniform laws, the word ‘uniformity’ loosely refers to the desirability of functional similarity of the rules of international trade but falls far short of requiring absolute uniformity (whether textual or applied). Mistelis observed in the quotation at the start of this chapter that such similarity and functional comparative method will lead to convergence and this theory particularly lends itself to the flexibility in textual uniformity provided by a model law.

In subsequent chapters therefore when considering the uniformity specifically required of the UML the concept or objective of relative (that is to a degree) functional similarity and the concepts of relative textual and applied similarity will be foremost and provide the framework for identifying suitable methodologies for achieving the aims of this thesis.

¹⁶⁵ Andersen (n 114); see also Amissah (n 114).

CHAPTER 3: UNIFORMITY IN THE UNCITRAL MODEL LAW

[T]he Model Law's basic objective and purpose are better served by the internationalist interpretive approach, as the adoption of such an approach will significantly reduce the risk that domestic courts will interpret and apply the Model Law's provisions in idiosyncratic and counterproductive ways.¹⁶⁶

3.1 Objective of Uniformity in the UML

UNCITRAL's *raison d'être* is to be the:

[C]ore legal body within the United Nations system in the field of international trade law, [with a mandate] to co-ordinate legal activities in this field in order to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law.¹⁶⁷

Research into the history of the UML reveals little about the overall objectives or aims of those who gathered in New York in the early nineteen eighties. The UML protagonists might say they are obvious and this is essentially confirmed in the General Assembly Resolution introducing the UML.¹⁶⁸ Broches, who was involved, states:

More importantly, the participants in the consultative meeting were of the unanimous view that it would be in the interest of international commercial arbitration if UNCITRAL would initiate steps leading to the establishment of uniform standards of arbitral procedure and that preparation of a model law on

¹⁶⁶ F Bachand, 'Judicial Internationalism and the Interpretation of the Model Law: Reflections on Some Aspects of Article 2A' in F Bachand and F Gelinas (eds), *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (JurisNet 2013) 237.

¹⁶⁷ General Assembly Resolution 40/71 40 GAOR Supp. No. 53 A/40/53 307 available at <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/477/78/IMG/NR047778.pdf?OpenElement>> accessed 11 September 2014.

¹⁶⁸ General Assembly Resolution 40/72 11 December 1985 available at <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/477/79/IMG/NR047779.pdf?OpenElement>> accessed 13 September 2014.

arbitration would be the most appropriate way to achieve the desired uniformity.¹⁶⁹

When the Commission first met to discuss the proposal, which had been put forward by the Asian-African Legal Consultative Committee on International Commercial Arbitration, their initial focus was not about the level of uniformity but more about the method of implementing the proposal.¹⁷⁰ The *travaux préparatoires* contain little about the uniformity objective but it seems to underlay all considerations. As suggested above, the objective of harmonisation is an UNCITRAL fundamental and given that the method of promoting this was to be a model law and not a convention, the drafters' attention was surely on flexibility and compromise, in having a model law that was going to be acceptable to most countries. Clearly it would be better if the model law were adopted with the least amount of changes in order to better promote harmonisation and uniformity.¹⁷¹

The NYC had been enacted some twenty odd years earlier and it was the main objective of that instrument to achieve harmonisation and uniformity of enforcement of arbitration awards. The UML was the next step in the arbitration world's progress toward global uniformity and harmonisation of arbitral procedures, providing the necessary buttress in support of globalisation. Indeed the UML may in fact have been a sop to those who proposed a revised NYC when it was considered too difficult to revise it.¹⁷² As stated by the UNCITRAL Secretary General 'harmonisation of the enforcement

¹⁶⁹ A Broches, 'The 1985 UNCITRAL Model Law on International Commercial Arbitration: An Exercise in International Legislation' (1987) 18 NYIL 3.

¹⁷⁰ H Holtzman and J Newhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer 1994) 10, 1163-1164; G Herrmann, 'Introductory Note on the UNCITRAL Model Law on International Commercial Arbitration' 1985 1 Unif.L.Rev. 285; W Slate, S Lieberman, J Weiner & M Micanovic, 'UNCITRAL Its Workings in International Arbitration and a New Model Conciliation Law' (2004-05) 6 Cardozo Journal of Conflict Resolution 73.

¹⁷¹ Explanatory Note by UNCITRAL Secretariat on the Model Law on International Commercial Arbitration para 3. This document is published together with the 1985 UML and is available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 22 March 2014.

¹⁷² The genesis of the UML was a meeting of the Asian-African Legal Consultative Committee on International Commercial Arbitration in Kuala Lumpur in July 1976. At this meeting it was decided to propose to UNCITRAL that a supplement to the NYC was needed to deal with certain gaps or defects.

practices of jurisdictions and the judicial control of the arbitral procedure, could be achieved more effectively by promulgation of a model or uniform law, rather than by any attempt to revise the New York Convention'.¹⁷³ The UML is arguably therefore a *de facto* supplement to the NYC by those jurisdictions who have enacted the NYC and adopted the UML. As such it was natural for there to be little discussion about the objectives as it is likely they were assumed.

Perhaps this assumption was not shared globally. Certainly those expected to implement the UML into their domestic laws were told of the intentions in the resolution in 1985 which recommended to jurisdictions the adoption of the UML when it spoke of the UML contributing to 'harmonious international economic relations' and a 'unified legal framework' and also of the desirability of 'uniformity of the law of arbitral procedures'.¹⁷⁴ The UNCITRAL intended a unified approach because the Resolution also requested the UN Secretary-General to forward, along with the text of the UML, the *travaux préparatoires*. The *travaux préparatoires* contain little about the need for uniformity but do contain a very large volume of subjective views of the protagonists in arriving at the words for each Article of the UML. The clear implication is that with the aid of the *travaux préparatoires* arbitral tribunals and the courts of jurisdictions would be able to obtain assistance in order to arrive at proper or consistent interpretations of the UML. Some jurisdictions reinforced this by specifically referring to the *travaux préparatoires* as an aid to interpretation in the domestic law implementing the UML.¹⁷⁵

This was taken to UNCITRAL and the decision, was to deal with the concerns by way of a model law: Holtzman and Newhaus (n 170) 1160-1237 contains a detailed legislative history of the UML. The ostensible (and perfectly legitimate) reason for preferring the model law approach to that of a supplement to the NYC was that the proposals made by the AALCC extended beyond the scope of the NYC. More recently it has been suggested that revisions to the NYC could be effectively achieved by amending Article 34 of the UML; E Gaillard, 'Is There a Need to Revise the New York Convention' [2008] DRI 2, 187.

¹⁷³ Report entitled '[S]tudy on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' UN Doc. A/CN. 9/168 available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/902/27/PDF/NL790227.pdf?OpenElement>> accessed 13 September 2014.

¹⁷⁴ Resolution (n 167); See also R Sorieul, 'The Influence of the New York Convention on the UNCITRAL Model Law on International Commercial Arbitration' (2008) 2 DRI 27.

¹⁷⁵ For example Hong Kong in the HKAO.

The 1985 UML contains an Article entitled “*Definitions and Rules of Interpretation*” but this article contains nothing about the goal(s) of harmonisation or uniformity. The Secretariat’s Explanatory Note does however state:

The General Assembly, in its resolution 40/72 of 11 December 1985, recommended “that all States give due consideration to the [UML], in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.”

The Model Law constitutes a sound and promising basis for the desired harmonization and improvement of national laws.¹⁷⁶

The Note goes on to explain why the UML will assist in the development of international arbitration by providing the consistency required in international trade. This of course relates to the textual uniformity process. The other official texts to assist in the interpretation of the UML and commonly regarded as the most important *travaux préparatoires*¹⁷⁷ are the Secretary-General’s Report containing the Analytical Commentary¹⁷⁸ and the UNCITRAL Report on the work of the eighteenth session where the UML was recommended for adoption.¹⁷⁹ Neither of these documents expressly considers harmonisation or uniformity and despite an exhaustive search of the *travaux préparatoires* no useful consideration of this can be located and neither does there appear to have been recorded any discussion about whether an equivalent to CISG Article 7(1) should have been included.

This was a modest beginning for any push for uniformity of arbitral procedures, even more so when it is considered that the tool of an equivalent of the CISG Article 7(1)

¹⁷⁶ Explanatory Note (n 171).

¹⁷⁷ For example these were the documents listed as *travaux préparatoires* in the Hong Kong adoption of the UML in 1989.

¹⁷⁸ The report of the Secretary-General dated 25 March 1985 and entitled ‘Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration’ (UN document A/CN.9/264 available at <<http://www.uncitral.org/uncitral/en/commission/18th.html>> accessed 22 March 2014).

¹⁷⁹ The report of UNCITRAL on the work of its eighteenth session (3-21 June 1985) (UN document A/40/17 available at <<http://www.uncitral.org/pdf/english/yearbooks/yb-1985-e/vol16-p3-46-e.pdf>> accessed 11 September 2014).

was available but not used.¹⁸⁰ There is therefore very little primary materials directly on the UML which will help either in identifying the UML meaning of harmonisation and uniformity or in formulating the appropriate methodology of interpretation, at least of the pre Article 2A UML. However, given the importance of the object and purpose of the UML, to a teleological approach to interpretation, suffice to state at this point that harmonisation and unification of arbitration laws is the underlying object and purpose of the UML. Gelinas suggests that the jurisdictions which adopt the UML ‘not only implements the provisions of a uniform law instrument, but also explicitly adopts the harmonisation objective underlying the dissemination and adoption of that instrument.’¹⁸¹

3.1.1 The CISG Article 7¹⁸²

An intriguing phenomenon can be observed. Most of the scholarly writing on uniformity has as its context the CISG which is another UN document but implemented 5 years ahead of the UML. The Article in the CISG which has attracted much attention is Article 7:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

¹⁸⁰ In an interesting gloss, when Hong Kong adopted the UML in 1989 it added an interpretation provision which appears based on CISG Article 7(1): ‘In interpreting and applying the provisions of the UNCITRAL Model Law, regard shall be had to its international origin and to the need for uniformity in its interpretation, and regard may be had to the documents specified in the Sixth Schedule.’ HKAO Section 2(3).

¹⁸¹ F Gelinas, ‘Peeking Through the Form of Uniform Law: International Arbitration Practise and Legal Harmonization’ (2010) 27 J. Int’l Arb. 317.

¹⁸² See generally R Goode, H Kronke and E McKendrick (eds), *Transnational Commercial Law: Text, Cases and Materials* (OUP 2007) paras 7.36-7.65.

The specific direction to ‘promote uniformity in its application’ is what some scholars suggest is the genesis of the ‘global jurisconsultorium’¹⁸³ which is essentially a ‘jurisprudence of international trade’¹⁸⁴ as regards the CISG and a jurisprudence of international arbitration as regards the UML. There is an unequivocal expressed objective of what some refer to as ‘applied uniformity’,¹⁸⁵ the similarity of results or decision making by jurisdictions’ courts. This can be contrasted with the UML. The 1985 UML did not contain an equivalent of Article 7(1) and the only reference to the objective of uniformity was contained in the introductory Resolution.¹⁸⁶ The Resolution did not expressly refer to the need for applied uniformity. Instead it referred to the need for a ‘unified legal framework’ which is probably a reference to ‘textual uniformity’¹⁸⁷ and the desirability of ‘uniformity of the law of arbitral procedures’,¹⁸⁸ which is a vague expression. This leads on to consideration of an equivalent to the CISG Article 7 for the UML.

3.1.2 Omission of the CISG Article 7 Equivalent from the UML

It would appear that the omission of an Article 7 equivalent from the initial UML was due to a deliberate decision of the Commission although the reasons for such omission are not easy to discern.¹⁸⁹ This is surprising given the expressed UNCITRAL objective

¹⁸³ An expression apparently introduced by V Rogers and A Kritzer, ‘A Uniform International Sales Law Terminology’ in Schwenzer and Hager (eds), *Festschrift für Peter Schlechtriem zum 70 Geburtstag* (Siebeck 2003) 223, 227. Explained and defined further by Andersen as ‘a concept of sharing and consultation across borders and legal systems in the aim of producing autonomous interpretation and application of a given uniform law’: CB Andersen, ‘Defining Uniformity in Law’ (2007) 12 *Unif. L. Rev.* 5.

¹⁸⁴ A Kastely, ‘Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention’ (1988) 8 *Nw. J. Int’l L. & Bus.* 574, 601.

¹⁸⁵ CB Andersen, ‘*The Uniformity of the CISG and its Jurisconsultorium: An Analysis of the Terms and a Closer Look at Examination and Notification*’ (PhD Thesis Aarhus School of Business, 2006) 57.

¹⁸⁶ Resolution (n 168).

¹⁸⁷ H Flechtner, ‘The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)’ (1998) 17 *J.L. & Com.* 187 and subsequently developed by Andersen (n 185).

¹⁸⁸ Resolution (n 168).

¹⁸⁹ S Bazinas, ‘Uniformity in the Interpretation and the Application of the CISG: The Role of Clout and the Digest’ in UNCITRAL-SIAC Conference *Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods* (SIAC 2006) 18, 18.

of ‘Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade’.¹⁹⁰ This could be because the Commission did not regard a model law as a uniform law because of the uncertainty of its textual uniformity.¹⁹¹

3.1.3 The 2006 Revisions to the UML

In 2006 UNCITRAL promulgated revisions to the 1985 UML as well as a recommended interpretation of an article in the NYC. The UN Resolution recommending the revisions to the UML and the NYC interpretation recalled the same obscure language of the 1985 document as regards the UML revisions but went further as regards the suggested interpretation of the NYC:

Believing that, in connection with the modernization of articles of the [UML] the promotion of a uniform interpretation and application of the [NYC], is particularly timely.¹⁹²

The difference in treatment of the recommendations between the UML and the NYC is surprising especially when one of the revisions to the UML was the addition of Article 2A, comprising an equivalent to Article 7 of the CISG:

¹⁹⁰ General Assembly Resolution 2205 (XXI) Establishment of the United Nations Commission on International Trade Law 17 December 1966 para 8(d) which is in the UNCITRAL Yearbook Vol 1: 1968-1970 65.

¹⁹¹ Ibid para 8(c) which contains a reference to ‘model laws and uniform laws’ suggesting a difference between them in the eyes of UNCITRAL.

¹⁹² General Assembly Resolution 61/33 4 December 2006 available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/496/41/PDF/N0649641.pdf?OpenElement>> accessed 5 November 2013. This wording goes further than the expressed intention of the Final Act in 1958 which stated: ‘greater uniformity of national laws on arbitration would further the effectiveness of arbitration’ available at <<http://daccess-dds-ny.un.org/doc/UDDOC/GEN/N58/293/82/PDF/N5829382.pdf?>> accessed 7 January 2014; although the current official stated objectives of the NYC are to ‘provide common legislation standards’ in respect of recognition and enforcement: see <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html> accessed 7 January 2014.

(1) In the interpretation of this 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 Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

It is surprising that the introduction of such a ‘potentially fundamental’¹⁹³ provision appears to have been the subject of very little legislative history or discussion either in the UNCITRAL Working Group or the Commission.¹⁹⁴ One year earlier an equivalent provision had been included in the Model Law on Electronic Communications because it ‘was a standard provision in UNCITRAL texts’.¹⁹⁵ In addition and of perhaps more relevance, in 2002 the equivalent provision had been included in the UNCITRAL Model Law on International Commercial Conciliation.¹⁹⁶ The words of the Commission when approving Article 2A are important:

The Commission considered whether the Arbitration Model Law should include a provision along the lines of article 7 of the United Nations Convention on Contracts for the International Sale of Goods...., which was designed to facilitate interpretation by reference to internationally accepted principles. The Commission observed that similar provisions were included in other model laws prepared by the Commission, including article 3 of the UNCITRAL Model Law on Electronic Commerce.

¹⁹³ R Amissah, ‘Revisiting the Autonomous Contract: Transnational contracting, trends and supporting structures’ (draft document) available at

<<http://www.jus.uio.no/lm/autonomous.contract.2000.amissah/doc.html>> accessed 15 March 2014.

¹⁹⁴ P Binder, *‘International Commercial Arbitration and Conciliation in Model Law Jurisdictions* (3rd ed Sweet & Maxwell 2010) para 1-062.

¹⁹⁵ Report of the UNCITRAL Commission on the work of its thirty-eighth session, 4-15 July 2005, Supplement No. 17 (A/60/17) para 39 available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V05/868/63/PDF/V0586863.pdf?OpenElement>> accessed 22 March 2014.

¹⁹⁶ Article 2 available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf> accessed 21 December 2014.

The Commission agreed that the inclusion of such a provision would be useful and desirable because it would promote a more uniform understanding of the Arbitration Model Law.¹⁹⁷

This superficial treatment is surprising and particularly so given the structural differences between the CISG Article 7 and the UML discussed below (relevant also to the Model Law on Electronic Commerce).

3.2 Two Interpretative Regimes for the UML

At the time of the inclusion of Article 2A there was already in excess of 60 jurisdictions that had enacted municipal legislation based on the UML including Hong Kong, Singapore and Australia. Assuming that the jurisdictions which enacted legislation based on the UML in future would include Article 2A, this would mean that there would be two UML regimes in play. One having an approach to uniformity possibly quite different to the other.¹⁹⁸ Whether this is the case will be examined in this chapter but *prima facie* the inclusion of Article 2A in the UML was potentially profound. It also needs to be considered what the position would be if a jurisdiction decided not to include Article 2A in its enactment of the UML. Indeed this has happened with Singapore.¹⁹⁹ The 2010 amendments to the SIAA which were specifically put forward to bring the law up to date with the UML following the 2005 amendments to the UML, do not include Article 2A. The documents related to the 2010 Amendments do not

¹⁹⁷ Report of the UNCITRAL Commission on the work of its thirty-ninth session, 19 June-7 July 2006, Supplement No. 17 (A/61/17) para 174-175 available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V06/558/15/PDF/V0655815.pdf?OpenElement>> accessed 22 March 2014.

¹⁹⁸ Prior to the introduction of Article 2A Sanders had expressed concern about the prospect of there being a replacement UML. Article 2A does not produce two model laws but his arguments are nevertheless relevant: P Sanders, 'UNCITRAL's Model Law on International Arbitration: Present Situation and Future' (2005) *Arb. Int'l* 21 443, 480.

¹⁹⁹ Also Ireland, New Zealand, Peru and Rwanda although in the cases of Ireland and New Zealand there is a *travaux préparatoires* provision: see T Walsh, '2006 Model Law: Are States Adopting the Law in Letter and Spirit?' *Arb and ADR Review* 3:215, 233.

evidence any reason for this.²⁰⁰ This might mean that Singapore has no interest in promoting uniformity. Another interesting question would be whether any State is really interested in promoting uniformity or simply suffers it in order to promote business and international trade for its country. This is beyond the scope of this thesis and difficult to prove or test in any event. On the other hand the recent HKNAO²⁰¹ which substantially reformed its arbitration law and the IAA (amended in 2010) do include Article 2A and the HKAO contained a similar provision.²⁰² This gives rise to the question whether the courts in Singapore on the one hand and Hong Kong and Australia on the other hand approach the interpretation of the UML differently. This question will be examined in Chapter 5.

3.3 Relevance of Article 7 to the Meaning of Article 2A

The introduction of Article 2A inevitably raises the question whether the voluminous writings on the CISG and Article 7 can be relied upon to provide guidance on the interpretation of Article 2A. An initial problem with such proposition is differences between the CISG and the UML.

3.3.1 Article 7 and Article 2A Compared

There are differences between the CISG Article 7(1) and the UML Article 2A(1): the absence of ‘in international trade’ at the end of paragraph (1) and Article 2A(2) does not end with: ‘or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law’. These differences will be considered in this chapter. For present purposes it is enough to note that although the Resolution appeared to draw a difference between the need for uniform application of the NYC and the need for a unified legal framework of the UML, the introduction of the new Article

²⁰⁰ For example Consultation Paper available at

<<https://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/linkclick967e.pdf>> accessed 7 March 2014.

²⁰¹ Which came into force on 1 July 2011.

²⁰² Section 2(3).

2A and the use of the words ‘uniformity of its application’ in the article itself²⁰³ may have brought the UML to an equivalent position as CISG, regarding the uniformity objective. However the Explanatory Note to Article 2A suggests that it is ‘designed to facilitate interpretation by reference to internationally accepted principles and is aimed at promoting a uniform understanding of the Model Law’ which falls somewhat short of applied uniformity.²⁰⁴

3.3.2 Conceptual Differences between the CISG and the UML

UNCITRAL covers a number of areas of international trade. However a law dealing with the rules of dispute resolution and in particular the UML is very different from a law such as the Model Law on Electronic Commerce or CISG which have as their objectives the setting out of clear rules of commerce which are intended to have the effect of avoiding disputes. This difference is of particular importance when the inclusion of the concept of good faith in the context of rules of arbitration is considered. It is very surprising that there appears to have been no discussion about this.

Article 7 of the CISG has received more detailed treatment by scholars than any other part of the CISG.²⁰⁵ It has been described as; the ‘crowning statement of the importance of uniformity’²⁰⁶ and ‘a key provision to the uniformity of the CISG’.²⁰⁷ Its importance to the uniformity and methodology of interpretation in CISG is undoubted and profound

²⁰³ Compare this however with the words of the Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session (n 197) para 175: ‘The Commission agreed that the inclusion of such a provision would be useful and desirable because it would promote a more uniform understanding of the Arbitration Model Law.’

²⁰⁴ Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, para.4 available at < http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 5 November 2013; see also *ibid*.

²⁰⁵ The amount of material on the CISG and in particular Article 7 is almost staggering. Most of it is gathered and available at the CISG Database available at < <http://www.cisg.law.pace.edu/>> accessed 13 September 2014.

²⁰⁶ Flechtner (n 187) 188.

²⁰⁷ Andersen (n 185) 89.

but the question is whether the introduction of Article 2A has had the same effect on the UML.²⁰⁸

3.3.3 Structural Differences between the CISG and the UML

The introduction of Article 2A into the UML was uncontroversial, possibly opportunistic but certainly with the expressed goal of uniformity. This may have been because of a feeling within UNCITRAL of failure of the UML to achieve uniformity in the way initially intended by the UML. This could have been because of the alterations made to the UML by those jurisdictions which adopted it or because of a failure of courts to apply the UML in a uniform way. When it was introduced the Commission would have known that there were court decisions from various jurisdictions dealing with Article 7 as well as volumes of scholarly works. Before taking a close look at the meaning of Article 2A by reference to materials on Article 7 it is necessary to consider whether this is a valid comparison. It is certainly valid from the perspective of similarity of wording. There are differences but this will not invalidate comparison provided that the differences are taken into account in the analysis. There are however three important structural differences between the UML and the CISG.

First the UML is a model law and the CISG is a convention. Binder identifies that this structural difference is something that was not (but perhaps should have been) considered by the UNCITRAL Commission when it was introduced into the UML:

No mention is made of the fact that the CISG has the status of a convention, i.e. a fixed text shared by the contracting States that have a certain interest in maintaining a joint standard of interpretation. In contrast the Model Law – despite its widespread acceptance – remains a textual suggestion for enactment into a national legislative system, which itself will commonly already provide a regime for the interpretation of its own laws.²⁰⁹

Subject to the reservations allowed by CISG the text will be relatively consistently adopted and therefore the level of textual uniformity will be high.²¹⁰ With the UML no

²⁰⁸Binder suggests that Article 2A ‘as some might say – just restates the obvious.’ (n 194) para 1-062.

²⁰⁹Binder (n 194) para 1-062.

²¹⁰For a contrary view see J Bailey, ‘Facing the Truth: Seeing the Convention on Contracts for the Sale of Goods as an Obstacle to a Uniform Law of International Sales’ (1999) 32 Cornell Int’l L.J. 273. The

such consistency can be assumed although may in fact exist. Whether this would invalidate a comparison is doubtful because the comparison will inevitably and necessarily be subject to differences in particular versions of the UML which may impact on Article 2A. This suggests a challenge, in theory at least, in arriving at a uniform interpretation of Article 2A. The number of jurisdictions which have adopted the UML with Article 2A (or a modified version) included is, as at January 2015, fourteen including Australia and Hong Kong.²¹¹

As suggested by Binder, where particular jurisdictions have rules of interpretation which affect the interpretation of its arbitration law based on the UML and in particular Article 2A, this is obviously something that will have to be considered. This is certainly a further potential challenge to a uniform interpretation of Article 2A but does not in itself invalidate a comparison which assumes a consistent adoption of Article 2A and the absence of any jurisdictional rules of interpretation which result in an interpretation of the UML (not only Article 2A) which differs to that intended by Article 2A.

Secondly, as a convention the CISG is prima facie subject to the VCLT) (for those adopting jurisdictions which are a party to the VCLT).²¹² The UML not being a convention or treaty is not subject to the VCLT or affected by any other treaty. The VLCT contains rules of interpretation including; a treaty must be interpreted in good faith, a reference to a consideration of the *travaux préparatoires* where there is any ambiguity and provision for interpretation where a treaty is authenticated in two or more languages.²¹³

However this structural difference is potentially fatal to any comparison if Article 7 requires an autonomous interpretation of the CISG. An autonomous interpretation

number of reservations to Article 7 are dwindling: see CB Andersen, 'Recent Removals of Reservations under the International Sales Law-Winds of Change Heralding Greater Unity of the CISG' (2012) 8 J.B.L. 698.

²¹¹ Binder (n 194) para 1-063; since that was published it has also been used in the legislation in Australia (including each the States for domestic legislation), Hong Kong, Costa Rica, Lithuania and Georgia (USA).

²¹² This is not beyond doubt: Andersen (n 185) 91-93; Honnold, 'The Sales Convention in Action – Uniform International Words: Uniform Application?' (1988) 8 J.L. & Com. 207. Even on the effect and scope of the VCLT on the interpretation of CISG there is no agreement among scholars.

²¹³ VLCT Articles 31 to 33.

would require the answers to all questions of interpretation to be found within the CISG itself. There is no room for the relevance of any domestic factors or indeed for any other international factors. There is no agreement amongst scholars as to whether the CISG requires an autonomous interpretation. The minority, who suggest it does not, advocate that the principles of interpretation in the VCLT that codify the rules of customary international law are applicable to the CISG.²¹⁴ Although it is unclear that the two approaches result in any different methodology,²¹⁵ it cannot seriously be argued that the UML requires an autonomous interpretation. The UML becomes law, possibly with amendment or supplement, within a domestic piece of legislation (as does the CISG of course) and although requires by reason of Article 2A (and possibly without it) an internationalist approach to interpretation, this is not the same as an autonomous one. If therefore the proper interpretation of Article 7 of the CISG requires an autonomous interpretation, Article 2A must by necessity mean something different in the context of the UML.²¹⁶ Some even suggest that the CISG requires an ‘international jurisprudence’ which seems equivalent to an internationalist approach to interpretation, not an autonomous one.²¹⁷ Bonell suggests an interesting definition of autonomous: ‘according to internationally uniform principles and rules, whereas recourse to domestic law is admitted only as a last resort.’²¹⁸ Diedrich suggests it implies a “supranational

²¹⁴ See for example M Roth and R Happ, ‘Interpretation of the CISG According to the Principles of International Law’ (1999) IV International Trade and Business Law Annual 1, 3. For the contrary argument and specific response to Roth and Happ see B Zeller ‘Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) according to Principles of International Law – a reply’ available at <http://vuir.vu.edu.au/812/1/Zeller_InterpUNConvContracts.pdf> accessed 23 September 2014.

²¹⁵ Roth and Happ (n 214) 705.

²¹⁶ Although Moss considers that both the NYC and UML require autonomous interpretations, surely an aspirational view of the UML: G Moss, ‘Arbitration and Private International Law’ (2008) Int. A.L.R. 153, 154.

²¹⁷ J Chuah, *Law of International Trade: Cross Border Commercial Transactions* (4th ed, Sweet & Maxwell 2009) para 5-04.

²¹⁸ M Bonell, ‘Towards a Legislative Codification of the UNIDROIT Principles’ in *Modern Law for Global Commerce* (UNCITRAL Congress 9-12 July 2007, Vienna available at <http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf> accessed 22 March 2014).

synthesis”.²¹⁹ This is similar to an internationalist approach and highlights the uncertainty over what is being referred to when the word ‘autonomous’ is used.

The third structural difference is related to the purpose of the two instruments. The CISG is intended primarily to govern a contractual relationship between two or more parties who are involved in international trade together concerning the sale of goods. It seeks to govern a private contractual relationship. It seeks to set out an acceptable set of terms and conditions governing the substantive contractual relationship. The UML however does not seek to set out substantive terms governing a private relationship. It does govern private relationships but only on a procedural level once a dispute has arisen and is ready to be arbitrated pursuant to the express terms of the agreement between the two parties who have been involved in international trade. Whether this structural difference has any effect on the interpretation of similar provisions, which appear in both instruments, will depend on the context. It cannot be determined that merely because of this structural difference any comparison is invalid. However this is certainly a feature which could be relevant to the validity of any comparison of similar provisions.

The three structural differences are therefore seen as potentially relevant depending on the context of the question of interpretation being addressed but not immediately requiring the comparison to be declared invalid. To do so would be to ignore the intent of the drafters of the 2006 amendments to the UML who intended the addition of Article 2A to add to the UML in the same way as it has supported an autonomous or internationalist interpretation of the CISG. The structural differences therefore must be borne in mind.

It is therefore considered that the comparison between Article 7 of the CISG and Article 2A of the UML is a valid one and assistance can be gleaned from materials on Article 7 of the CISG. As Binder puts it in his discussion about the equivalent provision in the Model Law on International Commercial Conciliation:

²¹⁹ F Diedrich, ‘Maintaining Uniformity in International Law Via Autonomous Interpretation: Software Contracts and the CISG’ (1996) 8 Pace Int’l L.Rev. 303, 312; see also M Gebauer, ‘Uniform Law, General Principles and Autonomous Interpretation’ (2000) 5 Unif. L. Rev. 683 who regards the expression as a principle rather than method of interpretation, at 687.

Although the minor textual variations to art. 2 of the Model Conciliation Law are evident, the substance of the provision remains the same. Despite the fact that the CISG is a multilateral convention rather than a model law, it is recommended that the scholarly writing and commentaries on art. 7 CISG are referred to as an aid to construing art. 2, this especially so because the immediate travaux of the Model Law reveal little information on the specifics of this provision other than that it was inspired by the CISG provision. The following commentary on the provision will therefore consider some of the views expressed in connection with art. 7 CISG.²²⁰

Binder does not seem to have considered the complexities of the issue but his view is a common sense starting point. It is therefore suggested that it is permissible to consider the approach to CISG Article 7 as being relevant to Article 2A on the basis of a ‘horizontal uniformity’.²²¹

3.4 The Meaning of Article 2A

Article 2A appears to provide a method or rules of interpretation but on analysis what article 2A does is to set out the goals of interpretation.²²² However in aiming for these goals the rules necessary to achieve the goals have to be identified and followed. Much of the commentary on Article 2A is taken up with identifying these unwritten rules.

3.4.1 Article 2A(1)

Article 2A(1) contains the following rules that an interpreter must have regard to:

- the international origin of the UML;
- the need to promote uniformity in its application;
- the observance of good faith.

²²⁰ Binder (n 194) para 10-027.

²²¹ A term used by M Van Alstine, ‘Dynamic Treaty Interpretation’ (2000) 146 U.Pa.L.Rev. 687, 730.

²²² F Ferrari, ‘Uniform Interpretation of The 1980 Uniform Sales Law’ (1994-95) 24 Ga.J.Int’l.& Comp.L. 183, 199; Roth and Happ (n 214) 700.

It is not apparent whether these constitute rules of interpretation or simply objectives of or aids to interpretation, having applied the rules. A comparison can be made with the rules of interpretation in the VCLT, where Article 31 sets out a teleological rule of interpretation where the words of a treaty must be interpreted in the light of its context and purpose. Article 32 sets out a supplementary means of interpretation allowing reference to the *travaux préparatoires* in the case of ambiguity or absurdity. Bachand is of the view that the rules of interpretation of the VCLT are applicable to the UML, whether or not Article 2A is present, because the UML is a transnational normative instrument requiring an ‘internationalist interpretative approach’.²²³ However a number of jurisdictions which adapted the UML sought to direct, by specific legislation, the reader to the *travaux préparatoires* and the Analytical Commentary.²²⁴

Bachand’s analysis initially focuses on the object and purpose directive in VCLT Article 31 as a pre-eminent directive toward the teleological approach to interpretation.²²⁵ However Bachand recognises that a strict teleological approach to interpretation may not lend itself well to the UML as the *travaux préparatoires* and Analytical Commentary are considered to be such an important part of the aids to interpretation available to the courts. Nevertheless given the importance of the object and purpose of the UML it is considered that a teleological approach is appropriate provided that the *travaux préparatoires* and Analytical Commentary are given equivalent weight as an interpretive tool, certainly where Article 2A is present and, Bachand suggests, even when not.²²⁶

²²³ Bachand (n 166) 243. Herrmann similarly refers to the theme of the UML as including ‘internationalisation’ Herrmann (n 170) 295; the word ‘internationalist’ was used in the UNCITRAL Report of the Secretary-General: Possible features of a model law on international commercial arbitration, as an aid to uniformity (A/CN.9/207) available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL8/102/47/PDF/NL810247.pdf?OpenElement>> para 106 accessed 18 March 2015.

²²⁴ For example Hong Kong and Bermuda (as referred to by Bachand (n 166) 184). See also Broches (n 169) 18.

²²⁵ Bachand (n 166) n 11 235.

²²⁶ Bachand (n 166) 249.

Roth and Happ suggest that the uniformity objective in the UML requires an internationalist interpretation reflective of customary international law.²²⁷ This reflects the House of Lords directives in *Fothergill v Monarch Airlines*.²²⁸

3.4.1.1 International Origin

First the interpreter must have regard to ‘the international origin’ of the UML. In the context of the CISG the corresponding expression is ‘its international character’ which is widely understood as a direction to the interpreter to adopt an autonomous interpretation methodology.²²⁹ The words themselves do not appear to give this direction, however the *travaux préparatoires* of the CISG expressly emphasise the importance of avoiding an interpretation of the CISG which is influenced by the methods or concepts used by the legal system of the interpreter.²³⁰

The UML must be adopted into the law of a State by a municipal law. As such the law is a piece of municipal legislation and different types of legal system may have different approaches to the interpretation of a statute giving rise to particular rules of interpretation. In a Common Law system the words are traditionally interpreted literally with less weight being attached to the *travaux préparatoires* or any other materials that are outside the statute itself save for case law.²³¹ However there is an increasing tendency for common law jurisdictions to modify these traditional rules by allowing reference to *travaux préparatoires*, particularly with interpretation of

²²⁷ Roth and Happ (n 214).

²²⁸ [1981] AC 251, 282, 290. In the context of the CISG Zeller suggests that the correct application of CISG Article 7(1) ‘mirrors many of the observations made in *Fothergill*’; B Zeller, ‘Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods’ May 2003 40 available at <<http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>> accessed 15 March 2014.

²²⁹ For example Bazinas (n 189) 19; Bailey (n 210) 287; Diedrich (n 219) 310.

²³⁰ United Nations Conference on Contracts for the International Sale of Goods Vienna 10 March – 11 April 1980 Official Records Documents of the Conference and Summary Records of the Plenary Meetings of the Main Committees 17 (1981) 17 available at <<http://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf>> accessed 22 March 2014.

²³¹ F Bennion, *Bennion on Statutory Interpretation* (6th edn, Lexis Nexis 2013) section 216; D Law, ‘Statutes’ in *Halsbury’s Laws of Hong Kong* 45 (LexisNexis 2012) 917.

international norms.²³² In a Civil Law system there will be little regard to case law and instead the *travaux préparatoires*, scholarly writings and the words themselves will give the answer.²³³

Another but related contrast in approach to interpretation is one cited by Ferrari when he refers to the long debate about how conventions should be interpreted.²³⁴ One school of thought being that they must be interpreted as municipal law because they become part of municipal law. The other being that they should be interpreted in an autonomous way ‘without making reference to the meaning one generally attributes to certain expressions within the ambit of a determined system’.²³⁵ This is a highly complex debate which has been the subject of much academic comment. Like most other commentators Ferrari appears to opt for the autonomous interpretation approach for the CISG but recognises also that an autonomous interpretation is not sufficient, by itself, to produce uniform results.²³⁶ Zeller however does not initially agree that an autonomous interpretation is required and argues, like Roth and Happ²³⁷ that an alternative approach which appears to be more reflective of customary international law principles is persuasive.²³⁸ In his later works however Zeller promotes what he refers to as an autonomous interpretative methodology but which is akin to an internationalist approach methodology.²³⁹ Zeller’s work highlights the lack of an agreed notion of the autonomous method and rather than attempting to identify a proper definition of an autonomous method it is better to identify the actual method and give it a separate

²³² J Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed Kluwer 1999) para 88; Bennion *ibid*; Law *ibid*. See also *Fothergill* (n 228).

²³³ Honnold *ibid*. There are of course many other differences between the two legal systems which may affect interpretation of statutes but it is the high level difference highlighted which is considered material.

²³⁴ Ferrari (n 222) 198.

²³⁵ Ferrari (n 222) 198.

²³⁶ Ferrari (n 222) 203; see also F Ferrarri, ‘Applying the CISG in a Truly Uniform Manner: *Tribunale de Vigevano*, 12 July 2000’ (2001) 6 *Unif. L. Rev.* 203, 205; F Ferrari, ‘Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG’s Autonomous Interpretation by Courts’ in Andersen & Shroeter (eds), *Sharing International Commercial Law; Festschrift for Albert Kritzer on the Occasion of his 80th Birthday* (Wildy & Hill 2008) 13, 134, 139.

²³⁷ Roth and Happ (n 214).

²³⁸ B Zeller, ‘The UN Convention on Contracts for the International Sale of Goods, CISG – a Leap Forward towards Unified International Sales Laws’ (2000) 12 *Pace Int’l L.Rev.* 79.

²³⁹ Zeller (n 228).

name. This is precisely what this thesis will do in referring the correct approach to the interpretation of the UML as being the ‘Internationalist Approach to Interpretation’.

If, therefore the CISG Article 7 is to be interpreted without any influence from the methods or principles of interpretation applied by any particular State, avoiding the ‘homeward trend’,²⁴⁰ almost as a ‘truly independent international body of law’,²⁴¹ the applicable methods and principles of interpretation are necessarily autonomous. Conceptually this is difficult to understand as all lawyers are educated in a method that has well defined principles. Honnold refers to this as a ‘threat to international uniformity..a ..tendency to read the international text through the lenses of domestic law’.²⁴² Sturley identifies this as the reason for inconsistency in the interpretation of uniform laws based on research of the Hague Rules.²⁴³ Gebauer recognizes this difficulty and suggests that autonomous interpretation of Article 7:

[I]s not a method of interpretation in addition to other methods such as literal, historical, teleological or systematic interpretation. Rather, it would seem to be a principle of interpretation that gives preference to a particular kind of teleological and systematic argument in interpreting a legal text.²⁴⁴

Andersen also recognises this and suggests that the difficulty is so enshrined that even judges who are used to applying private international law cannot make the distinction and thus why there are difficulties in achieving an autonomous interpretation of the CISG.²⁴⁵

Amissah considers that the autonomous contract ‘virtually self-contained and self-governing’ is possible, especially in international commercial arbitration although he

²⁴⁰ J Honnold, *Documentary History of the Uniform Law for International Sales: The Studies, Deliberations, and Decisions that led to the 1980 United Nations Convention with Introductions and Explanations* (Kluwer 1989) 1.

²⁴¹ Van Alstine (n 221) 761.

²⁴² Honnold (n 212) 208.

²⁴³ M Sturley, ‘International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation’ (1986-1987) 27 Va.J.Int’l L792.

²⁴⁴ Gebauer (n 219) 686.

²⁴⁵ CB Andersen, ‘The Uniform International Sales Law and the Global Jurisconsultorium’ (2005) 24 J.L.& Com. 159, 163; See also Bailey (n 210) 287.

recognises that autonomous interpretation is subject to contrary mandatory municipal laws.²⁴⁶ He does not however attempt an explanation of the conceptual steps a judge or tribunal would have to take as an autonomous interpreter. Felemegas however is clear that the CISG is an autonomous body of law ‘intended to replace all the rules previously governing matters within its scope, whether deriving from statute or from case law’.²⁴⁷

If ‘international character’ in Article 7 denotes autonomous interpretation this does not necessarily mean that ‘international origin’ in Article 2A denotes anything different. Unfortunately, as referred to earlier, there are no relevant *travaux préparatoires* indicating why a different terminology was used from the CISG. It is possible that it was felt that the CISG had not been sufficiently successful in directing an autonomous interpretation in Article 7. However the intention of the provision was at least considered when the same provision, with identical differences from Article 7 of the CISG, was introduced into the Model Law on International Commercial Conciliation (2002). This suggests that the effect of such a provision would be to limit the extent to which the uniform law is interpreted according to the local law of the adopting jurisdiction.²⁴⁸ The words used in the Guide to Enactment of the instrument are important to this analysis:

The expected effect of article 2 is to limit the extent to which a uniform text, once incorporated in local legislation, would be interpreted only by reference to the concepts of local law. The purpose of paragraph 1 is to draw the attention of courts and other national authorities to the fact that the provisions of the Model Law (or the provisions of the instrument implementing the Model Law), while enacted as part of domestic legislation and therefore domestic in character, should be interpreted with reference to its international origin in order to ensure uniformity in the interpretation of the Model Law in various countries. Inclusion

²⁴⁶R Amissah, ‘The Autonomous Contract: Reflecting the Borderless Electronic-Commercial Environment in Contracting’ available at <<http://www.cisg.law.pace.edu/cisg/biblio/amissah2.html>> accessed 30 August 2014.

²⁴⁷J Felemegas, ‘The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation’ (2000-2001) 115 Pace Int’l L.Rev. 14.

²⁴⁸ UNCITRAL Model Law on International Commercial Conciliation Guide to Enactment available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf> accessed 31 March 2014.

of court decisions interpreting the Model Law in the case-law on UNCITRAL texts (CLOUT) will assist this development.²⁴⁹

Clearly then the intention was to require something similar to (though not identical) the autonomous interpretation suggested by Amissah and by the CISG Article 7.²⁵⁰ It is not a large step to suggest that the inclusion of Article 2A in the same terms as article 2 of the Model Law on International Commercial Conciliation had precisely the same intention despite the lack of *travaux préparatoires* confirming this intent. However the structural difference between a convention and a model law is ultimately important. A textually uniform convention lends itself more readily to be considered as requiring an entirely autonomous interpretive methodology. A model law, which will be subject to amendment in possibly every jurisdiction that adapts it would be very difficult to interpret in an autonomous way as by definition an autonomous methodology cannot apply to sets of unique documents. If this is accepted, the contextual detailed analysis of the difference in change of the word ‘character’ to ‘origin’ between CISG Article 7 and UML Article 2A might suggest a move away from autonomous interpretation toward an alternative internationalist approach.

In any event in terminology the word ‘origin’ is stronger than ‘character’. A statute can have international characteristics but still be interpreted according to municipal methodology but having regard to those characteristics. If regard is to be had to a statute’s international origin this suggests that the statute must be given an internationalist interpretation. Article 2A(1) therefore is a strong direction to an internationalist (but not autonomous) interpretation.

3.4.1.2 Need to Promote Uniformity

The interpreter must have regard to ‘the need to promote uniformity in its application’. This has a number of features. Foremost is that it reflects the fundamental objective of the UML of uniformity in the procedures for resolution of disputes in international commercial arbitration. Paradoxically a model law is by its very nature a flexible instrument but flexibility does not necessarily require change and where there is no change it is plain that uniform interpretation is desirable.

²⁴⁹ Ibid para 40.

²⁵⁰ For example Bazinas (n 189) 19.

Therefore this expression ‘the need to promote uniformity in its application’ can only be directed to those provisions of the UML which have been incorporated into a State’s municipal law. There can still be an internationalist interpretation of provisions which have been added or altered by any State but it is not possible for there to be a uniform application of a provision which is unique to a particular State’s law.

The words used direct the interpreter to a ‘need to promote’ rather than require or direct an absolute uniform interpretation. Flechtner suggests this language waters down the uniformity objective because it does not ‘ensure’ uniformity of result and therefore Article 7(1) does not intend absolute uniformity.²⁵¹ This might be a strict literal approach to interpreting Article 7(1) or simply pragmatic, as without an independent adjudicatory body (such as an ‘international court of arbitral awards’²⁵² or or ‘international court of appeal’²⁵³ or ‘international tribunal’²⁵⁴) strict uniformity is simply not feasible.²⁵⁵

Some commentators suggest that the need to promote uniformity is a natural progression from autonomous interpretation. It is suggested that if a truly autonomous interpretative methodology is adopted a uniform result is inevitable or at least highly likely. Some, like Cross, argue that it should not be assumed that autonomous

²⁵¹ Flechtner (n 187) 205; for a contrary view see T Keily, ‘Harmonisation and the United Nations Convention on Contracts for the International Sale of Goods’ (2003) *Nordic Journal of Commercial Law* 1 available at <http://www.njcl.utu.fi/index.php?issue=1_2003> accessed 3 September 2014: ‘there can be no variation in the way it is interpreted and applied by courts around the world. The CISG does not permit room for error.’

²⁵² H Holtzmann, ‘A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards’ in M Hunter, A Marriott and V Veeder *The Internationalisation of International Arbitration: The LCIA Centenary Conference* 109 (Graham and Trotman 1995); K Harper, ‘Has the Time Come for a Truly Neutral Forum? Reconsidering a Court of International Arbitration’ in T Carbonneau and J Jaeggi (eds), *Handbook on International Arbitration and ADR* (JurisNet 2006) 50.

²⁵³ F Gelinias, ‘From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives’ in Bachand F and Gelinias F (eds), *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (JurisNet 2013) 265.

²⁵⁴ L Sohn, ‘Uniform Laws require Uniform Interpretation: Proposals for an International Tribunal to Interpret Uniform Legal Texts’ in *Uniform Commercial Law in the Twenty-First Century: Proceedings of the Congress of the United Nations Commission on International Trade Law* (18-22 May 1992).

²⁵⁵ Sohn, *ibid* 6.

interpretation without regard to domestic principles is what is intended by Article 7(1).²⁵⁶

The autonomous interpretation school of thought may be idealistic and simply adopting a uniformity principle such as autonomous or internationalist interpretation does not inevitably mean that applied uniformity will result. This suggests that it is possible to have an autonomous or internationalist interpretative methodology which does not achieve strict uniformity; as of course it is possible to achieve strict uniformity without an autonomous or internationalist interpretation. In the latter case however this would be a coincidence because of the numerous different legal orders and cultures involved in the UML jurisdictions. In the former it is certain that strict uniformity will not be achieved. It is the promotion and objective of achieving uniformity which is the key to understanding how uniformity should be defined for the purposes of the UML.²⁵⁷ If an autonomous or internationalist interpretation is adopted it is far more likely to promote uniformity.

3.4.1.2.1 Requirement for Internationalist Interpretation

If one reads together the requirement of having regard to the international origin of the UML and the need to promote its uniformity there is clear policy direction toward an internationalist interpretation. Gelinas accordingly states:

[T]he harmonisation objective, once established, is not only taken into account; courts are asked to pursue it by referring to relevant international and foreign sources. In both cases, judges must put arbitration law in an international context that takes into account objectives conceived and understood as international.²⁵⁸

If the courts do not approach interpretation in this way ‘the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern international practice are often not met.’²⁵⁹

²⁵⁶ K Cross, ‘Parol Evidence Under the CISG: The “Homeward Trend” Reconsidered’ (2007) 68 *Oh.S.L.J.* 133, 138.

²⁵⁷ Flechtner refers to it as a ‘process’ in the context of the CISG (n 187) 214.

²⁵⁸ Gelinas (n 181).

²⁵⁹ M Hunter and A Banerjee, ‘National Arbitration Legislation: One Act or Two?’ (2014) 80 *Arb.* 62, 63.

Born refers to this as interpretation ‘from an international, rather than domestic standpoint’.²⁶⁰ Bachand refers to it as the ‘internationalist interpretive approach’ being that which:

- (a) is responsive to the international arbitration system;
- (b) requires international not domestic rules, relying for this hypothesis on the fact that international arbitration institutions adopt an international approach to their rules of arbitration and that even non-UML jurisdictions adopt international approaches to interpretative methodology.²⁶¹

Bachand validates this approach as being consistent with the object and purpose of UNCITRAL. However to promote uniformity requires more, it needs rules, methods or techniques to implement the internationalist interpretative approach so as to produce an ‘international community’²⁶² of countries adopting the UML. The necessary rules, methods or techniques might be enshrined as part of domestic law even without Article 2A, as is the case with Singapore.²⁶³ Bachand considers that Article 2A requires a two-step process in the implementation of the internationalist approach. First, a search for global consensus by comparative analysis. If there is a sufficient body of decisions on a particular question it can be treated as ‘determinative’ but not formally binding.²⁶⁴ The second step is necessary only if there is no sufficient body of decisions and involves the application of what he refers to as ‘transnational interpretive rules’. For this he suggests the application of VCLT Articles 31-33 which he considers codifies customary rules of interpretation of international normative instruments. Whilst he recognises that the UML is a model law and not the same as a convention, he seems to suggest that the

²⁶⁰ G Born, *International Commercial Arbitration* (Kluwer 2009) 119.

²⁶¹ Bachand (n 166) 235.

²⁶² Words used by Kastely as one of the objectives of the CISG: (n 184) 577.

²⁶³ See para 4.2.2.1.

²⁶⁴ Bachand (n 166) 240; it should be noted however that in the context of the CISG not everyone considers it is of benefit for a court to have regard to decisions of other courts: R Hillman, ‘Cross – References and Editorial Analysis – Article 7’ available at <<http://www.cisg.law.pace.edu/cisg/biblio/kastely.html>> accessed 13 September 2014; in addition some consider that it is better to have reference to scholarly writings rather than cases: J Honnold, ‘Uniform Laws for International Trade: Early “Care and Feeding” for Uniform Growth’ 11 ITBLJ (1995) 1, 9.

travaux préparatoires should be resorted to with caution.²⁶⁵ In Bachand's method therefore the order of importance is part of the global jurisconsultorium (scholarly writings and cases)²⁶⁶ followed by the *travaux préparatoires*.²⁶⁷ The *travaux préparatoires* would possibly be relevant in the case of ambiguity or absurdity, as recognised in VCLT Article 32.²⁶⁸

3.4.1.2.2 The Global Jurisconsultorium – An International Jurisprudence of the UML

A clear methodological approach to achieving the policy directive of the internationalist approach to interpretation is required²⁶⁹ although undoubtedly Article 2A is intended to guide judges.²⁷⁰

Article 2A makes no express reference to any obligation upon the interpreter to have knowledge of the decisions of the courts of other jurisdictions but, as has been seen, this obligation is implicit, arising from the obligation to 'promote uniformity in its application'.²⁷¹ The next consideration is, what exactly a court should do with decisions from other jurisdictions, assuming that these are either readily available, for example

²⁶⁵ Bachand (n 166) 250.

²⁶⁶ CB Andersen, 'The Global Jurisconsultorium of the CISG Revisited' (2009) 13 *Vindobona Journal* 1, 43.

²⁶⁷ See also Van Alstine (n 221) on the CISG.

²⁶⁸ It is difficult to see how Article 2A codifies the method of treaty interpretation itself codified in Articles 31 and 32. If it had been the intention to do so it would have been very easy to simply include provisions reflecting the VCLT articles instead of Article 2A. Moreover UNCITRAL would not have introduced Article 2A to change an approach to interpretation which had in practice adopted the VCLT approach. It is unlikely that any municipal court approaching the interpretation of domestic legislation implementing the UML would have recourse to the directives in the VCLT.

²⁶⁹ Zeller (n 238) 85; 'an 'autonomous' interpretation resolves the problem of policy but not the one of interpretative techniques or methods.'

²⁷⁰ P Koneru, 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach based on General Principles' (1997) 6 *Minn.J.Global Trade* 105, 106.

²⁷¹ Andersen (n 245); CB Andersen, 'Reasonable Time in Article 39(1) of the CISG – Is Article 39(1) Truly a Uniform Provision?' available at <<http://www.cisg.law.pace.edu/cisg/biblio/andersen.html>> accessed 14 September 2014; Chuah (n 217) para 5-04.

via CLOUT.²⁷² In a survey of NYC States it was reported that they thought decisions from other jurisdictions on the NYC should be ‘considered’, ‘drawing guidance’, ‘being an additional element’ or being of ‘persuasive value’ and that such decisions did not have binding authority.²⁷³

Some jurisdictions have already begun to become part of a global legal culture or global judiciary giving respect to their brother judges decisions in other jurisdictions, as Koch puts it:

In global decisions, global judges will pay attention to the opinions of their colleagues, and hence will tend towards a system of precedent.

Therefore, global legal culture may already be accustomed to giving case law precedential force. But global tribunals may use precedent more as the civil law does, because its limits on judicial law development may be more appropriate to the international arena.²⁷⁴

There is no question of any court being bound by any decision of a court from another jurisdiction.²⁷⁵ For this to happen there would need to be clear municipal legislative intent. Even if the political motivation existed this would still never happen unless there was in turn a clear and universal principle of *stare decisis* as well as a superior independent (of any jurisdiction) court which would be able to hear appeals and make important pronouncements. Such a scenario has been considered and suggested by

²⁷² For a description of CLOUT see M Canafoglia, ‘The CLOUT System (Case Law on UNCITRAL Texts): An UNCITRAL Experience’ in Bachand F and Gelinas F (eds), ‘*The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration*’ (JurisNet 2013).

²⁷³ UNCITRAL Secretariat Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_implementation.html> accessed 22 March 2014; See also Ferrari (n 236) 164.

²⁷⁴ C Koch, ‘Envisioning a Global Legal Culture’ (2003) 25 Mich.J.Int’l L 1, 51; however there seems to be insufficient research on this subject save for anecdotal.

²⁷⁵ For example see S Strong, ‘*Research and Practice in International Commercial Arbitration*’ (Oxford 2009) 27, 45; Dimatteo believes otherwise but is likely to be in a very small minority with such a view: L Dimatteo, ‘The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings’ 22 Yale J.Int’l L. 111, 133; Bazinas tentatively suggests that there might be some binding effect; Bazinas (n 189) 19.

Koch²⁷⁶ and by Mangan,²⁷⁷ the latter in the context of international commercial arbitration. It has recently been suggested that a regional arbitration court be set up in this regard for the Asia-Pacific region.²⁷⁸ If strict uniformity was the objective arguably this is the only way of achieving it. However if the promotion of uniformity only is the objective a binding system of *stare decisis* is unnecessary.

If a court is not bound by a decision from another jurisdiction the question is how a court should treat conflicting decisions from other jurisdictions. Bailey suggests that Article 7(1) undermines the uniformity principle in this regard, ‘By failing to establish the legal significance of foreign case law’.²⁷⁹ Indeed Bailey is highly critical of this Article:

Unfortunately, the most Article 7 does is to vaguely announce the principle, leaving courts to divine its meaning. Without an explicit explanation of how to implement the command to interpret the Convention according to its international character, Article 7 fosters inconsistency because some courts will be more zealous than others in their recognition of the Convention’s international character.²⁸⁰

Whilst it is true that Article 7(1) does not direct the interpreter as to what to do with foreign case law it is difficult to see what could have been stated. The problem can be considered as a practical question. Gelinas suggests:

[T]he judge becomes an international judge. She is keenly aware that she is applying a law intended to respond to the needs of a transnational community. She thinks in terms of applying an international instrument; her reference points

²⁷⁶ Koch (n 274).

²⁷⁷ M Mangan, ‘With the Globalisation of Arbitral Disputes, is it time for a new Convention?’ (2008) Int. A.L.R. 133.

²⁷⁸ K Karadelis, (2014) 9(1) GAR 45, referring to a suggestion put forward by Sunil Abraham at an IBA conference in Sydney.

²⁷⁹ Bailey (n 210) 293. Bridge suggests that how a court will approach the provision ‘is a mystery’, M Bridge, ‘Uniformity and Diversity in the Law of International Sale’ (2003) 15 Pace Int’l L.Rev. 55.

²⁸⁰ Bailey (n 210) 290. Schlechtriem also had early doubt about the effectiveness of Article 7; P Schlechtriem, ‘Uniform Sales Law – The Experience with Uniform Sales Laws in the Federal Republic of Germany’ (1991/92) Juridsk Tidskrift 1, 15.

and sources are global. She is part of a transnational interpretive community, and she decides accordingly.²⁸¹

It is difficult to envisage a court making its own researches,²⁸² so what is envisaged here is a situation where counsel from opposing sides have a number of decided cases in their client's favour on very similar facts and have brought them to the attention of the court. The way forward is probably more complex in theory than in practice. The court would be expected to adopt an internationalist interpretative methodology and choose the line of cases that it considered it should give more weight to. In doing this the court would 'appreciate that they are colleagues of a world-wide body of jurists with a common goal',²⁸³ have some 'international discussion',²⁸⁴ with other national courts and examine the methodologies adopted by the respective courts and exclude any decision given for reasons which do not accord with an internationalist interpretation. Flechtner refers to this as 'a process or methodology involving awareness of and respect for, but not necessarily blind obedience to, interpretations of the CISG from outside one's own legal culture'.²⁸⁵ Koneru suggests that the court must 'consult other international opinions, but also realize that his or her opinion will be consulted by the judiciary from other jurisdictions for persuasive authority'.²⁸⁶ And Mazzacano suggests it is a 'minimal duty to consider cases from international practice'.²⁸⁷ Over time the decisions on principles, which have followed the internationalist interpretative methodology, will converge and become a leading but only persuasive (non-binding), line of authority. It has been referred to as the establishment of 'an established body of case law ... giving it

²⁸¹ Gelinas (n 253) 264.

²⁸² A Kritzer and L Mistelis, 'Taming the Dragons of Uniform Law: Sharing the Reasoning of Courts and Arbitral Tribunals – English Case Texts' (2001) 5 *Vindobona Journal* 2, 282.

²⁸³ Honnold (n 232) 8.

²⁸⁴ Felemegas (n 247) 52.

²⁸⁵ Flechtner (n 187) 188.

²⁸⁶ Koneru (n 270) 108.

²⁸⁷ P Mazzacano, 'Canadian Jurisprudence and the Uniform Application of the UN Convention on Contracts for the International Sale of Goods' (2006) 18 *Pace Int'l L.Rev.* 3; Strong appears to suggest that it is almost a discretion on the part of courts whether to interpret the UML in ways similar to courts from other jurisdictions in that it 'may find [it] useful': (n 275) 45.

a binding quality'.²⁸⁸ But this is putting the case too high. One would of course expect due respect from the judiciaries in developed and mature judicial systems, as suggested by Lord Denning:

We are told that there have been no decisions so far in other countries on this Article of the convention...So where we lead, others may follow. But I would like to assure them that if it had come first before them, we would only be too glad to follow them.²⁸⁹

In this way therefore, there will be persuasive or 'significant'²⁹⁰ authority because for a court to depart from a weighty line of authority whilst adopting an autonomous or internationalist methodology would in most jurisdictions provide grounds for appeal.²⁹¹ When an appeal took place one would expect appellate court pronouncements on the proper approach of the municipal courts when considering decisions from other jurisdictions, which are regarded as leading decisions on principle. There would be little utility in a trawl through a 'vast volume of cases';²⁹² only important principles or ratios would be relevant to research. In this analysis, apart from the decisions themselves, scholarly writings take on an important role as it is these writings which will analyse conflicting decisions and take the lead in suggesting what is correct. The civil law has a suitable analogy of '*jurisprudence constante*' which suggests that non-binding

²⁸⁸ P Osbourne, 'Unification or Harmonisation: A Critical Analysis of the United Nations Convention on Contracts for the International Sale of Goods 1980' (LLM Dissertation, University of Hull 2006) available at <<http://www.cisg.law.pace.edu/cisg/biblio/osborne.html>> accessed 14 September 2014, 18. See also S Zheng, 'International Treaties in Chinese Private International Law' (2012) HKLJ 597.

²⁸⁹ *James Buchanan & Co Ltd v Babco Forwarding and Shipping (U.K.) Ltd* [1977] 1 All ER 518 (CA) at 522, 524; reinforced by *Fothergill* (n 228) and *Antwerp United Diamonds BVBA and another v Air Europe (a firm)* [1995] 3 All ER 424 (CA).

²⁹⁰ Kastely (n 184) 601.

²⁹¹ This is therefore probably more than simply an obligation to 'take similar cases from international practice into consideration' as suggested by Andersen; CB Andersen, 'Furthering the Uniform Application of the CISG: Sources of Law on the Internet' (1998) 10 Pace Int'l L.Rev. 403, 405.

²⁹² T Hill and D So, 'The Hong Kong Arbitration Ordinance and its Application to the Construction Industry' (2012) Asian DR 8.

precedents become more persuasive if they are consistently applied over time.²⁹³ This is effectively the less formalistic equivalent of the common law *stare decisis*.

Whether it can be said however that this is what should happen with Article 2A merits some discussion. UNCITRAL have now published a digest of decisions on the UML put together by the UNCITRAL Secretariat (with the help of Bachand, Boo and Kroll). The Digest attempts primarily to identify consistent trends and therefore decisions not conforming to a trend may not necessarily be highlighted²⁹⁴ or even where divergent decisions are included there may be no attempt to take a position as to which is to be followed.²⁹⁵ In addition, to this day only a minority of jurisdictions which have enacted legislation based on the UML have submitted cases to CLOUT. A similar problem has been encountered with the efforts of Pieter Sanders to encourage the publication of national cases on the NYC.²⁹⁶ It is therefore 'difficult to state that any specific wording in an Article of the Model Law is generally construed in a definite way: the collection of judgments is much too restricted to some particular courts for this.'²⁹⁷ Another significant weakness of the CISG Digest is that scholarly writings which might involve criticism of cases have been ignored to avoid publishing criticism of national court decisions.²⁹⁸ However the references to those same writings are available elsewhere on

²⁹³ G Bell, 'Uniformity through Persuasive International Authorities – Does *Stare Decisis* really Hinder the Uniform Interpretation of the CISG?' in Andersen and Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert Kritzer* (Wildy 2008) 47.

²⁹⁴ Andersen (n 266).

²⁹⁵ C Montineri, 'The Draft Digest of Case Law on the UNCITRAL Model Law on International Commercial Arbitration' in UNCITRAL-SIAC Conference, *Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration* (SIAC 2006)32. In the context of CISG see C Orlandi, 'Legal Harmonization in Practice: teaching and learning uniform commercial law' in *Modern Law for Global Commerce* (Collation of papers presented at the UNCITRAL Congress 9-12 July 2007, Vienna available at <<http://www.uncitral.org/uncitral/en/about/congresspapers.html>> accessed 22 March 2014) 92.

²⁹⁶ P Sanders, 'The Making of the Convention' at New York Convention Day, Enforcing Arbitration Awards under the New York Convention: Experience and Prospects' 10 June 1998 available at <<http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>> accessed 26 May 2015.

²⁹⁷ J Beraudo, 'Case Law on Articles 5, 8 and 16 of the UNCITRAL Model Arbitration Law' (2006) 23 J.Int'l Arb. 101.

²⁹⁸ Bazinas (n 189) 23.

the UNCITRAL website.²⁹⁹ Perhaps the greatest potential weakness of CLOUT and the Digest is the willingness of practitioners to resort to such a large body of law in preparation for appearances in the courts.³⁰⁰

Whilst the methodological approach to the internationalist method of interpreting the UML is less than certain, there can be no doubt that an internationalist approach requires consideration of decisions from other foreign jurisdictions. As Croft has said about the requirements in the context of the IAA: ‘In a practical sense, this means that Australian courts should have regard to decisions of overseas courts applying and interpreting the’ UML.³⁰¹

3.4.1.3 Observance of Good Faith

Thirdly, the interpreter must have regard to ‘the observance of good faith’. In treaty interpretation this is of fundamental importance and has resulted in much scholarly writings.³⁰² Although difficult to identify consensus the majority view seems to refer to the need for a treaty to be interpreted in good faith. This is a difficult concept that may not be possible because good faith is *prima facie* a subjective matter whilst interpretation is an objective one. The difficulties of a uniform interpretation are compounded by the different meanings attached to this term across different

²⁹⁹ Consolidated Bibliographies available at

<http://www.uncitral.org/uncitral/publications/bibliography_consolidated.html> accessed 14 September 2014.

³⁰⁰ R Ashby Pate, ‘The Future of Harmonization: Soft Law Instruments and the Principled Advance of International Lawmaking’ (2010) 13 *Touro Int’l Law Rev.* 142, 159.

³⁰¹ C Croft, ‘Recent Developments in Arbitration in Australia’ (2011) 28 *J.Int’l Arb.* 599, 604; see also Born (n 261) 5.

³⁰² For example: R Aryal, *Interpretation of Treaties: Law and Practice* (Deep & Deep 2003); E Yambrusic, *Treaty Interpretation: Theory and Reality* (University Press of America 1987); D Bederman, ‘Revivalist Canons and Treaty Interpretation’ (1993-1994) 41 *UCLA Law Review* 953; F Berman, ‘Treaty “Interpretation” in a Judicial Context’ (2004) 29 *Yale J. Int’l L.* 315; M Bos, ‘Theory and Practise of Treaty Interpretation’ (1980) 27 *NILR* 3; E Lauterpacht, ‘Restrictive Interpretation and the Principle of effectiveness in the Interpretation of Treaties’ (1949) XXVI *BYBIL* 48; R Gardiner, *Treaty Interpretation* (OUP 2008) 147-161.

jurisdictions and cultures. Gardiner suggests this may require an overlap between interpretation and application.³⁰³

The difference from the wording of Article 7(1) of CISG is clear. Article 7(1) refers to the ‘observance of good faith in international trade’ whereas these words are omitted from Article 2A. This provision is ambiguous and has been described as ‘definitional uncertainty’.³⁰⁴ Again Bailey is a critic:

Of all the principles contained in Article 7, the declaration that the CISG must be interpreted so as to ‘[observe] good faith in international trade’ is the most puzzling. In fact, there seems to be no agreement as to what this principle means or in what situation it is to be applied.³⁰⁵

However Schlechtriem considers it is possible to interpret this provision in a uniform way:

The principles to be derived from that general concept must not, however, be taken from domestic legal systems, but must be developed using internationally recognised principles of honourable conduct and, as far as possible, with the maximum measure of agreement between the courts of the Contracting States. International usage (Article 9 [CISG]) and views will have a material role to play in that regard.³⁰⁶

Binder considers that the meaning of the expression in Article 2A can simply be gleaned from the CISG commentaries:

Due to the fact that neither the Model Law itself nor the travaux provide a definition of the term “observance of good faith”, reference should be made to

³⁰³ Gardiner *ibid* 148.

³⁰⁴ Osborne (n 289) para 4.5.

³⁰⁵ Bailey (n 210) 293.

³⁰⁶ P Schletriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford Clarendon Press 1998) 63.

art.7(1) of the CISG commentary of Professor Schletttriem, who is one of the leading commentators on the CISG.³⁰⁷

Binder's comments do not refer to the differences between CISG and the UML, although he has recognised that CISG is an international convention and the UML a model set of rules in another part of his book.³⁰⁸ Arbitration is an adversarial process and a duty of good faith may not usually apply to the parties in conducting an adversarial process. Choong and Weeramantry identify the situation where the concept may be relevant: 'the legal and professional obligations upon parties, counsel, arbitrators and the courts.'³⁰⁹ In a court the legal representatives have a duty not to mislead the judge and arguably this also applies in arbitration. However it is a far cry from misleading to act in a way that is threatening or even misleading to the opposing party in arbitration. If parties from a common law jurisdiction were told that they had a duty to act in good faith to each other in arbitration they might be surprised. Instead they might say that they are involved in a war and after all 'The rules of fair play do not apply in love and war'.³¹⁰ It has been suggested however that a principle of good faith does indeed apply in international commercial arbitration, obliging the parties to abstain from delaying tactics or tactics that might delay enforcement.³¹¹ Choong and Weeramantry suggest the concept does no more than act as a buttress to the existing duties of the parties:

As noted above, it is doubtful whether the requirement to interpret these and other provisions by reference to the principle of good faith adds materially to their substantive content in practice, although it undoubtedly serves to underline the legal and professional duties in accordance with which parties, counsel and

³⁰⁷ Binder (n 194) para 10-029 although Binder was at this point commenting on the UNCITRAL Model Law on International Commercial Conciliation.

³⁰⁸ Binder (n 194) paras 1-062 and 10-027.

³⁰⁹ J Choong and J Weeramantry, *The Hong Kong Arbitration Ordinance – Commentary and Annotations* (Sweet & Maxwell 2011) para 9.10. See also J Choong and R Weeramantry, *Hong Kong Civil Procedure 2014* (Sweet & Maxwell 2014) para U1/9/4.

³¹⁰ J Lyly *Euphues* (1578).

³¹¹ V Veeder, 'The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith' (2002) 18 Arb. Int'l 431; G Petrochilos, *Procedural Law in International Arbitration* (OUP 2004) 218.

tribunals are already expected to conduct themselves in relation to arbitral proceedings.³¹²

This suggestion may be idealistic but persists in particular with civil law lawyers. However it is impossible to police and sanction effectively in an arbitration. The existing duties rely upon traditional professional conduct and fear of the tribunal. This is a far cry from specifically legislating for such duties as it is entirely unclear how such legislation would be policed and enforced. Maniruzzaman considered the application of the term in the context of international investment disputes but concludes little more than the term as a 'functional or objective one in the sense of a framework of relationship between the parties to a contract'.³¹³ Moses considered the same question but in the context of the introduction of the term into the IBA Rules of Evidence for International Arbitration. Those rules provide for a principle that each party shall deal with its evidence in good faith:

Increasingly, there is a consensus that parties should engage in fair conduct, act honestly and with mutual trust, and meet each other's reasonable expectations of decent behaviour within a fair process. By encouraging the taking of evidence in good faith, the IBA Rules will help develop a jurisprudence with respect to the taking of evidence that focuses on transparency, good faith, and efficiency.³¹⁴

The commentaries on CISG suggest that good faith equates to equitable results. This provides a ready and simple meaning of the expression and although the result concerned with Article 7 may be substantive, with Article 2A it would clearly be procedural.

It is a reasonable interpretation of the requirement of the observance of good faith in Article 2A that the UML should be interpreted so as to avoid any procedural decision

³¹² Choong and Weeramantry (Ordinance) (n 309) para 9.11.

³¹³ M Maniruzzaman, 'The Concept of Good Faith In International Investment Disputes – The Arbitrator's Dilemma' Kluwer Arbitration Blog 30 April 2012 available at <<http://kluwerarbitrationblog.com/blog/2012/04/30/the-concept-of-good-faith-in-international-investment-disputes-%E2%80%93-the-arbitrator%E2%80%99s-dilemma-2/>> accessed 30 May 2015.

³¹⁴ M Moses, 'Is Good Faith in the IBA Evidence Rules Good?' available at <<http://www.kluwerarbitrationblog.com/2012>> accessed 7 December 2012.

that is inequitable or which allows a party to take advantage of bad faith (in procedural matters).

3.4.3 Article 2A(2)

Article 2A(2) is the gap filling tool.³¹⁵ It directs the interpreter to fill gaps in the UML by settling questions ‘in conformity with the general principles on which this Law is based’ and in this continues the hybrid common/civil law approach to interpretation reflected in Article 2A(1) (common law precedent and civil law underlying principles). The genesis of Article 7(1) are provisions contained in the Convention relating to a Uniform Law on the International Sale of Goods (ULIS) which was intended as a self-contained sales law independent of municipal laws.³¹⁶ The UML is not independent of municipal law; as it must be incorporated into a municipal law. Only if Article 2A(2) can be interpreted in an autonomous manner will it have the potential of having any real positive consequence. Assuming it can the next question requires these principles to be identified. Without their expression in the UML, the courts and tribunals will have a free hand to underpin the UML with any number of principles which could include purely municipal basic underlying ones as suggested by Eorsi:

But the real danger to unification is that in the search for general principles it is unlikely that the tribunals and parties would find the same "general principles." And if different jurisdictions find different general principles or interpret them in a different way, possibly following local practice, then unification will suffer a heavy blow.³¹⁷

Achieving an acceptable degree of uniformity with such an approach will not be easy. Arguably the general principles should be limited to those principles set out in Article 2A(1) but if this was the intention it would have been simply stated. Curran suggests the civil law approach of these principles being identified by scholarly commentary is

³¹⁵ Binder states it ‘has a quasi gap-filling function’ (n 194) para 10-030.

³¹⁶ ULIS Articles 2 and 17 available at <<http://www.cisg.law.pace.edu/cisg/text/ulis.html>> accessed 14 September 2014.

³¹⁷ G Eorsi, ‘General Provisions’ in Galston & Smit (eds), *The United Nations Convention on Contracts for the International Sale of Goods* (Mathew Bender 1984) Ch. 2, 2-1 to 2-36, 11. An example of a purely municipal principle could be a State’s ‘le droit’; N Leroux, ‘Lalive Lecture 2009 How does an international tribunal distinguish droit from loi?’ (2009) 4(4) GAR 44.

required.³¹⁸ A common law lawyer would find this strange and those principles have yet to be seen set out in any clarity in any scholarly writings.

The conceptual and structural differences between the CISG and the UML discourage any valid comparison between the two provisions in the case of Article 2A(2). General principles applying to a sales contract are unlikely to be the same as those applying to a procedural law for arbitration. According to the CISG Digest they have been found to include: party autonomy, good faith, estoppel, place of payment of monetary obligations, currency of payment, burden of proof, full compensation, informality, dispatch of communications, mitigation of damages, binding usages and so on.³¹⁹ Whilst party autonomy is undoubtedly one of the general principles underlying the UML, none of the others are likely to be. That so much case law on Article 7(2) has produced a large number of general principles illustrates that claims can be grounded on those general principles. However extensive case law is not likely under Article 2A(2) where general principles are used only as an aid to interpretation. There is no known case law on Article 2A(2) and the UML Digest does not attempt to identify the principles.

With the lack of any case law on Article 2A(2) commentators have looked to the Model Law on International Commercial Conciliation which has included the same provision since it was promulgated in 2002. However there is no case law on this model law in CLOUT or elsewhere. The Guide on this model law does however suggest a set of non-exhaustive general principles.³²⁰ As seen above Binder relies upon this guide for his commentary on the interpretation of Article 2A and Choong and Weeramantry go even further, suggesting that the principles ‘may be applied, mutatis mutandis, to international commercial arbitration’.³²¹

³¹⁸ V Curran, ‘Book Review, The Interpretive Challenge to Uniformity by Claude Witz’ (1995) 15 J.L. & Com. 175, 176.

³¹⁹ CISG Digest 43-45. Available at <<http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>> accessed 14 September 2014.

³²⁰ Guide (n 248).

³²¹ Choong and Weeramantry (Ordinance) (n 309) para 9.15 although these authors have referred to the principles differently in a more recent publication as ‘equal treatment of the parties, independence, fairness and impartiality of the tribunal, and party autonomy’: (Procedure) (n 309) para U1/9/6.

If this approach was adopted the principles would include:

- (a) to promote arbitration as a method of dispute settlement by providing international harmonised legal solutions to facilitate arbitration that respect the integrity of the process and promoting active party involvement and party autonomy by the parties;
- (b) to promote the uniformity of the law;
- (c) to promote frank and open discussions by parties by ensuring confidentiality of the process, limiting disclosure of certain information and facts raised in the arbitration in other subsequent proceedings subject only to the need for disclosure required by law or for the purposes of implementation or enforcement;
- (d) to support developments and changes in the arbitration proceedings arising from technological developments, such as electronic commerce.

The first principle, namely the promotion of harmonisation, party involvement and party autonomy is uncontroversial save that the promotion of harmonisation is probably unnecessary in view of Article 2A(1). The second principle is clearly unnecessary because of Article 2A(1). The third principle is relevant to conciliation but not to arbitration, and even if it was, the constituent parts of the principle are covered by other parts of the UML. The fourth principle appears relevant but it is uncertain in its scope and arbitration rules require more certainty than such a principle might provide. Its inclusion therefore is debatable.

The number of principles governing the gap or quasi gap filling purpose of Article 2A(2) are therefore probably very limited. To the first principle should be added the limitation of court involvement in the arbitral process. However the extent to which these principles survive will also depend on the extent to which the adopting jurisdiction attempts to fill all gaps by extensive gap filling provisions.³²² Choong and Weeramantry outline the first four principles but then state that the first principle 'is likely to be at the forefront of the settlement of questions falling within Article

³²² Hong Kong is a prime example.

2A(2).³²³ They do not mention the extensive gap filling of the new arbitration law in Hong Kong however.

3.4.4 Conclusion on Article 2A Uniformity Directive

Eorsi, a supporter of Article 7(1) accepts: ‘It could be argued that the provisions of Article 7(1) are but pious wishes: the paragraph is necessarily vague and therefore open to surprising results.’³²⁴ A provision purporting to assist in the interpretation of a set of rules is vague and may have possibly resulted in the antithesis of uniformity. Unpredictability is unlikely to achieve what UNCITRAL suggest is its’ *raison d’être* as recorded by the UN’s Montineri, ‘the aim of enhancing legal certainty and predictability is still the main driving force of international harmonization efforts.’³²⁵

Whilst the directive to the international origin of the UML is understood to be a requirement of internationalist interpretation, there is no guidance as to the techniques or methodologies that would enable a consistent approach. The saving grace of Article 2A(1), despite Bailey’s skepticism, is its directive to the interpreter to consider foreign case law. This is what makes uniformity more viable as suggested by Rogers and Kritzer: ‘Simply put, a “comity of nations” is the goal that should be sought by the entire international community. There should be an informal and voluntary recognition by courts of one jurisdiction of the decisions of another.’³²⁶

Article 2A(2) does not assist in the enhancement of legal certainty and predictability. For an article that is designed to fill gaps it seems to create a number of its own, in particular as to the principles underlying its interpretation. A provision that has the intention of contributing to a uniform interpretation instead has the clear potential of contributing to a non-uniform application of the UML. However if its limits are circumscribed in the way suggested above, there would be a potential limited value for gap filling depending on the express gap filling expressly carried out by adopting States.

³²³ Choong and Weeramantry (Ordinance) (n 309) para 9.15.

³²⁴ Eorsi (n 317) 2-4; Bayley refers to the provision as ‘vague and obfuscatory’; J Bayley, ‘A Doctrine of Good Faith in New Zealand Contractual Relationships’ (Thesis, University of Canterbury 2009) 319.

³²⁵ C Montineri, ‘Legal Harmonisation Through Model Laws: The Example of the UNCITRAL Model Law on International Commercial Arbitration’ in UNCITRAL-SIAC Conference, *Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration* (SIAC 2006).

³²⁶ Rogers and Kritzer (n 183) 226.

What does emerge from Article 2A are some consistent themes or as Nelson has referred to them ‘key indicators’ for the internationalist approach.³²⁷ These are an appreciation of the ‘international normative context’³²⁸ in which the UML was drafted and the second is the consideration of decisions from courts of other jurisdictions. To these can be added the consideration of the UML *travaux préparatoires*.

3.5 Uniformity in the Pre-Article 2A UML

The starting point for this discussion is that a methodology is required for a model law that is different from a treaty or convention. This may not matter to the argument because if a model law is adopted in the same (or very similar) terms by more than one jurisdiction there is a degree of textual similarity. For present purposes it may be assumed in such a case that the degree of textual similarity is sufficient to consider whether applied uniformity has been achieved.

3.5.1 The UML is Adopted as Domestic Legislation

The legislation resulting from the adoption of the UML is a piece of domestic legislation. The UML will be incorporated into municipal laws by specific legislation and according to legal theory will be a municipal law. This is almost insurmountable in a study of this type because each jurisdiction may have its own approach to interpretation, in particular common law and civil law jurisdictions will have different approaches. This difficulty can only be overcome by a general proposition that adoption of the UML constitutes the buying in to an international model that requires a different approach. When considering treaty interpretation Wouters and Vidal suggest that ‘a norm that is the result of sometimes protracted negotiations between multiple sovereign States should be interpreted differently, in a less unilateral fashion, than a norm emanating from the sovereign will of a single State.’³²⁹ If the rationale for the UML is

³²⁷ J Nelson, ‘International Commercial Arbitration in Asia: Hong Kong, Australia and India Compared’ (2014) 10 A.I.A.J. 105, 116.

³²⁸ F Bachand, ‘Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism’ (2012) J.Disp.Resol. 83.

³²⁹ J Wouters and M Vidal, ‘Domestic Courts and Treaty Interpretation’ Institute for International Law Working Paper No 103 – December 2006.

the pursuit of uniformity or at least harmonisation of international commercial arbitration, a jurisdiction adopting the UML must be so adopting for at least partly the pursuit of UNCITRAL's objectives. However this general proposition is subject to validation on a case-by-case basis. It might be that a particular jurisdiction has adopted the UML in a way which makes it plain that uniformity, and therefore an internationalist interpretation of the law, is not intended. With this proviso however it is considered reasonable and valid to start with the general proposition.

3.5.2 Treaty Interpretation is Analogous

It is not easy to identify scholarly writings on how the pre-Article 2A UML should be interpreted. The NYC is a convention or treaty and there are much scholarly writings on how treaties and conventions should be interpreted. However a model law is a different type of international norm although importantly both types of norm have the same objective of uniformity. It may be suggested therefore that recourse may be had to how treaties are interpreted to gain insight as to how a model law should be interpreted. If the clear objective of uniformity of the drafters of the UML has been incorporated by an adopting jurisdiction a general proposition can be postulated that the pursuit of uniformity demands an internationalist approach in a similar way as given to treaties and conventions. This general proposition is also subject to any express or implied contrary intention by any jurisdiction. Courts have developed rules for interpreting treaties which recognise the international character of treaties and the sovereign recognition given to an international agreement. There seems little conceptually to prevent a model law requiring, expressly or possibly by implication or by custom, an approach by the courts reflective of the approach afforded treaties. For example both the CISG and the UML include an interpretative tool in the form of Article 7 and Article 2A. They are not identical but both carry the same basic directives to the interpreters and courts. But the problem is that we are considering now the position before Article 2A and asking whether the internationalist approach to interpretation was also applicable to the UML at that time.

Generally it seems counter-intuitive³³⁰ that a model law should be interpreted in the same way as a treaty or convention:

The very purpose of a true international convention (as opposed to a simple model law that operates as a mere guideline for domestic legislation) is to supersede national legal norms within its defined scope. The interpretive standards of CISG article 7 give full force to this preemptive effect. Beyond the displacement of domestic law, that provision establishes a means for interpreters to develop the law under an international convention in a manner entirely free from the influence of domestic legal norms.³³¹

When the UML was first adopted it had the goal of harmonisation of laws relating to international commercial arbitration. In pursuit of this goal UNCITRAL set up various tools such as CLOUT and the Digest. A comparison can be made with the treatment by courts of common form treaties. These are treaties that derive from a model treaty, such as Bilateral Investment Treaties, Double Taxation Agreements and Extradition Treaties. Gardiner suggests that courts' common approach to such treaties interpretation might have as a legal basis a customary general rule of international law.³³²

The starting general proposition therefore is that the method of interpretation of the UML can be compared with the method of interpretation of a treaty or convention.

3.5.3 Vienna Convention on the Law of Treaties

Prior to the VCLT there was no settled law as to how treaties should be interpreted and depended on the particular approach of the court required to interpret the treaty. The competing approaches were basically a textual or literal approach usually adopted by common law jurisdictions and the teleological approach usually adopted by civil law jurisdictions. When drafting the VCLT the International Law Commission sought to

³³⁰ Bachand (n 166) 233.

³³¹ Van Alstine (n 221) 733.

³³² Gardiner (n 302) 283. In the context of the USA Coyle considered whether a model law could be interpreted as would a treaty or incorporative statute and suggests that the approaches may be similar as they serve the same functional purpose; J Coyle, 'Incorporative Statutes and the Borrowed Treaty Rule', Draft 09/04/09 available at <<http://www.law.harvard.edu/faculty/faculty-workshops/new-folder/johncoyle0916.pdf>> 14 accessed 6 September 2014.

reconcile the two basic approaches into rules that both types of jurisdictions would be prepared to adopt. The result therefore is a hybrid solution, which was contained essentially in two articles. Article 31 contains the primary rules:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 32 provides the supplementary rule that *travaux préparatoires* can be taken into account either to confirm a meaning arrived at by application of Article 31 or to determine the meaning where the application of Article 31 gives rise to an ambiguity or obscurity or is manifestly absurd or unreasonable. Whilst referred to as a supplementary means of interpretation it is readily apparent that there is an interaction between Articles 31 and 32.

It is at least arguable that the VCLT does not apply to private law conventions such as the CISG and, by analogy, the UML.³³³ However: ‘In line with the International Court of Justice and the Appellate Body of the World Trade Organization, a large majority of international legal scholars currently supports the customary character of the rules on interpretation. This means that they are applicable regardless of the ratification by a particular State of the VCLT.’³³⁴ In addition there is increasing references to the VCLT in higher courts decisions on private law conventions in England and Wales.³³⁵

3.5.4 Modern Approach to Treaty Interpretation

Some thirty-seven years after his work on this subject³³⁶ Mann updated his work in particular by reference to the VCLT.³³⁷ He concluded that the methodology he had proposed for interpretation of uniform statutes in his 1946 work equated with principles of interpretation of treaties under public international law and now could be equated with the principles set out in the VCLT. For this conclusion he relied upon the opinion

³³³ Van Alstine (n 221) 706

³³⁴ Wouters and Vidal (n 330) 9.

³³⁵ J Basedow, ‘Uniform Private Law Conventions and the Law of Treaties’ (2006) 11 Unif.L.Rev. 731, 743.

³³⁶ F Mann, ‘The Interpretation of Uniform Statutes’ (1946) 62 L.Q.R. 278, 278.

³³⁷ F Mann, ‘Uniform Statutes in English Law’ (1983) 94 L.Q.R. 376.

of Lord Diplock in *Fothergill*.³³⁸ This case can be considered as seminal as summarising the method of interpretation of uniform laws in England and Wales both prior to and even following the VCLT. The issue in the case concerned whether a partial loss could be said to come within the meaning of the word ‘damage’ in the Warsaw Convention, which was incorporated into municipal law. The House, noting the overall uniformity objective of the convention, was firmly against adopting a domestic approach to interpretation and Lord Diplock referred to the words of Lord Wilberforce in *Buchanan*³³⁹ when adopting the principle of ‘broad principles of general acceptance’ earlier set out by Lord Macmillan in *Stag Line*.³⁴⁰ However the House went further and can be said to have formulated (but being obscure as to whether these rules are part of the ratio and thus binding precedent on every point³⁴¹) a methodology of interpreting uniform laws: First that the courts are not constrained by technical rules of domestic law.³⁴² Secondly that the interpretation should meet the commercial purpose of the treaty.³⁴³ Thirdly that it is permissible (with caution) to refer to the *travaux préparatoires*, scholarly writings and foreign court decisions.³⁴⁴ Finally that the VCLT codifies public international law.³⁴⁵ All of the judges appeared to start with a consideration as to whether the words are clear enough on their own and to this extent they can be said to have agreed with the first step as being to consider the words used. This is such an obvious matter that the rule, stated in the VCLT Article 31, is not necessary to be repeated and Lord Scarman alone seems to have done so when at the same time explained why, in the present case, the application of this first stage was not enough:

³³⁸ *Fothergill* (n 228).

³³⁹ (n 290) 1052.

³⁴⁰ *Stag Line Ltd v. Foscolo Mango & Co* [1932] AC 328.

³⁴¹ Indeed Lord Scarman stated that the approach of ‘general acceptance’ was well settled but the details of the implications of this approach remained to be worked out by the courts: ‘our courts will have to develop their jurisprudence in company with the courts of other countries from case to case.’ 715A.

³⁴² Lord Diplock 706H; Lord Scarman 714J.

³⁴³ Lord Wilberforce 700B; Lord Scarman 713B.

³⁴⁴ Lord Wilberforce 701-703; Lord Diplock 706I, 708B; Lord Fraser of Tullybelton 710H; Lord Scarman 715H.

³⁴⁵ Lord Diplock 707A; Lord Scarman also, as he directed himself ‘broadly along the lines’ of the VLCT.

[T]he court must first look at the terms of the convention as enacted by Parliament. But, if there be ambiguity or doubt, of if a literal construction appears to conflict with the purpose of the convention, the court must then, in my judgment, have recourse to such aids.³⁴⁶

The speeches of the House are notable and impressive for their internationalist approach to interpretation, in particular Lord Wilberforce who relied upon French dictionaries and doctrine related to the French translation of the relevant words.³⁴⁷ In doing so he felt it unnecessary to refer to the *travaux préparatoires* but certainly felt he was entitled to do so.³⁴⁸ In a recent case the Court of Appeal in England had to construe the legislation enacting the NYC and in adopting an overt internationalist approach (with references, inter alia, to the ICCA Guide³⁴⁹ and Van den Berg's writings³⁵⁰), stated:

Bearing in mind that the statute directly enacts the Convention, the statutory language must of course be given an autonomous meaning, which may be informed by the *travaux préparatoires*, the decisions on it of foreign courts and the views on it of foreign jurists.³⁵¹

Schreuer points out that the VCLT codifies public international law on the subject of interpretation of treaties, has also been accepted by ICSID Tribunals referring to 'customary international law',³⁵² and Wouters and Vidal, after noting that it is reasonable that different rules should apply to treaties and domestic legislation, suggest that 'a large majority of international legal scholars currently supports the customary character of the rules on interpretation' in the VCLT.³⁵³

³⁴⁶ *Fothergill* (n 228) 716A.

³⁴⁷ Zeller suggests that the judgment was 'ahead of its time': (n 228) 35.

³⁴⁸ (n 229) 702.

³⁴⁹ ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, The Hague 2011 available at <www.arbitration-icca.org/media/1/1309129848200/iccas_guide_to_the_1958_ny_convention_with_footer_final_with_disclaimer.pdf> accessed 7 March 2015.

³⁵⁰ Van den berg A, *The New York Arbitration Convention of 1958* (Kluwer 1981)

³⁵¹ Tomlinson LJ *Anthony Lombard-Knight v Rainstorm Pictures Inc* [2014] EWCA Civ 356 [3].

³⁵² Schreuer C, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' (2006) available at <http://www.univie.ac.at/intlaw/pdf/cspubl_85.pdf> accessed 6 September 2014.

³⁵³ Wouters and Vidal (n 330) 4 and 9 respectively; see also M Fitzmaurice, 'Treaty Interpretation' Book Review –(2009) 20 Eur. J. Int. Law 952.

As a summary of the modern approach to the interpretation of treaties and other uniform law instruments it can therefore be suggested that the text must be interpreted in good faith having regard to its context and its object and purpose. This requires the internationalist approach to interpretation in order to promote uniformity and consideration will also be given to the *travaux préparatoires*. Coyle suggests that an incorporative statute should be interpreted in the same way as the underlying treaty is interpreted (in the context of the United States of America where it is called the ‘borrowed treaty rule’ of interpretation).³⁵⁴ This is also the position in England and Wales.³⁵⁵

Whilst it is not beyond doubt that the VCLT codifies customary international law, it is likely to and in any event it seems clear that the principles of the VCLT are relied upon and applied.³⁵⁶ The approach to treaty interpretation can therefore be taken to be the same or similar whether before or after the VCLT and this approach is also suggested to be autonomous or internationalist:

[I]nterpretation of a private law convention must proceed on the basis of its ‘international character’. This directive serves a separating and elevating function. That is, it suggests an ‘autonomous’ interpretation free from the influence of national legal concepts and terminology, and even from the domestic interpretive techniques themselves. In doing so, this mandate amounts to an express direction to interpreters to view a convention as occupying an entirely different, elevated international dimension.³⁵⁷

3.5.5 Approach to Interpretation of Pre-Article 2A UML

Bachand forcefully argues that even before Article 2A the UML implicitly required judges to interpret its provisions with a view to promoting legal uniformity.³⁵⁸ Lew also considered that national courts should deal with applications ‘with an international

³⁵⁴ Coyle (n 333).

³⁵⁵ R Munday, ‘The Uniform Interpretation of International Conventions’ (1978) 27 ICLQ 450.

³⁵⁶ ‘There has as yet been no case where the Court has found that the Convention does not reflect customary law.’ A Aust, *Modern Treaty law and Practice* (2nd edn, Cambridge University Press 2007) 245; see also Yambrusic (n 302) 11, 13; Gardiner (n 302) 15.

³⁵⁷ Van Alstine (n 221) 730-31 (footnote omitted).

³⁵⁸ Bachand (n 166) 234.

approach’ and ‘National standards and preferences should not influence’ decisions.³⁵⁹ Kaplan argued in 1996 that ‘cross pollinisation’ and ‘cross referencing’ of decisions involving international arbitration was prevalent and arose out of the growing ‘international arbitration culture’.³⁶⁰ Walsh suggests, without any analysis, that Article 2A is ‘not essential to the uniform interpretation of the [UML]’³⁶¹ which is of course correct as a conclusion of Kaplan’s argument above. Bachand suggests that international arbitration cases require courts to recognise the international normative context ‘when local sources that are binding on judges offer no obvious answer’.³⁶²

There is little juridical support for a domestic court applying an internationalist approach to the interpretation of domestic legislation, unless the jurisdiction concerned was a civil law one whose courts will in any event adopt a teleological approach to interpretation or a common law one which may be moving toward a teleological approach.³⁶³ Some common law jurisdictions might also have regard to the object or purpose of uniformity if their courts have moved toward the broadly equivalent purposive approach to the interpretation of statutes. Coyle differentiates between statutes derived from a model law and an incorporative statute but suggests, ‘the interpretive approach used to read them may in many cases be similar’.³⁶⁴ The proposition that either the VLCT or customary rules or an internationalist approach must apply to the interpretation of the pre-Article 2A UML or generally in international arbitration cases is also supported by the delocalisation or autonomous theory of

³⁵⁹ J Lew, ‘Achieving the Dream: Autonomous Arbitration’ (2006) *Arb Int’l* 179, 196.

³⁶⁰ N Kaplan, ‘A Case by Case Examination of Whether National Courts Apply Different Standards When Assisting Arbitral Proceedings and Enforcing Awards in International Cases as Contrasting with Domestic Disputes. Is there a Worldwide Trend toward Supporting an International Arbitration Culture?’ in A van den Berg (ed), *International Dispute Resolution: Towards an International Arbitration Culture* ICCA Congress Series 8 (Kluwer 1998); See also Bachand (n 328) 83.

³⁶¹ Walsh (n 199) 234.

³⁶² Bachand (n 328) 84.

³⁶³ Some argue this is the case in England and Wales. See M Kirby, ‘Judicial Activism’ The Hamlyn Lectures 2003 available at

<http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/Judicial_Activism.pdf> accessed 6 September 2014; see also I McLeod, *Legal Method* (Palgrave 2005) 256-261.

³⁶⁴ Coyle (n 333) 14.

international arbitration.³⁶⁵ Whilst a model law does not attempt to supplant domestic law in a way that the *lex mercatoria* does, what is arguably a codification of a *lex mercatoria* can retain the same nature and some of the features of an arbitration that is delocalised, thereby requiring an internationalist or autonomous approach to its application and supervision. Of course the UML is structured to specifically provide the courts of the *lex fori* supervisory powers but given the uniformity objective it is suggested that it does not lose the theoretical underpinnings of an international arbitration. Essentially the UML informs the courts of the *lex fori* ‘you can have the limited powers of supervision over me but don’t forget what I am and where I come from’. This is confirmed and reinforced by Article 2A. The proposition that the internationalist approach applies to the UML before and after the introduction of Article 2A is attractive from an internationalist or uniformity objective point of view and this proposition will be tested in Chapter 5 of this thesis.³⁶⁶

3.6 The New York Convention Connection

The NYC is a treaty concluded in 1958 prior to the 1969 VCLT and therefore is not subject to Articles 31 and 32³⁶⁷ although many jurisdictions that have adopted the NYC consider that the VCLT should govern its interpretation.³⁶⁸ To the extent the VCLT codifies the international customary rules applicable to treaty interpretation a similar approach would be directed to the interpretation of the NYC.³⁶⁹ It is clear from the numerous writings on the application of the NYC that an internationalist approach to interpretation which has an almost overriding regard to the teleological features of the NYC has been adopted as a general edict to domestic courts called upon to interpret the NYC. The overriding feature of the internationalist approach with the NYC is the teleological edict of the promotion of uniformity. If the NYC has attracted an internationalist approach to interpretation (with a teleological basis) this will apply to

³⁶⁵ See para 2.1.6 above.

³⁶⁶ Creer, Hoyle and Mulcahy in their paper ‘Arbitration in Australia: Brief Overview’ presented at the 6th International Arbitration Day: International Commercial Arbitration and Globalisation, 13 February 2003, Sydney, implied that the VCLT applied to the interpretation of the UML as incorporated into the IAA.

³⁶⁷ VCLT Article 4.

³⁶⁸ UNCITRAL Secretariat Report (n 273) para 36.

³⁶⁹ A Maurer, *The Public Policy Exception under the New York Convention* (2012 JurisNet) 6.

the Article 34 equivalent in the NYC for resisting enforcement of awards. A court, in any common law jurisdiction, called upon to interpret Article 34 would inevitably be drawn to any prior decision of the court (of the same jurisdiction or possibly another) on the NYC. If that decision, itself based on an internationalist approach to interpretation, were followed then *a fortiori* the court would have adopted the internationalist approach itself. It will be seen later that this is precisely what has happened, not only in the selected jurisdictions, but generally as evidenced by the Digest.³⁷⁰

The linkage between and influence of the NYC upon the UML is of course no accident³⁷¹ and the inevitable juridical cross-fertilization of decisions should equally not be a surprise.³⁷² If the NYC link has this effect on the UML equivalent provisions then it is difficult to see why an internationalist approach to interpretation should not be applied to those parts of the UML which are not NYC equivalents.

3.7 Chapter 3: Summary of Conclusions to take Forward

This chapter has explored the degree of uniformity that is required or anticipated by the UML in order to test whether that degree of uniformity has been achieved, which will be explored in Chapters 4 to 6. No definitive criteria or definition is however possible as to what degree of uniformity is required or ‘satisfactory’³⁷³ or ‘desired’³⁷⁴ whether pre or post Article 2A. This makes the identification of a test or benchmark very difficult for textual uniformity and applied uniformity of results. These will therefore need to be qualitatively assessed in Chapters 4 and 6 bearing in mind this chapter.

³⁷⁰ Further analysis of the textual similarities between Articles 34 and 36 of the UML and Article V of the NYC is contained in paragraph 4.3.1 below.

³⁷¹ Sorieul (n 174).

³⁷² For a contrary view see Maurer who considers the different scope and object between the UML and NYC will result in different meanings even where precisely the same words are used (n 369) 6.

³⁷³ Montineri (n 325).

³⁷⁴ Uniform Commercial Law in the Twenty-First Century Proceedings of the Congress of the United Nations Commission on International Trade Law New York, 18-22 May 1992, 1-3 available at <http://www.uncitral.org/pdf/english/texts/general/Uniform_Commercial_Law_Congress_1992_e.pdf> accessed 9 September 2014.

However a major feature emerges: the underlying purpose, function and objective of the UML are the desirability of a degree of harmonisation or uniformity in international arbitration particularly as it relates to the involvement of domestic courts. This purpose is enshrined in Article 2A, despite its shortcomings. Its ambitions were greater than its need and a simpler edict would probably have sufficed but nevertheless the underlying theme is clear, the UML requires an internationalist approach to interpretation. The same underlying theme forms the foundation of the object or purpose of the pre-Article 2A UML. Whilst a municipal juridical basis for a hypothesis that an internationalist interpretation applies in the case of the pre-Article 2A UML is unclear, there is support for such hypothesis on theoretical and practical levels and in limited writings as a purely domestic approach to interpretation is far less likely to achieve the degree of uniformity required by the underlying purpose of the UML. As Gelinas states: ‘Although the 1985 version of the Model Law was silent on the question of its own interpretation, there was a relatively clear sense among informed commentators that judges ought to read and apply it in a spirit of international harmonization.’³⁷⁵

Therefore an internationalist approach or method of interpretation is required to achieve the functional degree of uniformity required by the UML but how can it be tested as to whether the courts of a jurisdiction have adopted an internationalist approach? It is suggested that the following internationalist criteria or norms are suitable to take forward to Chapter 5, where the courts’ juristic methodology and approach to interpretation will be considered:

- (a) A conscious decision to adopt an internationalist approach to interpretation of the UML. By this is meant that the court expresses the intention to adopt an approach that reflects the principles of Article 2A. This will be referred to as the “UML Internationalist-Norm” or “UML I-Norm”.
- (b) Regard to the *travaux préparatoires* of the UML. This will be referred to as the “*Travaux Préparatoires* Internationalist-Norm” or “TP I-Norm”.

³⁷⁵ Gelinas (n 253) 261.

- (c) Regard to the UML global jurisconsultorium involving UML jurisdiction cases and scholarly writings on the UML. This will be referred to as the “Global Jurisconsultorium Internationalist-Norm” or “JC I-Norm”.

This will allow Chapter 5 to involve a qualitative and quantitative assessment because case law can be tested on the basis of the above three tests and analysed empirically.

It has been seen in this chapter that harmonisation or uniformity comprises the textual and applied aspects. Textual uniformity will be considered and tested in Chapter 4 and will be a comparative qualitative assessment. Applied uniformity will be considered in Chapters 5 and 6. Chapter 5 will assess the juristic methodology of applied uniformity, without which it is difficult to see that applied uniformity of results is possible. This assessment will be a qualitative and quantitative empirical analysis. Applied uniformity of results will be considered in Chapter 6 as again a qualitative and quantitative assessment.

Chapter 4: Textual Uniformity of the UNCITRAL Model Law

[T]extual uniformity is also a question of degrees of similarity, just like applied uniformity, and not an absolute.³⁷⁶

4.1 Textual Uniformity - Methodology

There are two aspects to textual uniformity. First there is Article 2A and the extent to which the internationalist approach directed by this Article is enshrined in the selected jurisdictions' legislation. In Chapter 3 it is suggested that the internationalist approach prevails as an approach for the UML even without Article 2A but it remains possible for a jurisdiction to adopt the UML in a way that avoids this directive. This must therefore be considered. Secondly there is the focus of this thesis, Article 34.

Given the similarity of Article 34 with the grounds for resisting enforcement of an award under the NYC the NYC grounds (essentially replicated in the UML Article 36) and decided cases are also considered. This is an approach which is theoretically logical and justified and a common approach in texts for the reason expressed by Morgan:

Because of the philosophical relationship between the New York Convention and the UNCITRAL Model Law..., authorities cited in the following notes include, where provisions are identical or analogous, cases decided under the Model Law art 34... and arts 35 and 36.³⁷⁷

³⁷⁶ CB Andersen, 'Defining Uniformity in Law' (2007) 12 *Uni. L. Rev.* 5.

³⁷⁷ R Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary* (Butterworths 1997) para [44.04]; See also J Choong and J Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Sweet & Maxwell 2011) para 81.21; J Choong and R Weeramantry, *Hong Kong Civil Procedure 2014* (Sweet & Maxwell 2014) para U1/81/6. The authors relied upon *Brunswick Bowling & Billiards Corp. v Shanghai Zhonglu Industrial Co. Ltd* [2011] 1 HKLRD 707, CLOUT 1252 (considered in Chapters 5 and 6); see also M Moser and C To, 'Hong Kong' in Moser (ed) *Arbitration In Asia* (2nd edn, Jurisnet 2013) HK-25 (R 5: December 2013); in addition Morgan does not note any differences between the NYC, Art 34/36 and Section 44(2) of the HKAO in specifically pointing to Van den Berg's

Model textual uniformity is to be tested by a comparison between the UML Article 34 and the selected jurisdictions' adoption of the UML (and its NYC equivalent). In this context textual uniformity is a comparison between each jurisdictions' law and the UML.

Comparative textual uniformity relates to how uniform each of the jurisdictions are to each other. This is then a comparison of each jurisdiction's legislative adoption of the UML (and the NYC equivalent) with each other's.

4.1.1 Degree of Textual Uniformity

This chapter has identified that there are two types of textual uniformity that can be used as tools to assess applied uniformity (and the relationship between textual uniformity and applied uniformity), namely model and comparative textual uniformity. The analysis is not sufficient without a classification of the degree of similarity between the respective texts being considered given the conclusions in Chapter 3. This analysis involves some judgment. At one end of the scale is perfect alignment or similarity. To this might be added insignificant or immaterial textual dissimilarity. This first classification then is for 'Nil or Insignificant Textual Dissimilarity'. With this classification textual uniformity or functional similarity is achieved.

The middle categorisation is where there is prima facie uncertainty about the effect of a textual dissimilarity. In this case textual uniformity or functional similarity would not necessarily be achieved and comparative application by a court would be subject to scrutiny. This classification is then for 'Potentially Significant Textual Dissimilarity'.

At the other end of the scale are obvious textual dissimilarities that appear to have different intent and meaning so that textual uniformity is not achieved and where applied uniformity is therefore not expected. This classification is 'Significant Textual Dissimilarity'.

1981 book 'For a uniform interpretation' of each provision. For a contrary view see A Maurer, *The Public Policy Exception under the New York Convention* (2012 JurisNet) 65.

4.2 Method of Adoption and Approach to Interpretation

Consideration will now be given as to how each jurisdiction adopts the UML and NYC and in particular whether Article 2A is included or whether there is an alternative to Article 2A. Consideration is given as to whether there is Model Textual Uniformity for each jurisdiction and Comparative Textual Uniformity between them and the degree of dissimilarity.

4.2.1 Hong Kong

Hong Kong is a genuinely unique jurisdiction. Although now a Special Administrative Region of the Peoples' Republic of China, since the handover from being a colony of the United Kingdom until 1 July 1997, it has retained the common law legal system as part of the agreement between the United Kingdom and China whereby the legal system would remain unaltered for 50 years.³⁷⁸ This is despite the legal system of China being based on a civil law model.³⁷⁹ Hong Kong adopted the UML in 1990 for international commercial arbitration³⁸⁰ having adopted the NYC in 1975.³⁸¹ In 2011 Hong Kong promulgated a new arbitration law, adopting the UML for both international and domestic arbitration.³⁸² The old law will remain applicable for arbitrations which have commenced prior to 1 July 2011. For this reason, and as most of the cases considered in this thesis applied the old law, it is necessary to compare the old and new laws in Hong Kong.³⁸³

4.2.1.1 Arbitration Ordinance Cap. 341

The HKAO includes separate domestic and international arbitration regimes. It defines an 'international arbitration agreement' and thus arbitrations subject to the international

³⁷⁸ The Hong Kong Basic Law available at <www.basiclaw.gov.hk/en/basiclawtext/index.html> accessed 12 June 2013.

³⁷⁹ See for example M Moser and J Choong, 'Hong Kong's Development as an International Arbitration Centre: Some Historical Notes' in C Bao and F Lautenschlager (eds), *Arbitrators' Insights: Essays in Honour of Neil Kaplan* (Sweet & Maxwell 2012) para 3.09; R Tong, 'The General Principles of Civil Law of the PRC: Its Birth, Characteristics, and Role' *Law and Contemporary Problems* Vol. 52: No. 2 151.

³⁸⁰ Arbitration (Amendment) (No 2) Ordinance 1989 which came into effect on 6 April 1990.

³⁸¹ Arbitration (Amendment) Ordinance 1975.

³⁸² NHKAO which came into effect on 1 July 2011.

³⁸³ For a summary of Hong Kong's arbitration history see Moser and Choong (n 379) 255.

regime by reference to the definition in the UML Article 1(3). The UML is set out in full in a schedule and given effect to in Section 34C which provides that an international arbitration is governed by Chapters I to VII of the UML. Chapter VIII that deals with Recognition and Enforcement (Article 35 and 36) is therefore excluded.³⁸⁴

There are a number of amendments and additions to the UML including, remarkably, an Article 2A equivalent some 17 years before it was adopted into the UML:

In interpreting and applying the provisions of the UNCITRAL Model Law, regard shall be had to its international origin and to the need for uniformity in its interpretation, and regard may be had to the documents specified in the Sixth Schedule.³⁸⁵

The Sixth Schedule specifies the 1985 Analytical Commentary, the Commission Report of 1985 and the report of the Hong Kong Law Commission, which recommended adoption of the UML. This provision was the idea of the two champions of the promotion of the UML in Hong Kong, the late David Hunter (who was then an appellate judge) and Neil Kaplan QC, who has said that it was included because of the concern that the UML would be given a purely domestic treatment by Hong Kong's judges.³⁸⁶ This is confirmed in a book jointly authored by Kaplan:

It was felt that these provisions would assist in ensuring that the interpretation given to the Model Law by judges in Hong Kong would have regard to the international origins of the Model Law and would not be over affected by the language used in the Model Law which is somewhat alien to the common law tradition.³⁸⁷

³⁸⁴ Its inclusion was 'not thought necessary in Hong Kong because Hong Kong is a party to the New York Convention'. Kaplan J in *Fung Sang Trading Ltd. v Kai Sun Sea Products & Food Co. Ltd* [1992] 1 HKLR 40, CLOUT 20.

³⁸⁵ Section 2(3).

³⁸⁶ Orally to the writer in 2009.

³⁸⁷ N Kaplan, J Spruce and T Cheng *Hong Kong Arbitration – Cases and Materials* (Butterworths 1991) 175.

Article 2A did not exist when this law was passed albeit arguably there is a measure of textual uniformity with the model of Article 2A by the above provision requiring the internationalist approach to interpretation:

The object of this provision is to promote uniformity of approach to the Model Law as between states and territories that have enacted it and also as between the Model Law and the New York Convention, on which the Model Law is philosophically based and for the monitoring of which UNCITRAL is also responsible.³⁸⁸

However, despite the apparently similar intent to both provisions, the difference in wording suggests a degree rating of potentially significant textual dissimilarity.

In Hong Kong interpretation of statutes adopts the purposive approach and would therefore certainly lean toward an internationalist interpretation method for the pre-Article 2A UML even without the presence of Section 2(3).³⁸⁹

4.2.1.2 Arbitration Ordinance Cap. 609³⁹⁰

The HKNAO has a unitary regime for both domestic and international arbitration.³⁹¹ It uses a novel technique for its adoption of the UML by setting out the provisions of the UML which are adopted in quotations and then adding provisions so that the ordinance is effectively an expanded UML with numerous additional provisions filling in most of the gaps in the UML. As the HKNAO includes Article 2A there is no doubt that Hong Kong has continued an approach, at a textual level at least, of interpretation by the internationalist approach and has perfect textual uniformity in this regard.

Unlike HKAO's Section 2(3), Article 2A does not expressly require that consideration be given to the *travaux préparatoires*. However it was felt during the drafting of the

³⁸⁸ R Morgan, 'Hong Kong Arbitration: A Decade of Progress – But Where to Next?' Hong Kong Lawyer, Oct 1999 65.

³⁸⁹ Interpretation and General Clauses Ordinance Cap. 1 section 19; See also A Cooray and A Law, 'Legislative Guidelines on the Use of Extrinsic Materials in Statutory Interpretation: Is Hong Kong Ready? (2001) 9-1 APLR 23.

³⁹⁰ For the background to the NHKAO see D Lewis, 'The Hong Kong Arbitration Ordinance-Proposed Changes' (2009) A.I.A.J. 109, 110-114.

³⁹¹ Although has some opt-in 'domestic' provisions in a schedule.

new law that the UML provision should be adhered to and that since the UML was first adopted there had been many texts written, apart from those of the *travaux préparatoires* as well as numerous cases.³⁹² Article 2A is self evidently wider than the old section 2(3) and requires consideration of the global jurisconsultorium not just the *travaux préparatoires*.³⁹³ In practice it will be seen in Chapter 5 that the Hong Kong courts have referred to the global jurisconsultorium even when applying the HKAO and therefore there has not been any judicially recognised or applied distinction between Section 2(3) and Article 2A even though it can be classified as having potentially significant textual dissimilarity.

There is one oddity with Article 2A as it is incorporated into Hong Kong's domestic law. This is that by virtue of section 8(3)(e) the principles of Article 2A apply only to the UML provisions and not the Ordinance as a whole. There are numerous additions and modifications to the UML and these may be interpreted in a purely domestic way. This could give rise to difficult questions of interpretation on modified UML provisions in particular. However it may be that 'the distinction may not be particularly significant in practice.'³⁹⁴

The inclusion of an international interpretation guide in the form of Section 2(3) and Article 2A respectively is conclusive that the UML requires an internationalist approach to its interpretation in Hong Kong and therefore reflects a high degree of textual uniformity.

³⁹² The author was on the drafting committee and involved in those discussions.

³⁹³ The Consultation Paper on the Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill (Department of Justice, December 2007, LC Paper no. CB(2)2261/08-09(02) para 2.7 stated 'it would be desirable to allow a party to arbitral proceedings to refer to any case law, reports or any other relevant materials e.g. preparatory materials of the model Law in the course of proceedings. It is then within the power of the arbitral tribunal or the court to decide whether those documents or materials are indeed relevant and, if so, to determine the weight to be attached to them' available at <<http://www.doj.gov.hk/eng/public/pdf/2007/arbitration.pdf>> accessed 20 September 2014. See also T Hill and D So, 'The Hong Kong Arbitration Ordinance and its Application to the Construction Industry' (2012) Asian DR 8.

³⁹⁴ Choong and Weeramantry (n 377) para 9.10.

4.2.1.3 Hong Kong – New York Convention

Chapter VIII of the UML that deals with Recognition and Enforcement is excluded and replaced by bespoke provisions. This was because ‘the New York Convention already applied to Hong Kong and that the United Kingdom has taken the reciprocity reservation on behalf of Hong Kong.’³⁹⁵

The HKAO deals with enforcement of arbitral awards in three ways. First it expressly refers to the NYC and sets it out in full in a schedule as well as setting out express detailed provisions to implement it. Secondly the law specifically sets out provisions, which are for most purposes identical to those dealing with the NYC, dealing with the enforcement of awards made in the Mainland and thirdly it sets out provisions dealing with the enforcement of all other awards, which includes domestic awards and foreign awards from non-NYC jurisdictions and the Mainland.

The HKNAO deals with the NYC by setting out express detailed provisions to implement it. It is not scheduled, as it was in the HKAO. Section 87(1) is the implementing provision and is in similar terms to Section 42(1) of the HKAO.

Section 42(1) of the HKAO is the implementing provision of the NYC:

A Convention Award shall, subject to this Part, be enforceable either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 2H.

Convention Award is defined by express reference to an award made in any State a signatory of the NYC, which in turn is defined and set out in full in schedule 3 to the HKAO.³⁹⁶ The reference to Section 2H is to the domestic arbitration provision providing for enforcement of an award to be carried out as a judgment but with leave of the court.

³⁹⁵ H Alvarez, N Kaplan and D Rivkin, *Model Law Decisions* (Kluwer 2003) 12; see also Kaplan (n 387); the reciprocity reservation is considered equally applicable to the HKNAO.

³⁹⁶ HKAO Section 2(1); this provision thereby implements the reciprocity reservation of the United Kingdom which also applied to Hong Kong.

4.2.2 Singapore

4.2.2.1 Singapore International Arbitration Act

Singapore is another country that has a British colonial past and has retained a common law legal system. Singapore adopted the UML in 1995 via the SIAA. Prior to this Act Singapore had only one arbitration regime, under the Arbitration Act Cap. 10 of 1985 and this theoretically³⁹⁷ applied to both domestic and international arbitrations. The SIAA was enacted to ‘make provision for the conduct of international commercial arbitrations based on the Model Law....and to give effect to the New York Convention.’³⁹⁸ The SIAA followed the setting up of the Singapore International Arbitration Centre and was considered ‘a bold and robust step taken by the Singapore legislature for the development of international arbitration in Singapore’.³⁹⁹

The UML is set out in full in a schedule to the SIAA and given effect to by Section 3, other than Chapter VII which is instead given effect to by specific provisions in Part III. There are also a number of additional provisions amending and supplementing some parts. Like Hong Kong the approach to interpretation of the UML has been modified by a specific provision, Section 4(1):

For the purposes of interpreting the Model Law, reference may be made to the documents of-

- (a) the United Nations Commission on International Trade Law; and
 - (b) its working group for the preparation of the Model Law,
- relating to the Model Law.

³⁹⁷ There was little international arbitration with Singapore as their seat until Singapore took measures to promote itself as an arbitration centre, starting in the early 90s; see L Chew, *Introduction to the Law and Practice of Arbitration In Singapore* (LexisNexis 2010) 11.

³⁹⁸ SIAA Preamble.

³⁹⁹ L Boo and C Lim, ‘Overview of the International Arbitration Act and Subsidiary Legislation in Singapore’ (1995) 12 J.Int’l Arb. 75, 89; see also H Locknie, ‘The Adoption of the UNCITRAL Model Law on International Commercial Arbitration in Singapore’ [1994] Sing. JLS 387, 389-390.

However this was as far as Singapore was prepared to go in adopting an internationalist approach to interpretation of the UML, despite the stated intent in the Law Reform Committee of Singapore's 1993 report that 'If Singapore aims to be an international arbitration centre it must adopt a world view of international arbitration.'⁴⁰⁰ In 2009 Singapore amended the SIAA to incorporate the 2006 revisions to the UML but not the inclusion of Article 2A. A reason for this might be that both the Singapore Government as well as the local arbitration community were not persuaded the 2006 version of the Model Law had reached the 'gold standard' of being an internationally accepted and familiar *lex arbitri*. The Singapore perception is that arbitrators and parties are more familiar with the 'original' un-amended 1985 Model Law which does represent the gold standard.⁴⁰¹ This also raises the question whether Singapore has any interest in promoting uniformity.

Section 4(2) provides that Section 9A of the Singapore Interpretation Act Cap. 1 applies to the interpretation of the SIAA. Section 9A provides for certain extrinsic materials to be considered to confirm an ordinary meaning and to deal with ambiguity and absurdity. The extrinsic materials are stated to include all the *travaux préparatoires* of the SIAA and Section 9A is unlikely to compromise the prospect of a internationalist approach to interpretation.

Like Hong Kong the additional and supplemental provisions to the UML contained in the SIAA appear to require a domestic interpretation as Section 4(1), to the extent that it directs an internationalist approach to interpretation, applies only to the interpretation of the UML.

It is not clear that Section 4(1) of the SIAA fills the gap left by the absence of Article 2A. At best it can be stated that Singapore courts will interpret the SIAA in a purely domestic way but in doing so can refer to UNCITRAL documents and the UML *travaux préparatoires*. Whether this permits the courts to refer to CLOUT, the Digest and other

⁴⁰⁰ Report available at

<http://www.sal.org.sg/digitallibrary/lists/Law%20Reform%20Reports/Attachments/1/review_of_arbitration_laws.pdf> accessed 10 March 2015; See also M Pillay, 'The Singapore Arbitration Regime and the UNCITRAL Model Law' in (2004) 20 Arb. Int'l 355.

⁴⁰¹ C Lim, 'The Development Life Cycle of International Arbitration Legislation – Singapore IAA Case Study' (2011) A.I.A.J. 1.

post 1985 UNCITRAL documents, is not clear. Arguably the reference materials are those pre-dating the UML and this is a purely *travaux préparatoires* provision.⁴⁰²

Although therefore there can be considered to be degree of textual uniformity for the approach to interpretation, it is not as high as Hong Kong or Australia given the absence of Article 2A. This suggests that there is a potentially significant textual dissimilarity as regards Article 2A.

4.2.2.2 Singapore – New York Convention

Singapore adopted the NYC in 1986.⁴⁰³ The NYC was originally adopted via a specific piece of legislation, the Arbitration (Foreign Awards) Act. Like the HKAO, this Act expressly referred to the NYC and set it out in full in a schedule with detailed provisions to implement it. This formula was also taken forward to the SIAA,⁴⁰⁴ which repealed the earlier Act and largely repeated it in Part III of the SIAA. The implementing provision is Section 29(1):

Subject to this Part, a foreign award may be enforced in a court either by action or in the same manner as an award of an arbitrator made in Singapore is enforceable under section 19.

As ‘foreign award’ is defined as a NYC award.⁴⁰⁵ The first change from the UML is that Singapore has implemented a reciprocity reservation but has not implemented the commercial reservation.

⁴⁰² R Merkin and J Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (Informa 2009) 15, directs the reader to the UNCITRAL website for ‘the relevant General Assembly resolutions, travaux préparatoires and explanatory Notes on the Model Law’ and no mention is made of documents post dating the UML.

⁴⁰³ See for example M Hwang, A Chan and R Selveraj, ‘Singapore’ in M Moser (ed), *Arbitration in Asia* (2nd edn, Juris 2012) (R 6: December 2014) para 1.1.

⁴⁰⁴ When this was enacted the hitherto unitary regime for domestic and international arbitration ended with separate pieces of legislation now dealing with each.

⁴⁰⁵ Section 27(1).

4.2.3 Australia

4.2.3.1 Australia International Arbitration Act

Australia is a mature common law arbitration jurisdiction and has separate regimes for international and domestic arbitrations.⁴⁰⁶ International arbitration is governed on a federal basis by the IAA. The IAA, which underwent its most recent amendments in 2010, is effectively an umbrella law which implements the NYC, the UML and the Washington Convention (which deals with investment treaty arbitration). In adopting the NYC Australia made no reservation.

By Section 16 of the IAA, introduced in 1989, the UML has the force of law in Australia and this now includes the 2006 amendments since the International Arbitration Amendment Act 2010⁴⁰⁷ which schedules the 2006 version of the UML to the IAA, including Article 2A.⁴⁰⁸

Article 2A is supplemented by a specific provision dealing with interpretation, Section 17, which is almost identical to Section 4 of the SIAA.

Section 15AB, Acts Interpretation Act 1901 is almost identical to the Singapore Interpretation Act and is likely to have a similar affect on interpretation. This may help in promoting uniformity if the relevant material suggests, even implicitly, that an internationalist approach should be adopted in the interpretation of the Act. In any event Article 2A has been specifically incorporated and given effect to although subject to some additional provisions which may allow complex issues of interpretation to be raised in the courts. To add to the potential confusion the 2010 amendments included a new Section 2D which set out the objects of the Act including ‘to facilitate international

⁴⁰⁶ It is possible to contract out of the UML and have the domestic legislation govern an international arbitration although it is doubtful that the part of the international law dealing with enforcement of foreign arbitral awards can be excluded; see M Pryles, ‘Australia and New Zealand’ in Moser (ed), (n 377) (R 5: December 2013) paras AUS & NZ-17, 18.

⁴⁰⁷ Available at < <http://www.comlaw.gov.au/Details/C2010A00097> > accessed 10 December 2014.

⁴⁰⁸ Applicable to Part III of the IAA that covers the amendments and supplements to the UML and therefore is different to the position in Hong Kong. Nottage and Garnett suggest that it should also apply to the other parts of the IAA in order to promote uniformity more widely; L Nottage and R Garnett, ‘Top 20 Things to Change in or Around Australia’s International Arbitration Act’ (2010) A.I.A.J. 1.

trade’ and to ‘give effect to the’ UML and a new Section 39 requiring a court, when interpreting the UML to have regard to ‘the objects of the Act’ which does no more than direct the reader back to Section 2D and to have regard to ‘the fact that: (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and (ii) awards are intended to provide certainty and finality’.

Although therefore there can be considered to be degree of textual uniformity for the approach to interpretation it is not as high as Hong Kong although higher than Singapore. The additions to Article 2A suggest a classification of potentially significant textual dissimilarity.

There is recognition in Australia that there is a need for uniformity at least on a Federal level but it is not clear that this extends to an international platform.⁴⁰⁹ The Federal system, by which each of the States’ courts can hear applications under the IAA, is a potential hindrance to the consistent application of the IAA with appeals to the Federal High Court not frequent.⁴¹⁰

4.2.3.2 Australia – New York Convention

Part II of the IAA expressly refers to the NYC and sets it out in full in a schedule, does not incorporate the provisions but instead sets out express detailed provisions to reflect them, including additional implementing provisions.⁴¹¹ The NYC Article V is reflected in IAA Section 8, which deals with recognition and enforcement of foreign awards. There is no attempt to omit or amend UML Articles 35 and 36 which therefore still apply. To try to deal with this potential conflict Section 20 states:

Where, but for this section, both Chapter VIII of the Model Law and Part II of this Act would apply in relation to an award, Chapter VIII of the Model Law does not apply in relation to the award.

⁴⁰⁹ P Keane, ‘The Prospects for International Arbitration in Australia: Meeting the Challenge of Regional Forum Competition or our House, Our Rules’ Annual Address to Australian Maritime and Transport Commission 2012 Brisbane (2013) 79 Arb. 195.

⁴¹⁰ G Smith and A Cook, ‘International Commercial Arbitration in Asia-Pacific: A Comparison of the Australian and Singapore Systems’ (2011) 77 Arb. 108.

⁴¹¹ The NYC was first incorporated into Australian law by the Arbitration (Foreign Awards and Agreements) Act 1974.

This begs the question as to when Articles 35 and 36 will apply. Given that Part II only applies to foreign awards⁴¹² it may have been the intention that Articles 35 and 36 are intended to apply only to foreign awards made in non-NYC countries and to awards pursuant to international arbitration taking place in Australia itself.⁴¹³ The articles will certainly apply to awards rendered in Australia but the words of Article 35(1) are broad, providing for enforcement of an award ‘irrespective of the country in which it was made’. It would seem therefore that NYC related awards are enforced under Part II and non-NYC awards pursuant to Part III under the UML provisions. On close analysis there are no substantive or material differences between the two regimes. Article 35(1) has its equivalent in Section 8(1), (2) and (3). Article 35(2) has its equivalent in Section 9, which is broadly the same substantively. The result is that there is little difference between enforcement of foreign awards whether the awards are made in NYC jurisdictions or non-NYC jurisdictions.

Therefore there is a fairly high degree of textual uniformity of the IAA with both the NYC and, so far as recognition and enforcement is concerned, the UML (save for the inclusion of Section 2D and 39 as referred to above).⁴¹⁴

4.2.4 Summary – Method of Adoption and Approach to Interpretation

Each of three jurisdictions has slightly different legislative approaches to interpretation of the UML. They all have additional and supplemental provisions to the UML. Where they differ slightly is in their express textual commitment to the internationalist approach to interpretation. If the degree of adherence to model textual uniformity was assessed it would suggest: Hong Kong has the highest level of commitment with the inclusion of Article 2A (and previously Section 2(3) of the HKAO) resulting in a classification of nil or insignificant textual dissimilarity; Australia the next highest with the inclusion of Article 2A and, although overlapping, the *travaux préparatoires* provision (but the interpretation of which is potentially affected by the reference to the Acts Interpretation Act and Sections 2D and 39) and Singapore is perhaps least committed as it has not included Article 2A in the SIAA, although does have the

⁴¹² Section 8(4) contains a type of reciprocity requirement in that either the award must emanate from a NYC state or the party seeking to enforce it must do so.

⁴¹³ A Monichino, ‘Australia: Arbitration Act Declared Constitutional’ (2013) 8(2) GAR 30.

⁴¹⁴ Para 4.2.3.1.

travaux préparatoires provision (but potentially qualified in the same way as Australia with reference to the Interpretation Act). Singapore and Australia are therefore classified as having potentially significant textual dissimilarity with Article 2A.

It is not clear why Singapore did not include Article 2A when it introduced other UML 2006 amendments into the SIAA (and it is not apparent from the official papers) but one of the main texts on the SIAA suggests that Article 2A is ‘largely aspirational’.⁴¹⁵ However the other main text also makes no reference whatsoever to Section 4 of the SIAA and it may fairly be stated that the question of approach to interpretation does not seem to have been considered by this text.⁴¹⁶ The other texts on arbitration in Singapore also have no discussion on the question of the approach to interpretation.⁴¹⁷

On a textual level therefore Hong Kong and Australian courts are squarely directed to have regard to the full body of global jurisconsultorium, via Article 2A (and in the case of the HKAO Section 2(3)). Singapore courts however are permitted to have reference to the *travaux préparatoires* and also UNCITRAL documents. Given that UNCITRAL documents now include CLOUT and the Digest, as well as consolidated bibliographies of published materials relating to the UML, the textual differences between each jurisdiction may well be academic. However the differences in each jurisdiction’s legislation as to the approach to interpretation on a comparative textual uniformity level can hardly be suggested to be a contribution to uniformity. This illustrates the arguable difference between harmonisation and uniformity. It can be strongly suggested that harmonisation has been achieved by the common basing of each jurisdictions’ legislation on the UML but as regards the required approach to its interpretation the legislative texts do not reflect a commitment to uniformity.

Chapter 5 will consider whether each jurisdiction’s courts have been conscious of the degree of an internationalist (or otherwise) approach to interpretation required by its respective legislation and whether they have followed those requirements.

From the above it seems fairly clear that the level of comparative textual uniformity as regards method of adoption of the UML is fairly high. Model textual uniformity as

⁴¹⁵ Merkin and Hjalmarsson (n 402) 79.

⁴¹⁶ Chew (n 397).

⁴¹⁷ Hwang, Chan and Selveraj (n 403).

regards the approach to interpretation is highest for Hong Kong given that it has now adopted Article 2A in an unqualified manner, whereas Australia's adoption of it may be qualified by Section 17 of the IAA. Australia's model textual uniformity can however be described as fairly high given that these qualifications are on the face of it fairly minor. On the other hand Singapore's unwillingness to adopt Article 2A, even though including its version of a *travaux préparatoires* provision in Section 4(1) of the SIAA (which is similar to Section 17 of the IAA), provides a medium level of model textual uniformity only. A comparison of each of the jurisdictions with each other in terms of approach to interpretation produces three different models with potentially different results. They therefore score a low result in terms of comparative textual uniformity. With such lack of textual uniformity on such a fundamental cornerstone of the method of interpretation, any hope of achieving applied uniformity would normally be forlorn. Paradoxically, should these jurisdictions achieve a high level of applied uniformity, whether in terms of juristic methodology or substantive applied uniformity, it could suggest a number of things. For example it could suggest that comparative textual uniformity is not an important factor in the achievement of applied uniformity, that the courts of the three jurisdictions have sub-consciously adopted a common juristic methodology of an internationalist approach or it could suggest that in interpreting the UML the courts have taken up where they left off with the approach to treaties, in particular the NYC. These factors may arise for further analysis in Chapters 5 and/or 6.

If model textual uniformity is important in achieving comparative textual uniformity and/or applied uniformity it would be beneficial if UNCITRAL published a model method of adopting the UML as well as an amended Article 2A which ensured that there could not be any provisions of any domestic laws overriding or affecting the effect of Article 2A.

4.3 Relationship between Article 34 and Article 36 (and the New York Convention)

4.3.1 Textual Similarities

There are great similarities between Articles 34 and 36 in terms of the grounds for setting aside and resisting enforcement respectively. Any study of Article 34 cannot

sensibly ignore Article 36. In addition Article 36, or its equivalent in particular jurisdictions, has been a rich vein of jurisprudence since the NYC came into being. Decisions on grounds contained in Article 36 are relevant to the proper approach to Article 34, which has received less treatment from the courts.⁴¹⁸ The Digest notes that the grounds in Article 34 ‘essentially mirrors that contained in article 36(1), which is similar to the provisions of article V of the 1958 New York Convention.’ The Digest goes on to observe that there might be a substantive difference between the law applied to Articles 34 and 36 respectively only in respect of public policy and non-arbitrability.⁴¹⁹ Binder also refers to the similarity between the three provisions and suggests the ‘similarity is indeed no coincidence’ and refers to the *travaux préparatoires* which suggest that Article 34 and 36 form ‘part of the alternative defence system’ for attacking an award.⁴²⁰ Binder then goes on to implicitly recognise the comparative relevance of the three provisions when considering the case law on Article 34: ‘full and detailed discussion of each ground would go far beyond the scope of this book and quick research of the literature available on the New York Convention immediately reveals how rich the sources are for discussion of this topic.’⁴²¹ It was the UNCITRAL Secretariat which suggested that Articles 34/36 reflect the NYC grounds for resisting enforcement,⁴²² recognised by Sanders as an important decision.⁴²³ Holtzmann and Neuhaus identify both the importance of the discussions about Article 34 and the crucial decision that was made for the grounds for Articles 34 and 36 to essentially mirror the NYC:

⁴¹⁸ In Hong Kong 189 cases were considered, of which 58 dealt with the NYC equivalent of Article 36 and only 9 considered Article 34. In Singapore 79 cases were considered, of which only 9 dealt with the NYC equivalent of Article 36 and 34 considered Article 34. In Australia 55 cases were considered, of which 16 dealt with the NYC equivalent of Article 36 and 5 considered Article 34. See generally Tables 2, 2A, 2B and 2C for these statistics.

⁴¹⁹ Digest 134 paras 1-2.

⁴²⁰ P Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd ed Sweet & Maxwell 2010) para 7-011 and A/CN.9/264 art 34 para 8. See also for example Choong & Weeramantry (n 377) para 81.21; A Baykitch, *Arbitration Law of Australia: Practice and Procedure* (Juris 2013) para 6.3.1; Merkin & Hjalmarsson (n 402) 61.

⁴²¹ Binder (n 420) para 7-017.

⁴²² H Holtzmann and J Neuhaus, *A Guide to The UNCITRAL model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer 1989) 912.

⁴²³ P Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (2nd edn, Kluwer 2004) 128.

The most difficult question was, of course, what grounds would justify setting aside an arbitral award. The primary issue here was whether the grounds for setting aside an award should be limited to those grounds on which recognition and enforcement of an award may be refused under the 1958 New York Convention.⁴²⁴

Of course the respective provisions are interpreted in very different circumstances. Article 34 is interpreted by the court of the jurisdiction where the arbitration took place whereas Article 36 (or its NYC equivalent) is interpreted by the court where enforcement is sought (although Article 36 is equally applicable to domestic awards, that is awards in arbitrations which have taken place in the enforcing jurisdiction). Courts will be called upon to interpret both Article 34 and 36, although not in respect of the same arbitration proceedings (save for domestic awards). It is therefore conceptually acceptable on a theoretical level for the court to apply Articles 34 and 36 consistently. As a general principle there is no obvious reason why the respective provisions should attract different interpretations, save where the wordings are textually different (substantively non-arbitrability and public policy) where consideration of differences would need to be considered. Morgan (and others) suggests that this is what should be done.⁴²⁵ Sanders suggests that the fact that the grounds under the NYC Article 34 are ‘virtually the same’ has a ‘harmonizing effect’ and it is likely that he is referring to this notion of same interpretation.⁴²⁶

Because the NYC equivalent (and an equivalent provision applying to domestic awards) more often than not emasculates Article 36,⁴²⁷ and this has occurred in the three chosen jurisdictions, the scope for the courts in the three jurisdictions to have regard to any decisions on Article 36 in its own court is removed because there will not be any. However the courts can have regard to decisions on Article 36 in those jurisdictions

⁴²⁴ Holtzmann and Neuhaus (n 422) 911.

⁴²⁵ Morgan (n 377) para [2.15]. See also R Morgan, ‘Book Review: International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions’ (2011) Asian DR 30.

⁴²⁶ P Sanders, ‘The Harmonising Influence of the Work of UNCITRAL on Arbitration and Conciliation’ in *Understanding transnational commercial arbitration* (Center for transnational law, Germany 2001) 43.

⁴²⁷ Binder (n 420) 600 shows that 42 out of the 80 UML jurisdictions have not adopted Article 36 or have included more extensive provisions dealing with enforcement.

which include it; to the Article 36 NYC equivalent as well as decisions on Article 34 itself.

The analysis in this chapter is central to the testing of uniformity in this thesis. This is because the substantive provisions of the NYC and both Articles 34 to 36 of the UML are all very similar textually. Jurisdictions that have adopted the NYC and the UML will have had a choice as to how this dual adoption was done. In the case of Hong Kong for example, it did adopt the NYC by scheduling the convention but the HKNAO has instead replicated equivalent provisions in the substantive text of the law (instead of adopting Article 36). In Chapters 5 and 6 cases applying both the old and new laws in Hong Kong will be considered and therefore it is necessary to compare in this chapter the grounds for setting aside with the grounds for resisting enforcement in both the NYC and Article 36.

4.3.2 The Similarities Contribute to Uniformity

The NYC is a treaty but the UML a soft law⁴²⁸ with potentially different rules applicable to their treatment by the courts. As seen above however, the similarity of wording suggests a similar approach to interpretation. Binder, in considering Article 34, identifies the linkage between the NYC and Articles 34/35/36:

Upon closer scrutiny it becomes apparent that the grounds listed in this provision bear great resemblance, on the one hand, to the grounds for refusing recognition and enforcement given in art.36(1)(a) and, on the other hand, to art.V of the New York Convention. The similarity is indeed no coincidence;⁴²⁹

The essence of the Convention is captured in arts 35 and 36 of the Model Law and the harmony between the two instruments greatly contributes to worldwide uniformity in international commercial arbitration.⁴³⁰

⁴²⁸ L. Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law' in I. Fletcher, L. Mistelis and M. Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2001).

⁴²⁹ Binder (n 420) para 7-011.

⁴³⁰ Binder (n 420) para 8-002.

Sanders similarly considers that the ‘alignment has had a harmonizing effect’.⁴³¹ However it could be suggested that the inclusion of provisions in the UML replicating the substantive provisions of the NYC might be confusing. Binder refers to this apparent conflict and concern within the UNCITRAL Working Group, with States that had adopted the NYC having no need for these provisions of the UML and those that had not adopted the NYC probably reluctant to implement it through the back door by adopting the UML. This issue was also magnified as the UML contains no reciprocity condition and at the time of the UML promulgation in 1985 some 47 signatory States of the NYC had adopted it with the reciprocity condition.⁴³² Despite these potential problems the reason for the replication of the NYC provisions in Articles 34/36 was in the final analysis simple. It was because there had to be Articles 34/36 dealing with the grounds for setting aside and resisting enforcement and there was no reason to depart from the grounds already included in the NYC although the Working Group had lengthy discussions about including additional grounds. They decided to align the grounds and gave, as their overall reason:

That solution would facilitate international commercial arbitration by enhancing predictability and expeditiousness and would go a long way towards establishing a harmonized system of limited recourse against awards and their enforcement. It was further stated in support that the reasons set forth in [the NYC] provided sufficient safeguards, and that some of the grounds suggested as additions to the list were likely to fall under the public policy reason.⁴³³

Nevertheless it is not obvious why the similarity between the NYC and Articles 35 and 36 of the UML per se contribute to uniformity. It has been recognised above that the similarities between the respective provisions will enable the courts, if they wish, to have regard to decisions on the provision it is interpreting and to decisions on the similar but different provisions applicable under different circumstances. As seen above Sanders thought this ‘alignment’ to have ‘had a harmonizing effect’.

⁴³¹ Sanders (n 423) 128.

⁴³² Binder (n 420) paras 8-004 - 8-006.

⁴³³ Third Working Group Report, A/CN.9/233 para 187 referred to in Holtzmann and Neuhaus (n 422) 912 see also 1055.

Perhaps it is better to view this as a contribution to testing uniformity as it provides more scope for comparative analysis. The existence of the different but similar provisions provides for a greater body of jurisprudence and thus expands the Article 34 global jurisconsultorium. However there is a danger in this in that a straight comparison between case law on each without proper methodology involving recognition of differences in application and textual dissimilarities with respect to particular jurisdictions could lead to incorrect conclusions. A court seized with the interpretation of Article 34 could be expected, when referring to decisions from the Article 34 global jurisconsultorium, not simply to rely upon a case blindly but to first analyse the differences in applicable interpretation methodology and any textual differences. It is immediately apparent that this obvious rule of proper comparative methodology renders the internationalist approach to interpretation practically and theoretically complex, unwieldy and user-unfriendly. There is a danger that the internationalist approach to interpretation could be rendered a topic of academic interest only.

4.4 Textual Comparison of Article 34

This part will consider the extent to which each of the jurisdictions have model textual uniformity and comparative textual uniformity as regards Article 34 and the NYC equivalent provisions. This entails, first a consideration of whether each of the jurisdictions has model textual uniformity with Article 34 both in respect of their adoption of Article 34 and in their adoption of an equivalent to NYC Article V (as none of the jurisdictions have adopted Article 36). Secondly consideration is given to whether there is comparative textual uniformity as between the three jurisdictions. The results of this exercise in respect of the grounds for setting aside are in Table 1.

It is noteworthy that scholarly writings do not draw attention to anything other than major changes. For example Broches states that the grounds ‘to a large extent reproduces *verbatim*’ the NYC grounds and ‘no substantial difference between’ the UML and NYC in this regard.⁴³⁴ Chew states, regarding the SIAA: ‘See section 31 of the IAA which consistently mirrors Article 34 of the Model Law’ which is clearly not

⁴³⁴ A Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer 1990) 188.

the case on a superficial review of Table 1.⁴³⁵ Merkin and Hjalmarsson are a little more circumspect when comparing the various relevant provisions: ‘The list of defences in s. 31(2) is taken almost verbatim from the New York Convention itself. The same list of defences, with minor variations, appears as grounds for challenging an award under Model Law, art. 34.’⁴³⁶ Hwang, Chan and Selvaraj in their comparison state: ‘The grounds are essentially those set out in Article V of the [NYC], which are similar to those under Article 34.’⁴³⁷ Moser and Choong, in comparing the NYC and the equivalent in the HKNAO: ‘The grounds in the Arbitration Ordinance for refusing enforcement of a Convention Award follow those of the New York Convention.’⁴³⁸ The same authors when comparing the IAA NYC equivalent and NYC Art. V: ‘The grounds for refusing recognition and enforcement of arbitral awards under Article V of the New York Convention are mirrored in Article 36.’⁴³⁹ Moser and To suggest Article 34 ‘closely follows’ and Section 44 (NYC equivalent) ‘replicates with minor variations’ the NYC grounds.⁴⁴⁰

The importance of this part of the analysis is perhaps self evident; Chapters 5 and 6 will consider applied uniformity and in doing so will consider the extent to which an internationalist interpretation approach has been used by the courts of the three jurisdictions and the extent to which the global jurisconsultorium has been utilised by those courts. Where cases from other jurisdictions have been relied upon consideration should be given to the differences between the respective laws applied. Where the comparison is between the decisions of the courts of the three jurisdictions, this chapter will provide the tools for testing whether when applying decisions from the other jurisdictions the courts have considered the differences in text identified. Where the comparison is with a case from another jurisdiction it is more difficult to consider this

⁴³⁵ Chew (n 397) 102 (n 7); see also Merkin and Hjalmarsson (n 402) 116-118 where in the case of each ground the reader is cross-referred to the notes on Section 31 of the SIAA, the NYC equivalent, without any reference to textual dissimilarities.

⁴³⁶ Merkin and Hjalmarsson (n 402) 72.

⁴³⁷ Hwang, Chan and Selvaraj (n 403).

⁴³⁸ M Moser and J Choong, ‘Hong Kong’ in Moser M and Choong J (eds), *Asia Arbitration Handbook* (Oxford 2011) para 4.393.

⁴³⁹ B Gerhle and D Jones, ‘Australia’ in Moser and Choong (eds), *ibid* para 23.340.

⁴⁴⁰ Moser and To (n 377) HK-24, 25.

test but it is still possible to test the court's approach, in particular whether it has considered any possible textual dissimilarities of the type identified in this chapter.

4.4.1 The Discretion

The first comparison which is important is between the introductory parts of the NYC, Article V, Article 34 and Article 36. Whilst the wording is not entirely the same and there are required differences between Articles 34 and V/36 to take into account the different contexts of application, they all include the important word 'may' denoting that in each case the court has a discretion whether to set aside or allow enforcement after a ground has been made out.⁴⁴¹ Much of the case law on each article concerns the exercise of this discretion. The discretion is carried forward into the three jurisdictions' legislation.⁴⁴²

4.4.2 First Ground – Incapacity, Invalid Arbitration Agreement

Article 36(1)(a)(i) contains the UML equivalent to the NYC Article V1(a) which is similar save for, first 'a party' replacing 'the parties' in the first line, which the Commission considered a drafting change to clarify that incapacity of one party to the arbitration agreement sufficed.⁴⁴³ Secondly the reference to the test for incapacity being

⁴⁴¹ Although the Working Group wanted the UML not to include discretion but its desire to maintain the NYC wording prevailed. See Binder (n 420) para 8-028 and 8-029 where the consequences of including the discretionary power are referred to in the form of the *Hilmarton (Societe Hilmarton v Societe Omniumde Traitment et de Valorisation*, Cass. Civ. L'ere, 1994 Rev, Arb. 327) and *Chromally (In the matter of the Arbitration of Certain Controversies Between Chromally Aeroservices and the Arap Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996). These were cases where awards set aside in the *lex fori* were nevertheless enforced in the enforcement jurisdictions.

⁴⁴² In some translations of the NYC, all equally binding, for example the French one, the wording suggests no discretion and some have suggested that a no discretion approach is best as otherwise different court treatment of the discretion would lead to a non-uniform approach to interpretation. See P Nacimiento, 'Article V(1)(a)' in H Kronke, P Nacimiento, D Otto and C Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Wolters Kluwer 2010) 208; B Hanotiau and O Caprasse, 'Public Policy in International Commercial Arbitration' in E Gaillard and D Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2009) 802-803.

⁴⁴³ Holtzmann and Neuhaus (n 422) 916 (n 27) quoting from the The report of UNCITRAL on the work of its eighteenth session (3-21 June 1985) (UN document A/40/17 available at

under the law applicable to them is omitted. This omission is also made in Article 34(2)(a)(i). These omissions from the UML may be positive improvements but nevertheless show a change from the NYC which would require an amendment to the UML by an adopting State if it wished to keep precisely to the NYC requirements and, secondly has its own problems in the uncertainty as to which law will apply. The drafters of the UML made a conscious decision to leave out the words in Article V out of ‘dissatisfaction with its vagueness and not because it was thought to point to one law rather than another.’⁴⁴⁴ The Commission did not consider that this was a substantive discrepancy with Article V.⁴⁴⁵ This is perhaps surprising and given their desire to keep to the NYC wording somewhat self serving and suggests that the difference in wording results in potentially significant textual dissimilarity. The deficiency in the NYC wording and scope for non-achievement of any applied uniformity is succinctly summarized by Anzorena:

These twenty words raise several interpretative issues and uncertainties and their meaning is more difficult to apprehend than may appear at first sight.

This is basically for two reasons. First, the structure and wording of the text of the Convention do not define the concept of capacity and are not clear as to the applicable law and other basic circumstances surrounding the operation of this defence. Secondly, the Convention is applied by courts from different parts of the world, and the imprecision referred to leaves significant scope for the individual

<<http://www.uncitral.org/pdf/english/yearbooks/yb-1985-e/vol16-p3-46-e.pdf>> accessed 11 September 2014); Broches (n 434) 189.

⁴⁴⁴ Holtzmann and Neuhaus (n 422) 916; C Anzorena, ‘The Incapacity Defence under the New York Convention’ in Gaillard and Pietro (n 442) 619. But the Explanatory Note by UNCITRAL Secretariat on the Model Law on International Commercial Arbitration para 50 considered the NYC ground to be ‘viewed as containing an incomplete and potentially misleading conflicts rule’. This document is published together with the 1985 UML and is available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 22 March 2014.

⁴⁴⁵ Holtzmann and Neuhaus (n 422) 916 quoting from Commission Report (n 443) para 321; Broches (n 434) 213.

operation of the different *lex fori* and, thus, for a range of divergent interpretations.⁴⁴⁶

Article 34(2)(a)(i) contains the equivalent ground for setting aside which is identical to Article 36(1)(a)(i) save that, in respect of the test for invalidity, instead of a reference to the ruling law being ‘under the law of the country where the award was made’ has a reference to ‘under the law of this State’ which is no more than a clarification because the court can only set aside an award made in the State where the award was made whereas an award can be enforced under Article 36 wherever it is made.⁴⁴⁷ The test is therefore the same but the result may depend on what substantive law governs the test. A NYC case would consider the test on the basis of expert evidence of the law of the jurisdiction where the award was made whereas what law applies in an Article 34 case is unclear.⁴⁴⁸

The HKAO and HKNAO adopt Article 34(2)(a)(i) unchanged.⁴⁴⁹ They similarly incorporate the equivalent NYC ground with the small amendment concerning ‘party’ and ‘parties’ as above, the clarification of the law ‘applicable to him’ and the contextual amendment relating to the applicable law for the test of invalidity.⁴⁵⁰ Singapore and Australia do the same as Hong Kong⁴⁵¹ although Pryles suggests that the ‘party’ ‘parties’ change results in a ‘narrower’ ground than the NYC which he suggests refers to incapacity on the part of ‘either party’ which is an interpretation opposite to a natural reading of the provision.⁴⁵² Therefore there is incomplete model textual uniformity regarding Article 34 because whilst each of the jurisdictions adopt the Article 34 ground unchanged, their adoption of the NYC Article V equivalent is slightly different (albeit some of the differences understandable contextual ones). There is also incomplete

⁴⁴⁶Anzorena (n 444) 615, at 632 he suggests the provision raises ‘some subtle hermeneutic problems’. See also A Broches, ‘The 1985 UNCITRAL Model Law on International Commercial Arbitration: An Exercise in International Legislation’ (1987) 18 NYIL 3.

⁴⁴⁷ See Binder (n 420) para 8-024.

⁴⁴⁸ See Choong & Weeramantry (n 377) para 81.26-27.

⁴⁴⁹ Section 34C and Section 81(1) respectively.

⁴⁵⁰ Section 44(2)(a) and (b) and Section 89(2)(a) and (b) respectively.

⁴⁵¹ Sections 3(1) (Art 34) and 31(2)(a) (NYC) SIAA and Sections 16(1) (Art 34) and 8(5)(a) IIA respectively.

⁴⁵² Pryles (n 406) para [8.2.1].

comparative textual uniformity as although each jurisdiction adopts Article 34 unchanged, it nevertheless adopts the NYC Article V equivalent in slightly different terms.

In conclusion, if any court of the three jurisdictions is considering a setting aside application under Article 34(2)(a)(i) and are referred to an Article 34 case from one of the other jurisdictions there are no differences in text to consider. Where the same court is referred to a NYC equivalent case, whether from its own or one of the other two jurisdictions, it should bear in mind the lack of model and comparative textual uniformity referred to above.

4.4.3 Second Ground – Unable to Present Case

Article 36(1)(a)(ii) contains the UML equivalent of NYC Article V1(b) and this is identical save for the reference to ‘an arbitrator’ and to ‘arbitral proceedings’ in the second line. These are not substantive changes. Article 34(2)(a)(ii) contains the equivalent ground for setting aside which is identical save that ‘the party against whom the award is invoked’ is replaced by ‘the party making the application’ which is a change merely to reflect the fact that a setting aside application does not involve enforcement of the award. Again there are no substantive differences between the three provisions and one would expect similar interpretation for all three. However under the UML this ‘due process’ ground is circumscribed by Article 18 requiring the parties to be ‘treated with equality and each party shall be given a full opportunity of presenting his case.’⁴⁵³ Whilst this does not directly affect the interpretation of this ground, it will do so indirectly and its absence from the NYC arguably reflects a lack of textual uniformity between the NYC and UML. In the absence of Article 18 the courts have no uniform yardstick for identifying the standards of due process.⁴⁵⁴ This highlights the application of this ground (as distinct from its interpretation) will be subject to laws and rules applicable to the particular arbitration. The global jurisconsultorium on this ground is therefore likely to have fewer tendencies to promote uniformity given the likelihood of differences in context.

⁴⁵³ Binder (n 420) para 7-019.

⁴⁵⁴ A Jana, A Armer and J Kranenburg, ‘Article V(1)(b)’ in Kronke and Naciemento (n 442) 237-240; H Verbist, ‘Challenges on Grounds of Due Process Pursuant to Article V(1)(B) of the New York Convention’ in Gaillard and Pietro (n 442) 683.

The HKAO, HKNAO, SIAA and IAA adopt Article 34(2)(a)(ii) unchanged.⁴⁵⁵ They similarly incorporate the equivalent NYC ground largely unchanged (other than what are no more than clarifications).⁴⁵⁶ Therefore prima facie there is complete model and comparative textual uniformity. But the HKAO and HKNAO depart from Article 18, instead providing their own standards of due process, including a clear difference from Article 18 (reasonable opportunity rather than full opportunity to present a case - sections 2GA and 46 respectively). The IAA also amends Article 18 in providing for a reasonable opportunity instead of full opportunity to present a case. This is an important amendment in departing from what UNCITRAL's Secretary General refers to as the '*Magna Carta*' of the UML.⁴⁵⁷ On close analysis therefore there is no model or comparative textual uniformity other than model textual uniformity on the part of the SIAA and comparative textual uniformity between Australia and Hong Kong. If therefore any court of the three jurisdictions is considering a setting aside application under Article 34(2)(a)(ii) and are referred to an Article 34 or NYC case from one of the other jurisdictions there will be these contextual differences to bear in mind.

4.4.4 Third Ground – Scope of Submission

Article 36(1)(a)(iii) contains the UML equivalent and again is identical save for the reference to 'dispute' instead of 'difference' in the first line. Article 34(2)(a)(iii) contains the equivalent ground for setting aside and is identical other than replacing the reference to 'recognized and enforced' being replaced by 'set aside' which is a necessary amendment in the context of a setting aside provision. There are no substantive differences between the three provisions and there is no reason to expect dissimilar interpretation. Consideration was given by the Working Group to amending the wording so that instead of referring to the 'not falling within the terms of the submission to arbitration' the provision would refer to 'outside the scope of the arbitration agreement or not referred to the arbitral tribunal'. This was ultimately not

⁴⁵⁵ Sections 34C, 81(1), 3(1) and 16(1) respectively.

⁴⁵⁶ Sections 44(2)(c), 89(2)(c), 31(2)(c) and 8(5)(c) respectively.

⁴⁵⁷ See The Report of the Secretary-General dated 25 March 1985 and entitled '*Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*' (UN document A/CN.9/264, available at <<http://www.uncitral.org/uncitral/en/commission/18th.html>> accessed 22 March 2014 44, also referred to in P Sanders, '*UNCITRAL's Model Law on International Arbitration: Present Situation and Future*' (2005) 21 Arb. Int'l 21 443, 453.

changed in order to preserve the alignment between the UML and NYC but it is suggested by Holtzmann and Neuhaus that the considered revised wording better reflects the intent. This *travaux préparatoires* may have a bearing on the interpretation.⁴⁵⁸

The HKAO, HKNAO, SIAA and IAA adopt Article 34(2)(a)(iii) unchanged.⁴⁵⁹ They incorporate the equivalent NYC ground with some textual changes concerning the separation of matters submitted from those not submitted to arbitration although seemingly leading to the same result.⁴⁶⁰ Therefore there is incomplete model textual uniformity regarding Article 34 because whilst each of the jurisdictions adopts the Article 34 ground unchanged, their adoption of the NYC Article V equivalent is slightly different (albeit some of the differences contextual ones). There is also incomplete comparative textual uniformity as although each jurisdiction adopts Article 34 unchanged the NYC Article V equivalent is not adopted in precisely the same terms.

In conclusion if any court of the three jurisdictions is considering a setting aside application under Article 34(2)(a)(iii) and are referred to an Article 34 case from one of the other jurisdictions there are no differences in text to consider. Where the same court is referred to a NYC equivalent case, whether from its own or one of the other two jurisdictions, it should bear in mind the lack of model and comparative textual uniformity referred to above.

4.4.5 Fourth Ground – Tribunal Composition or Arbitral Procedure

Article 36(1)(a)(iv) contains the UML equivalent of NYC Article V(1)(d) and again is identical save for the reference to ‘arbitral tribunal’ rather than ‘arbitral authority’ in the first line. Article 34(2)(a)(iv) contains the equivalent ground for setting aside and is rather different. First the reference to the possibility of the agreement of the parties being in conflict with any mandatory provision of the UML in which case the agreement is effectively invalid for the purposes of this ground. It is interesting as to

⁴⁵⁸ Second Draft of provisions of the UML, A/CN.9/WG.II/WP.42 available at <<http://www.uncitral.org/pdf/english/travaux/arbitration/ml-arb/acn9-wg2-wp42-e.pdf>> accessed 20 September 2014. Referred to by Holtzmann and Neuhaus (n 422) 1059. This is also the view of Van den Berg on NYC Art. V; A Van den Berg, *The New York Convention of 1958* (Kluwer 1981) 312, 322.

⁴⁵⁹ Sections 34C, 81(1), 3(1) and 16(1) respectively.

⁴⁶⁰ Sections 44(2)(d), 89(2)(d), 31(2)(d) and 8(5)(d) respectively.

why there has clearly been a deliberate decision to omit this part from Article 36(1)(a)(iv) but is presumably to better reflect the NYC as both deal with enforcement whereas the setting aside ground could independently be improved. This suggests a desire by the drafters of the UML to be consistent between the provisions of the NYC and the enforcement provision of the UML. However the *travaux préparatoires* suggest the reason was that the NYC gave absolute priority to the agreement of the parties irrespective of any mandatory provision of the curial law, whereas when applying Article 34 the court was essentially applying domestic law and inconsistent provisions of local law would have to take precedence.⁴⁶¹

The second difference is the reference in Article V1(d) and Article 36(1)(a)(iv) to the law of the country where the arbitration took place and in Article 34(2)(a)(iv) it is to ‘this Law’ being a reference to the UML. As with the first ground, this is no more than a clarification because the court can only set aside an award made in the State where the award was made whereas an award can be enforced under Article 36 wherever it is made.⁴⁶² Both this difference and the first are matters that should be considered when court decisions on this ground are considered.

The HKAO, HKNAO, SIAA and IAA adopt Article 34(2)(a)(iv) unchanged.⁴⁶³ They incorporate the equivalent NYC ground with the textual changes referred to above. Therefore there is incomplete model textual uniformity regarding Article 34 because whilst each of the jurisdictions adopts the Article 34 ground unchanged, their adoption of the NYC Article V equivalent is slightly different (albeit some of the differences understandable contextual ones). There is also incomplete comparative textual uniformity as although each jurisdiction adopts Article 34 unchanged the NYC Article V equivalent is not adopted in precisely the same terms.

⁴⁶¹ Holtzmann and Neuhaus (n 422) 917 quoting from Fifth (wrongly referenced as Third) Working Group Report, A/CN.9/233, para 149 available at <<http://www.uncitral.org/pdf/english/travaux/arbitration/ml-arb/acn9-233-e.pdf>> accessed 9 March 2015; see also 1060; Broches (n 434) 196. This can lead to problems where the parties agreement conflicts with mandatory provisions of the *lex fori* (see S Jarvin, ‘Irregularity in the Composition of the Arbitral Tribunal and the Procedure’ in Gaillard and Pietro (n 442) 730; P Nacimientto, ‘Article V(1)(d)’ in Kronke and Nacimientto (n 442) 285-287.

⁴⁶² Binder (n 422) para 8-024; Broches (n 434) 195.

⁴⁶³ Sections 34C, 81(1), 3(1) and 16(1) respectively.

In conclusion if any court of the three jurisdictions is considering a setting aside application under Article 34(2)(a)(iv) and are referred to an Article 34 case from one of the other jurisdictions there are no differences in text to consider. Where the same court is referred to a NYC equivalent case, whether from its own or one of the other two jurisdictions, it should bear in mind the lack of model and comparative textual uniformity referred to above.

4.4.6 Ex Officio Grounds – Arbitrability and Public Policy

There was much discussion about this ground recorded in the *travaux préparatoires*. In particular a number of grounds were considered for addition to Article 34 which the Commission believed were already covered in the public policy ground. In the final Report the Commission advised that this ground should be given a broad interpretation:

It was understood that the term ‘public policy’ which was used in the 1958 New York Convention and many other treaties covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording ‘the award is in conflict with the public policy of this State’ was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.⁴⁶⁴

Another question of interpretation concerned whether the ground should refer to ‘international public policy’, given that by this time the NYC had been subject to much interpretation and there was an emerging trend in court decisions to distinguish between the concepts of international and domestic public policy. This idea was not reflected in Article 34 however as there was a clear and strong desire to have the grounds of the NYC and UML aligned.⁴⁶⁵

Articles 36(1)(b) (and Article V(2) of the NYC) and Article 34(2)(b) contain two additional grounds which do not depend on an application being made by any party and

⁴⁶⁴ A/40/17 para 297.

⁴⁶⁵ A/CN.9/232 paras 16-17 and A/CN.9.233 paras 154. See also D Otto and O Elwan, ‘Article V(2)’ in Kronke and Nacimiento (n 442) 366.

can be considered by the court on its own motion or *ex officio*. These are the non-arbitrability and public policy grounds. The provisions of Articles 36 (and the NYC equivalent) and 34 and are the same save that the law applicable to the test for arbitrability under Article V(2) is that of the jurisdiction where enforcement is sought. This is consistent with Article 36 but not Article 34. One would still expect similar interpretation but the difference does mean that an application in one jurisdiction under Article 34(2) would be subject to a potentially different test to the same award being tested in another jurisdiction under Article V(2).⁴⁶⁶

The HKAO, HKNAO and SIAA adopt Article 34(2)(b) unchanged.⁴⁶⁷ The IAA adds to Article 34(2)(b) by including matters which are examples of the public policy ground; namely:

- (a) the making of the...award was induced or affected by fraud or corruption;
or
- (b) a breach of the rules of natural justice occurred in connection with the making of the ...award.⁴⁶⁸

Interestingly the SIAA includes almost identical wording⁴⁶⁹ but instead of describing these matters as examples of the public policy ground they are included as additional grounds in their own right.⁴⁷⁰ This could affect the interpretation of the ground whilst the IAA equivalent is stated to be without limiting the interpretation of the ground (although some have interpreted this as a complete definition of the ground itself).⁴⁷¹ Whilst on one level it could be said that there is model textual uniformity because all three jurisdictions adopt Article 34(2)(b) without changing the wording both Singapore

⁴⁶⁶ W Shen, *Rethinking the New York Convention* (Insentia 2013) Chapter 5, Public Policy and the New York Convention 234.

⁴⁶⁷ Sections 34C, 81(1) and 3(1) respectively.

⁴⁶⁸ Section 19; a similar approach has been adopted by a number of other jurisdictions including New Zealand and Malta: Binder (n 420) para.7-024; Shen (n 466) refers to the transplanting of this definition of public policy to a number of jurisdictions including Australia and Singapore at 292.

⁴⁶⁹ The provision relating to natural justice qualifies the breach of natural justice by requiring it to have prejudiced the rights of the party concerned.

⁴⁷⁰ Section 24.

⁴⁷¹ Gerhle and Jones (n 439) paras 23.36 and 23.318.

and Australia add what are grounds in Singapore and illustrations of public policy in Australia, so it is not possible to say that either Singapore or Australia have model textual uniformity as regards the public policy ground and it is not possible to say that there is comparative textual uniformity. The textual differences between each jurisdiction's adoptions of the public policy ground into the setting aside law and, in the case of Singapore and Australia, the differences in their laws with the Article 34 model, should be 'carefully considered'⁴⁷² and taken into account by the courts.

Regarding the NYC adoption of the non-arbitrability ground, the HKNAO, SIAA and IAA adopt the NYC ground unaltered and therefore have model and comparative textual uniformity.⁴⁷³ The HKAO however did not include the reference to the law of Hong Kong in the ground leaving it potentially ambiguous as to what law the test would be applied to (the law of Hong Kong or the law where the award was made).⁴⁷⁴ It is interesting that in the discussions about the drafting about Article 34(2)(b) (and Article 36(1)(b)) it was proposed that the reference to the '*law of this State*' be removed, as arbitrability was a question that should be decided by the *lex contractus*. However this proposal was rejected as it was suggested that parties to a contract would have to be careful to select an arbitral forum that would not set aside their award.⁴⁷⁵ Similar reservations were raised about the drafting of the NYC but at that time it seems to have been the view that arbitrability was properly to be considered according to the law of the enforcing court.⁴⁷⁶ At that time there was no Article 34 but it is not difficult to conceive that the test for setting aside could be the *lex contractus* and this would have enabled complete textual uniformity of the provision across Articles 34/36 and Article V. This difference in applicable law should therefore be taken into account where any relevant case is considered.

⁴⁷² A Yeo, 'Harmonisation, Party Autonomy and Mandatory Provisions under the UNCITRAL Model Law' in UNCITRAL-SIAC Conference, *Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration* (SIAC 2006).

⁴⁷³ Sections 89(3)(a), 31(4) and 8(7)(a) respectively.

⁴⁷⁴ Section 44(3).

⁴⁷⁵ Holtzmann and Neuhaus (n 422) 918 quoting from the Commission Report A/40/17 (n 443) para 293.

⁴⁷⁶ Van den Berg (n 458) 369.

The SIAA adopts the NYC public policy ground unaltered and therefore could be said to have model textual uniformity.⁴⁷⁷ However the addition in the SIAA of two grounds which are no more than illustrations of public policy detracts from this model textual uniformity and amounts to a localization of the UML.⁴⁷⁸ The IAA adopts the same additional grounds but as illustrations and this also detracts from an otherwise model textual uniformity requiring consideration by courts. The HKAO, HKNAO and IAA all adopt the public policy ground without specifying the law of the public policy test being that of the enforcing jurisdiction, as the NYC does.⁴⁷⁹ There is therefore potential ambiguity as to what law is relevant when testing public policy. Given the differences between the three jurisdictions it cannot be suggested that there is any comparative textual uniformity. However arguably the differences between the legislation of the three jurisdictions to the NYC might enhance the prospects of uniformity it being generally accepted that Article V(2)(b) of the NYC ‘did not seek overtly to attempt to harmonise public policy or to establish a common international standard’.⁴⁸⁰

4.5 Chapter 4: Summary of Conclusions to take Forward

The three selected jurisdictions take different approaches to the expressed methodological approach to the interpretation of the UML as adopted by them. In Chapter 3 it was concluded that an internationalist approach to interpretation was required for the UML certainly with Article 2A and possibly without it. In Chapter 5 this conclusion will be tested and in particular whether the different approaches on an expressed level to such methodology between the three jurisdictions has had any bearing on their approach.

⁴⁷⁷ Section 31(4)(b).

⁴⁷⁸ Pillay (n 400) 369; see also the apparent criticism of the additional grounds and the possible implications for harmonisation in Yeo (n 472) 57-58.

⁴⁷⁹ Sections 44(3), 89(3)(b) and 8(7)(b). In the case of Hong Kong the point is particularly interesting as the HKNAO corrected the omission (in the HKAO) of the reference to Hong Kong law as regards the non-arbitrability ground.

⁴⁸⁰ International Law Association, London Conference (2000) Committee on International Commercial Arbitration, ‘Interim Report on Public Policy as a Bar to Enforcement of International Arbitration Awards’ available at < <http://www.ila-hq.org/en/committees/index.cfm/cid/19> > accessed 20 September 2014, 8.

Articles 34 and 36 of the UML depart from the wording of the NYC in some respects. It is debatable whether such departures as regards Article 36 are effective in municipal law of those adopting States that are also signatories to the NYC. This is because the UML states expressly that it is ‘subject to any agreement in force between this State and any other State or States.’ This is understood to ensure that the UML does not compromise treaties⁴⁸¹ and this will include the NYC. Indeed the Analytical Commentary suggests that the proviso ‘should be of primary relevance with regard to treaties devoted to the same subject matter as that dealt with in the model law. Prominent examples ...New York Convention...’⁴⁸² and Sanders states that it ‘applies in particular to the New York Convention’.⁴⁸³ Given that this was recognised by the drafters of the UML it may be presumed that they did not consider the amendments made to Article 36 would be in conflict with the corresponding provisions of the NYC. This gives rise to two issues: first whether any jurisdiction has further amended Article 36 to place it in conflict with the NYC and thus its obligations under the NYC. Secondly whether any changes made by any of the chosen jurisdictions has been the subject of any judicial scrutiny. As none of the three jurisdictions have adopted Article 36 this is probably not relevant to the analysis in this thesis. However it does raise the same question in respect of the departures contained in the Article 36 equivalent provisions contained in each jurisdictions’ legislation. For present purposes this potential question should be kept in mind whilst respecting the *prima facie* departures from the NYC by each jurisdiction.

There are various textual dissimilarities within the grounds between the NYC and UML as adopted by the selected jurisdictions. Some of the differences are not significant but some are and some are potentially significant, in particular those relating to the public policy ground (which will be seen to be material in Chapter 5). Table 1 summarises the differences.

⁴⁸¹Binder (n 420) 24.

⁴⁸²Analytical Commentary (n 457) para 10.

⁴⁸³Sanders (n 423) 58.

Chapter 5: Applied Uniformity of the UNCITRAL Model Law – Juristic Methodology

It is critical that consistent interpretation and application is given to both the international and domestic legislative provisions which are based upon the UNCITRAL Model Law on International Commercial Arbitration (as revised and adopted in 2006) (the Model Law) so that they conform with international thinking and arbitral practice, particularly having regard to the Model Law's international heritage.⁴⁸⁴

5.1 Introduction – the Internationalist Approach

The words of the current Chief Justice of the Federal Court of Australia above are apposite and this Chapter will consider the extent to which the courts of the selected jurisdictions have adopted what has been referred to in Chapter 3 as the internationalist approach to the interpretation of the UML. In consequence whether they have achieved a degree of applied uniformity as regards the approach to interpretation.

It has been seen above that the NYC is important to the questions addressed in this thesis and requires consideration in this chapter. First there is the direct effect of the very close reflection of the NYC grounds of resisting enforcement in Article 35 of the UML or in the relevant enforcement provisions of the selected jurisdictions' legislation. Secondly this is reinforced, as it will be seen that the courts have relied upon decisions on enforcement in setting aside cases. Thirdly it has been proposed in Chapter 3 that there may be little difference between the approach of a court to the interpretation of a treaty and the UML (whether with or without Article 2A) and this hypothesis needs to be tested. Finally the UML was an extension of the NYC⁴⁸⁵ and consideration should be given to whether the courts have treated the NYC and UML similarly. In this chapter therefore cases from the selected jurisdictions that apply any part of the UML (not just Article 34) as well as those applying the NYC are considered in order to test the court's methodological approach to interpreting these norms.

⁴⁸⁴ J Allsop, 'Judicial Support of Arbitration' (FCA) [2014] FedJSchol 5.

⁴⁸⁵ See para 3.1 above.

When analysing how the court of a particular jurisdiction has approached the interpretation of the NYC and UML some features must be borne in mind. In common law jurisdictions the doctrine of *stare decisis* requires a system of precedent. There will normally be a tier system of junior and superior courts and once a superior court has pronounced on a particular question that will be a leading case that requires to be followed by the junior or inferior courts. One could expect therefore that following the adoption of the NYC and UML respectively there would follow a period when the inferior courts would be required to deal with applications concerning the NYC and UML. In doing so the courts would grapple with the approach to interpretation as well as actual interpretation. These courts would be effectively path finding for courts dealing with the same issues subsequently. Appeals could also be path finding to the extent that they comprise leading cases, particularly where the final or ultimate appeal court hears the appeal.⁴⁸⁶ One might expect therefore to find that in common law jurisdictions the most interesting cases have tended to occur in the early years following adoption of the NYC and UML. It will be seen below that this was arguably the case in Hong Kong where the NYC/UML legislative framework has been settled for many years and from the outset some of the judiciary promoted the non-interventionist and internationalist approach.⁴⁸⁷ However in both Singapore and Australia although the legislative frameworks have been around for a similar time the judiciary (possibly initially lacking the policy directive that may have existed in Hong Kong) took far longer to adopt a non-interventionist and internationalist approach and this has meant that the most interesting cases have come along within the last 5 to 10 years.

This chapter will first rehearse the method that will be adopted in the case analysis of testing the juristic methodology of the selected jurisdictions' courts. It will then survey the development of the relevant caselaw in suitable temporal periods drawing conclusions at the end of each survey period. It will conclude by analysing the survey results under appropriate headings with an overall conclusion about the degree of applied uniformity achieved with such methodology.

⁴⁸⁶ This might however depend on the extent to which the relevant jurisdiction allows appeals from first instance decisions. There is a trend to prevent such appeals in a number of jurisdictions: see J Hill, 'Onward Appeals under the Arbitration Act 1996' (2012) 31 C.J.Q. 194.

⁴⁸⁷ See paras 5.2.1 and 5.2.2 below.

5.2 Testing the Internationalist Approach

Chapter 3 identified uniformity in the context of the UML as an approach which achieved a degree of textual and applied uniformity with the latter divided into the adoption of an approach which had due regard to the objectives of the UML and the similarity of results. Chapter 4 identified the degree of textual uniformity achieved by the selected jurisdictions. This chapter will primarily consider the approach question, namely whether the three jurisdictions have adopted the internationalist approach and Chapter 6 will consider the similarity of results question. This chapter will also consider the extent to which textual dissimilarities identified in Chapter 4 have been taken into account in the courts' decisions. If they have not been taken into account this might suggest that a measure of textual dissimilarity is overridden by the force of policy or the force of persuasive influence of leading cases from other jurisdictions.

Chapter 3 identified the criteria or norms to test whether an internationalist approach has been adopted.⁴⁸⁸ These measureable norms are:

UML I-Norm: A conscious decision to adopt an internationalist approach to interpretation of the UML. By this is meant that the court expresses the intention to adopt an approach that expressly or implicitly reflects the principles of Article 2A. This may also apply to a NYC case given that the principles of Article 2A are not excluded from NYC cases and of course the conclusion from Chapter 3 is that Article 2A is effectively a codification of the principles applicable to uniform laws.

TP I Norm: Regard to the *travaux preparatoires* of the UML.

JC I-Norm: Regard to the UML global jurisconsultorium, involving UML jurisdiction cases and/or scholarly writings on the UML.

It might be suggested that the criteria should include regard to international cases from England and the USA and/or other non-UML jurisdictions. However including this

⁴⁸⁸ See para 3.7 above.

criterion will not assist the assessment because the developed judicial systems of Hong Kong, Singapore and Australia, like those of other developed jurisdictions, have long been prepared to adopt an international approach in the sense of having regard to decisions of other well developed jurisdictions and an increasing willingness to do so.⁴⁸⁹ This trend has been referred to as ‘judicial globalisation’.⁴⁹⁰ Judicial globalisation is not therefore the internationalist approach as described above although there is likely to be an overlap between the trend and internationalism brought about by uniform norms such as the NYC and UML which is probably impossible to identify. However it is interesting to consider the extent to which English cases, in particular, are still being cited in cases involving the NYC and UML because adopting the internationalist approach should necessarily involve moving away from reliance on English cases. Nottage has criticised the lack of an internationalist approach (and thus reliance upon English cases) by Australian courts and that criticism may be justified to the extent that reliance primarily on English cases is unnecessary because there are relevant cases from UML jurisdictions.⁴⁹¹ The analysis of cases for this thesis however suggests that many references to English cases relate either to enforcement decisions (where there is a NYC overlap) or principles such as waiver and estoppel where UML jurisprudence is inevitably much less developed. A continued reliance on English cases is not therefore determinative of a failure to adopt an internationalist approach although a finding that the courts have largely stopped the practice would suggest a stronger internationalist approach.

A combination of qualitative and quantitative method has been used to test the internationalist approach. The qualitative method consists of an analysis of case law and identifying the degree of adoption of the internationalist approach, on the basis of the three I-Norms. The quantitative method consists of a tabulated analysis of each case considered in particular to identify which of the I-Norms is engaged in each case. A total of 323 cases from the selected jurisdictions, all dealing with matters involving the

⁴⁸⁹ F Bachand, ‘Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism’ (2012) J.Disp.Resol. 83.

⁴⁹⁰ W Shen, *Rethinking the New York Convention* (Insentia 2013) Chapter 5 Public Policy and the New York Convention 266.

⁴⁹¹ See for example L Nottage, ‘International Commercial Arbitration in Australia: What's New and What's Next?’ (2013) 30 J.Int'l Arb. 465, 491.

NYC or UML were analysed. They were then categorised as to whether the judgment had engaged each of the I-Norms (whether directly or indirectly),⁴⁹² whether the judge had considered any relevant textual dissimilarities and whether English cases were cited. The relevant data is recorded and tabulated in Tables 2 to 6⁴⁹³ with summaries of the findings, as explained below, at Table 2.⁴⁹⁴

Filtered from the 324 cases were those not related to enforcement or setting aside.⁴⁹⁵ The analysis of the remaining cases are tabulated for each jurisdiction: Hong Kong in Table 3,⁴⁹⁶ Singapore in Table 4⁴⁹⁷ and Australia in Table 5.⁴⁹⁸ Table 6 comprises an extraction from Tables 3 to 5 of the 48 cases cross jurisdiction, dealing with setting aside cases only.⁴⁹⁹

The results of the case analyses (cross jurisdiction) are summarised in Tables 2 for all cases (including cases unrelated to enforcement and setting aside) Table 2A for enforcement and setting aside, Table 2B for enforcement alone and Table 2C for setting aside alone.

This chapter will refer to trends, indications and conclusions that can be drawn from the various analyses to test the internationalist approach.

⁴⁹² An indirect engagement occurs when the court cites a domestic case which has itself directly engaged one of the I-Norms.

⁴⁹³ Tables, pages 17 to 94.

⁴⁹⁴ Tables, pages 17 to 24.

⁴⁹⁵ Cases, unless mentioned in the text of this thesis, have not been listed in the List of Cases.

⁴⁹⁶ Tables, pages 25 to 50.

⁴⁹⁷ Tables, pages 51 to 68.

⁴⁹⁸ Tables, pages 69 to 76.

⁴⁹⁹ Tables, pages 77 to 94.

5.2.1 1977 to 1994

This period is dominated almost entirely by Hong Kong cases. This is primarily because of a large number of enforcement cases and stay applications. There are no reported or known setting aside applications in this period. There is little in the way of reported decisions in this period from either Australia or Singapore and this clearly highlights that both jurisdictions had not at that time developed arbitral practices, even before the courts despite the fact that Australia had adopted the NYC in 1974 and the UML in 1989 and Singapore the NYC in 1986.

The first Hong Kong case applying the NYC provisions was *Werner A Bock KG v The N's Co Ltd*.⁵⁰⁰ in which the judge referred to the grounds relied upon for objecting to enforcement as 'hitherto virgin territories'. Despite this the judge appears to have spent no time considering what method should be adopted in applying the NYC. This case was then considered by the Court of Appeal but again there was no detailed discussion about the NYC or the methods or approach to be adopted in applying it other than a reference to counsel submitting that the court should 'uphold Convention awards except where complaints of substance can be made out'.⁵⁰¹ The early Australian stay case of *Qantas Airways Ltd v Dillingham Corporation* recognised the 'former hostility to arbitration' suggesting that it needed to be 'discarded' although only US and English foreign cases were referred to.⁵⁰²

The first consideration of the approach to be adopted when applying the NYC provisions of the HKAO was by Kaplan J in *Tiong Huat Rubber Factory (SDN) BHD v Wah-Chang International (China) Company Ltd*.⁵⁰³ The judge explored the genesis of the applicability of the NYC to Hong Kong insofar as necessary to identify that the case concerned a NYC award.⁵⁰⁴ The judge, Neil Kaplan had a central role in the adoption of

⁵⁰⁰ 31 October 1977 HCMP 664/1977 unreported.

⁵⁰¹ [1978] HKLR 281 Huggins JA [5].

⁵⁰² (1985) 4 NSW113 [118E].

⁵⁰³ [1990] 2 HKC 450, CLOUT 674.

⁵⁰⁴ The Court of Appeal overruled him and set aside enforcement on the ground that the arbitrators had exceeded their jurisdiction; [1991] 1 HKC 28, CLOUT 675 (CA).

the UML in Hong Kong and has been described as the ‘Father of Hong Kong Arbitration’.⁵⁰⁵ The fairly brief treatment by Kaplan J of the method of approaching the NYC in this case may be compared with the treatment he gave his first case dealing with the UML. In *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd*⁵⁰⁶ the judge explored the UML and its incorporation into the laws of Hong Kong.⁵⁰⁷ He referred to Section 2(3) of the HKAO which ‘exhorts judges interpreting the Model Law to have regard to its international origin’ and also to the *travaux préparatoires*.⁵⁰⁸ The judge had to first decide whether an arbitration was an international one and in doing so relied upon the Analytical Commentary on the draft text of the UML ‘to aid interpretation’⁵⁰⁹ concluding that the drafters of the UML intended to take a different approach to defining ‘international’ to its treatment in the Brussels Convention. He then stated:

It may be helpful for practitioners to be aware of two books on the Model Law. The fullest guide to the Model Law is 'A Guide to the UNCITRAL Model Law on International Commercial Arbitration' written by Howard Holtzmann and Joseph Neuhaus published by Kluwer in 1989. This is a substantial treatise which takes each article of the Model Law, comments on it and sets out the various *travaux préparatoires*. For a shorter and more succinct commentary there is Aron Broches' 'Commentary on the UNCITRAL Model Law' also published by Kluwer in 1990.⁵¹⁰

Kaplan J engaged two of the I-Norms and was clearly intending to be a pathfinder for judges and practitioners in applying the UML but it is of some interest that he would

⁵⁰⁵ D Bateson, ‘Neil Kaplan’s Leading Role in the Development of Arbitration in Hong Kong – The Famous Harbour City Case’ in C Bao and F Lautenschlager (eds), *Arbitrators’ Insights: Essays in Honour of Neil Kaplan* (Sweet & Maxwell 2012) 17, 23; see also A Marriott, ‘Festschrift for Neil Kaplan’ in C Bao and F Lautenschlager (eds) *Arbitrators’ Insights: Essays in Honour of Neil Kaplan* (Sweet & Maxwell 2012) 231.

⁵⁰⁶ [1992] 1 HKLR 40, CLOUT 20.

⁵⁰⁷ For a discussion about this case see M Pryles, ‘Hong Kong Supreme Court Issues First Decision on Model Law’ (1991) 2 World Arbitration & Mediation Report 329.

⁵⁰⁸ (n 506) [19]-[21].

⁵⁰⁹ (n 506) [46].

⁵¹⁰ (n 506) [51].

later observe that he would have come to the same conclusion had the arbitration not been subject to the UML.⁵¹¹

It would not be long before Kaplan J extended the internationalist approach (engaging two I-Norms) to the NYC. *Shenshen Nan Das Industrial and Trade United Co Ltd v FM International Ltd*⁵¹² concerned an application to enforce a Convention award. The judge used his judgment as an opportunity to educate practitioners on how they should approach a NYC case, this being crucial to a full adoption of the internationalist approach in the courts:

Before parting with this case I would like to make the following observations which are not intended as any criticism of counsel or their solicitors. There are almost 90 countries who have acceded to the New York Convention. Courts in Convention countries are being asked to consider the Convention on a regular basis and there are many decisions on the Convention. It is clearly desirable, so far as is practicable, for the interpretation of the Convention to be uniform. Cases under the Convention are increasing dramatically in Hong Kong.There is only one textbook devoted solely to the New York Convention and that is by Prof. Albert Jan van den Berg published in 1981 by Kluwer. That must be the starting point for the consideration of any problem arising under the Convention. But this excellent book is now a little out of date and thus it is essential to keep abreast of new developments by reference to The Yearbook on Commercial Arbitration published by the International Council for Commercial Arbitration (ICCA). This too is published by Kluwer and is now edited by Prof. Albert Jan van den Berg. I was not referred to either of these works and I would suggest that anyone researching or arguing a New York Convention point must start with these 2 works.⁵¹³

On the same day that Kaplan J was adopting the internationalist approach one of his brother judges also did the same to the extent of engaging the UML I-Norm. In

⁵¹¹ N Kaplan, J Spruce and M Moser, *Hong Kong and China Arbitration, Cases and Materials* (1994 Butterworths) 177.

⁵¹² [1992] 1 HKC 328.

⁵¹³ Ibid [17]-[18]

*Interbulk (HK) Limited v Safe Rich Industries Limited*⁵¹⁴ Barnett J had to consider an application for a mareva injunction for an arbitration that was to take place in London. The HKAO provided for the court's power to give interim measures but the judge held that he should apply domestic Hong Kong law and followed an English decision even though England was not a UML jurisdiction. The judge did refer to Holtzmann and Neuhaus⁵¹⁵ and Broches⁵¹⁶ but relied entirely upon the English authorities and although noting the differences in the Hong Kong legislation and in particular the UML, nevertheless did not feel able to depart from them but did not explain why. Kaplan J continued to adopt an internationalist approach by often referring to authorities from other jurisdictions when interpreting the UML or NYC.⁵¹⁷

Showing his growing impatience for those ignoring the internationalist approach he stated: 'The public policy defence is construed narrowly and I deprecate the attempt to wheel it out on all occasions.'⁵¹⁸ Eventually Kaplan J stopped referring to authorities from other jurisdictions but instead referred simply to the decisions of the Hong Kong court which had itself referred to the international authorities.⁵¹⁹ This is still adopting an internationalist approach, albeit indirectly.

Other Hong Kong judges began to adopt an internationalist approach to interpretation when required to interpret the UML. Mayo J engaged at least one I-Norm when he

⁵¹⁴ [1992] 2 HKLR 185, CLOUT 42.

⁵¹⁵ H Holtzmann and J Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer 1994).

⁵¹⁶ A Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer 1990).

⁵¹⁷ Including *Lucky-Goldstar International (HK) Ltd v Ng Moo Kee Engineering Ltd* [1993] 2 HKLR 73, CLOUT 57; *Safond Shipping Sdn Bh. v East Asia Sawmill Corp* 6 October [1994] ADRLJ 295 CLOUT 60; *China Nanhai Oil Joint Service Corporation v Gee Tai Holdings* [1995] 2 HKLR 215 CLOUT 76.

⁵¹⁸ *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, CLOUT 1441.

⁵¹⁹ For example *Tianjin Medicine & Health Products Import and Export Corp v JA Moeller (Hong Kong) Ltd* [1994] 1 HKC 545, CLOUT 813; *OONC Lines Ltd v Sino-American Trade Advancement Co Ltd* [1994] ADRLJ 291, CLOUT 62; *Joong and Shipping Co Ltd v Choi Chong-Sick* [1994] 1 HKLR 439, CLOUT 63; *H Smal Ltd v Goldroyce Garment Ltd* 13 May 1994 HCMP 908/1994 unreported CLOUT 64.

referred to the *travaux préparatoires* and Holtzmann and Neuhaus⁵²⁰ in considering requirements for an arbitration agreement.⁵²¹ However he arrived at an interpretation of UML Article 7 with which Kaplan J later disagreed, after analysing in more detail the international commentaries including Holtzman and Neuhaus but also the Law Reform Commission of Hong Kong Report on Commercial Arbitration.⁵²²

Kaplan J gave an important decision engaging all I-Norms in *Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd*⁵²³ where he had to construe UML Article 7. In doing so he relied upon the *travaux préparatoires*, Holtzmann and Neuhaus and Broches.⁵²⁴ However he prefaced his analysis of these by referring to the HKAO direction to the *travaux préparatoires*: ‘Fortunately S.2(3) of the Arbitration Ordinance provides’.⁵²⁵ This could mean that he only felt able to adopt an internationalist approach to interpreting the UML because of the presence of Section 2(3) but if so it is surprising that he did not make this statement in the many UML cases that he had decided during the previous few years. This case is notable as being one of only five cases of those analysed in the selected jurisdictions that refer to the relevant interpretation provision, namely Article 2A or its equivalent. It is also notable in that the judge relied upon the different approach to interpretation as providing the basis for not following a decision of the House of Lords.

This period is characterised if not dominated by the early path-finding internationalist judgments of Kaplan J and the perhaps consequential internationalist approach of other judges in Hong Kong. Of 39 relevant cases analysed in this period (three in Australia) the UML I-Norm was engaged on 5 occasions, the TP I-Norm on 8 and the JC I-Norm on 13 (plus 4 indirect).⁵²⁶ The degree of adoption of an internationalist approach would in this period depend on which judge was hearing a case and without Kaplan J’s judgments there might have been a different analysis.

⁵²⁰ (n 515).

⁵²¹ *Hissan Trading Co Ltd v Orkin Shipping Corporation* [1993] 2 HKLR 360 CLOUT 43.

⁵²² *William Company v Chu Kong Agency Ltd* [1995] HKLR 139, CLOUT 44.

⁵²³ [1995] 1 HKLR 300, CLOUT 78.

⁵²⁴ (n 516).

⁵²⁵ (n 523) [18].

⁵²⁶ Tables, page 17.

5.2.2: 1995 to 2003

At this time possibly the first NYC case in Singapore emerges. In *Re An Arbitration Between Hainan Import and Export Machinery Corp and Donald & McCarthy Pte Ltd*⁵²⁷ Prakash J approached the test for refusing enforcement without engaging any I-Norms. She was faced with arguments that based on English legal principles the award should not be enforced. She stated:

Their contention as to how the arbitrators should act was based on English legal principles. These principles were not applicable because this was not an English arbitration.....⁵²⁸ As the plaintiffs submitted, the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist. As a nation which itself aspires to be an international arbitration centre, Singapore must recognise foreign awards if it expects its own awards to be recognised abroad.⁵²⁹

In effectively discounting the relevance of English principles in respect of a NYC case Prakash J does not seem to have considered the fact that England is a NYC jurisdiction and in this regard although recognising the importance of a comity in the principle of enforcement unless exceptional circumstances exist, still displayed a reluctance to an internationalist approach. In these early days of Singapore's UML status there was no reference to any Hong Kong cases despite the instructive approach of the Hong Kong courts above. The judgment of Onn J in *Coop International Pte Ltd v Ebel SA*⁵³⁰ further illustrates Singapore's early teething difficulties in grasping an internationalist approach to the UML. In considering whether the parties had opted out of the UML, the judge engaged the TP I-Norm when he was referred to the UNCITRAL's Secretariat's Explanatory Note on the UML:

Although the note is prepared for information only and is not an official commentary on the Model Law, nevertheless I think it is most helpful. It would of course be better if counsel had made available the official commentaries for my

⁵²⁷ [1996] 1 SLR 34.

⁵²⁸ Ibid [24].

⁵²⁹ (n 527) [45].

⁵³⁰ [1998] SGHC 425; [1998] 1 SLR(R) 615.

perusal. In fact, s 4 of the IAA specifically provides that reference may be made to the documents relating to the Model Law of the United Nations Commission on International Trade Law and its working group for the preparation of the Model Law for the interpretation of the Model Law, which has (subject to the IAA and with the exception of arts 35 and 36) the force of law in Singapore by virtue of s 3.⁵³¹

This case illustrates the difficulty of the legal representatives rather than the judge, who was clearly wishing to consider the *travaux préparatoires*. Prakash J did however engage the TP I-Norm in *ABC Co v XYZ Co Ltd*⁵³² where she had to consider the meaning of the application timing provisions in Article 34 and gained help from the *travaux préparatoires*.

In this period the Hong Kong Court of Appeal gave a number of decisions on the UML and NYC but without engaging any I-Norms.⁵³³ The first time an engagement appears to have been made was in *Apex Tech Investment Ltd. v Chuang's Development (China) Ltd*⁵³⁴ where the court engaged the JC I-Norm when it referred to Van den Berg⁵³⁵ suggesting that it was alive to an internationalist approach under the NYC.

Until 1997 the Privy Council had been Hong Kong's final court of appeal. From the handover to China in 1997 this changed to the Hong Kong Court of Final Appeal, which includes judges from England and Australia. The Court of Final Appeal first had cause to consider the NYC and in particular the public policy ground for resisting enforcement, in *Hebei Import and Export Corp v Polytek Engineering Co Ltd*.⁵³⁶ This judgment has become the leading case in Hong Kong (and in a number of other

⁵³¹ Ibid [139].

⁵³² [2003] SGHC 107, CLOUT 566.

⁵³³ *The Owners of the Ship or Vessel "Lady Muriel" v Transorient Shipping Ltd* [1995] 2 HKC 320, CLOUT 692 (CA); *Private Company Triple V Inc v Star (Universal) Co Ltd* [1995] 3 HKC 129, CLOUT 109 (CA); *Tai Hing Cotton Mill Ltd v Glencore Grain Rotterdam BV* [1995] HKEC 424 CLOUT 128 (CA); *Jin Hai An Construction and Engineering Ltd v Golden Rock Beach Inc* CACV 236/1995 unreported (CA).

⁵³⁴ [1996] 2 HKLRD 155, CLOUT 704 (CA).

⁵³⁵ A Van den Berg, *The New York Arbitration Convention of 1958* (Kluwer 1981).

⁵³⁶ [1999] 2 HKCFAR 111, [1999] 2 HKC 205, [1999] 1 HKLRD 665, CLOUT 599 (CFA).

jurisdictions) on the approach to the public policy ground whether under the NYC or Article 34 and is an excellent example of the engagement of all I-Norms in the adoption of the internationalist approach. The Court of Final Appeal confirmed the approach of the Court of Appeal to be generally correct. In his leading judgment Mason NPJ stated the general approach:

[I]t is appropriate that the courts should have regard to the principles of finality and comity to the extent to which they are consistent with the provisions of the Ordinance and the Convention. Both the Ordinance and the Convention give effect to the principles of finality and comity by prohibiting refusal of enforcement of a Convention Award except in the cases for which they provide.⁵³⁷

Mason NPJ went on to examine a number of authorities from Hong Kong and other jurisdictions in concluding that a decision of the supervisory court not to set aside an award does not debar a party from asking the enforcement court to set aside enforcement on the public policy ground. Further even if the grounds to resist enforcement are made out the court retains discretion to allow enforcement. He recognised that the public policy of the supervisory court jurisdiction might be different to that of the enforcement court jurisdiction although noted that civil law jurisdictions recognise an international public policy.⁵³⁸ His reasoning is arguably suspect. Throughout his judgment he refers to Articles of the NYC and in particular relies on the words ‘public policy of that country’ in Article V2(b) as justification for his interpretation that the NYC does not require a party to make an election between setting aside and resisting enforcement. However he seems to have missed the fact that this article had been altered in the implementing section of the HKAO by omitting the words ‘of that country’.⁵³⁹ This arguably alters the interpretation and could result in an

⁵³⁷ Ibid [82].

⁵³⁸ (n 536) [98].

⁵³⁹ (n 536) Mason NPJ [98]: ‘In some decisions, notably of courts in civil law jurisdictions, public policy has been equated to international public policy. As already mentioned, Article V. 2(b) specifically refers to the public policy of the forum. No doubt, in many instances, the relevant public policy of the forum coincides with the public policy of so many other countries that the relevant public policy is accurately described as international public policy. Even in such a case, if the ground is made out, it is because the

interpretation requiring taking into account the elusive international public policy recognised by civil law jurisdictions.⁵⁴⁰ This is a clear example of the insignificance of a textual dissimilarity in a leading case in order to maintain the policy of the relevant international norm.

In his judgment in the same case Bokhary P referred extensively to Van den Berg's writings and decisions of other jurisdictions: 'It is appropriate to examine how far the courts of other Convention jurisdictions have been prepared to go in enforcing Convention awards made in circumstances which do not meet their domestic Standards'. He went on to state:

When a number of States enter into a treaty to enforce each other's arbitral awards, it stands to reason that they would do so in the realization that they, or some of them, will very likely have very different outlooks in regard to internal matters. And they would hardly intend, when entering into the treaty or later when incorporating it into their domestic law, that these differences should be allowed to operate so as to undermine the broad uniformity which must be the obvious aim of such a treaty and the domestic laws incorporating it.⁵⁴¹

It will be seen that *Hebei*⁵⁴² (despite the lack of recognition of textual dissimilarity) is still a leading case in Hong Kong and the global jurisconsultorium on the meaning of public policy although it will be seen in Chapter 6 that it has not been followed to the letter in Singapore at least.⁵⁴³

enforcement of the award is contrary to the public policy of the forum (A.J. van den Berg, *The New York Convention of 1958*, page 298).'

⁵⁴⁰ Bokhary PJ also either does not seem to have noticed the differences between the NYC and HKAO or considered them not to be material. Expert commentators however including the International Law Association, propose that the test is international public policy: 'Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitration Awards' (2003) *Arb Int'l* 213; although this is controversial; see W Ma, 'Recommendations on Public Policy in the Enforcement of Arbitral Awards' (2009) 75 *Arb.* 14.

⁵⁴¹ (n 536) [28].

⁵⁴² (n 536).

⁵⁴³ See para 6.3.6 below.

In Australia there were a few stay applications in the nineties (including one in the High Court, the highest appellate court) adopting a purely domestic approach involving no reference to any I-Norms⁵⁴⁴ and the first case that appears to have considered in detail an enforcement application was *Hallen v Angledal*⁵⁴⁵ where the judge engaged the JC I-Norm by relying upon various international authorities including *Hebei* and *Van den Berg*.⁵⁴⁶ This early encouragement to the internationalist in Australia gave way to a delay of seven years before the next judgment adopting an internationalist approach. Indeed *Eisenwerk v Aust Granites Ltd*⁵⁴⁷ demonstrated a total failure to do so. The Queensland Court of Appeal found that an arbitration agreement providing for an ICC arbitration was an express opt out of the UML, demonstrating a failure to understand the nature of the UML and the difference with institutional rules of arbitration:⁵⁴⁸ ‘In my opinion the better view is that, by expressly opting for one well-known form of arbitration, the parties sufficiently showed an intention not to adopt or be bound by any quite different system of arbitration, such as the Model Law.’⁵⁴⁹ It would be 11 years before an Australian court overruled this decision⁵⁵⁰ although in Singapore the effects of the similar decision in *John Holland Pty Ltd v Toyo Engineering Corp (Japan)*⁵⁵¹ as well as *Coop International*⁵⁵² and *Dermajaya Properties v Premium Properties*⁵⁵³ were overturned by legislation in 2001.⁵⁵⁴

In *John Holland Teck* JC illustrated the continuing difficulty of the Singapore court to grasp the UML, finding as he did that the UML was ‘an optional set of rules to be

⁵⁴⁴ *Tanning Research Laboratories Inc v O’Brien* [1990] HCA 8; *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* [1996] FCA 1059; *Abigroup Contractors Pty Ltd v Transfield Pty Ltd* [1998] VSC 103.

⁵⁴⁵ [1999] NSWSC 552, CLOUT 1067.

⁵⁴⁶ (n 535).

⁵⁴⁷ [2001] 1 QdR 461.

⁵⁴⁸ J Nelson, ‘International Commercial Arbitration in Asia: Hong Kong, Australia and India Compared’ (2014) 10 A.I.A.J. 105, 111.

⁵⁴⁹ (n 547) Pincus JA [12].

⁵⁵⁰ *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887, CLOUT 1176.

⁵⁵¹ [2001] 2 SLR 393.

⁵⁵² (n 530) and in the Court of Appeal [1998] 3 SLR 670 (CA).

⁵⁵³ [2002] SLR 164.

⁵⁵⁴ International Arbitration (Amendment) Act 2001.

utilised like any other set of contractual rules such as the ICC rules'.⁵⁵⁵ The judge engaged the JC I-Norm in referring to *Eisenwerk*⁵⁵⁶ and arriving at the same incorrect conclusion.⁵⁵⁷ The judgment of the Singapore Court of Appeal shortly after in the setting aside case of *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley*⁵⁵⁸ engaged the TP I-Norm and made some important comments as regards an internationalist approach. The court referred to Section 4 of the SIAA⁵⁵⁹ in citing the *travaux preparatoires* in Holzmann and Neuhaus⁵⁶⁰ and decided that English cases on the subject of *functus officio* were not relevant to the interpretation of the UML as England had not adopted the UML.⁵⁶¹ At this stage the analysis of the UML however was nowhere near as extensive as the Hong Kong courts.

Sometimes adopting an internationalist approach can lead to a problem. In the Hong Kong case of *Paladin Agricultural Ltd v Excelsior Hotel (Hong Kong) Ltd*⁵⁶² Burrell J, engaging the JC I-Norm, relied on a Canadian case that held the reference in the UML Article 8(1) to 'statement on the substance of the dispute' referred to be the statement of case in the arbitration proceedings. This is illogical given that it is unlikely that any arbitration proceedings would be in existence in the context of a stay application. Nevertheless Burrell J relied upon this and granted a stay. He subsequently granted stays in many cases and does not appear to have made this mistake again. Burrell J was again the judge in *Societe Nationale D'Operations Petrolieres De La Cote D'Ivoire v Keen Lloyd Resources Ltd*⁵⁶³ where he engaged the JC I-Norm when faced with arguments in favour of enforcement of a French award relying on authorities from a

⁵⁵⁵ (n 547) [14].

⁵⁵⁶ (n 547).

⁵⁵⁷ In Australia the court had adjourned an application to enforce the award pending the decision in Singapore, adopting a different test to *Hallen* (n 545) (which had adopted the *Hebie* (n 536) test for a stay in these circumstances): *Toyo Engineering Corp v John Holland Pty Ltd* [2000] VSC 553. But see the defence of the courts in *John Holland* and *Coop International* in M Pillay, 'The Singapore Arbitration Regime and the UNCITRAL Model Law' (2004) *Arb Int'l* 355, 376.

⁵⁵⁸ [2001] 2 SLR(R) 273.

⁵⁵⁹ *Ibid* [16].

⁵⁶⁰ (n 515) also referred to in *Mitsui v Easton* [2004] 2 SLR 14.

⁵⁶¹ (n 558) [32]-[36].

⁵⁶² [2001] 2 HKC 215, CLOUT 522.

⁵⁶³ HCCT 55/2001 unreported, CLOUT 530.

number of jurisdictions and an argument based on French law. In rejecting an approach based on French law he stated: ‘This court’s concern is to apply the law applicable in Hong Kong to foreign awards. That law contains a strong pro-enforcement bias consistent with the general principle of finality and comity.’⁵⁶⁴

The Supreme Court of Victoria’s decision in *CTA International Pty Ltd v Sichuan Changhong Electric Co Ltd*⁵⁶⁵ concerned a stay application under section 7 of the IAA (which mirrors Article 8 of the UML) but Byrne J showed his confusion about the UML:

I should finally make mention in passing to the UNCITRAL Model Law. It was put on behalf of CTA that by Division 2 of the International Arbitration Act, the Model Law Rules apply to this arbitration including Article 8(1) which prevents a party from referring a court proceeding to arbitration after it has submitted its "first statement on the substance of the dispute". To my mind, these rules have no application to the present matter. The arbitration is being conducted in China. Local rules will therefore apply. There is no evidence that the Model Law Rules are those under which the Mianyang Arbitration Commission is conducting the proceeding before it.⁵⁶⁶

The judicial unease in Australia about the UML at this time is also demonstrated by Bronwnie AJ’s direction to himself (albeit engaging no I-Norms) in *Gordian Runoff Ltd v The Underwriting Members of Lloyd’s Syndicates*:

Another matter which seems to me to be of some, although not great, significance is that the model law reads somewhat strangely when compared to Australian and English statutes about arbitrations not of an international nature and when compared to the common law rules about arbitrations. But the convention is an international one and it presumably represents a compromise reached by nations with different legal backgrounds and different views about arbitrations. It seems

⁵⁶⁴ Ibid [14].

⁵⁶⁵ [2002] VSC 374 [19].

⁵⁶⁶ Ibid [19].

to me that it is appropriate to put out of mind the Anglo-Australian law on the subject and to focus upon the words of the model law.⁵⁶⁷

By 2004 Australia had adopted the NYC for 30 years and the UML for 25 years. As such it was nominally the most mature UML/NYC jurisdiction out of the three but the foregoing analysis demonstrates it was the least mature in terms of the adoption of the internationalist approach. Of the ten Australian cases analysed only one of them engaged any I-Norm and the courts were clearly feeling their way into the UML slowly. With the *Eisenwerk*⁵⁶⁸ decision immaturity gave way to ignorance and naivety as to the norms and trends of international commercial arbitration. Australian judges should not be blamed as judges make decisions based on the law submitted to them and that legal representatives would make submissions resulting in the *Eisenwerk* analysis is arguably reflective more on legal practise than judicial reasoning.⁵⁶⁹ Singapore, the least mature UML/NYC jurisdiction of the three, started in this period to develop the internationalist approach although the requirement, on three occasions, to modify its legislation to overcome interventionist court decisions is itself reflective of the words of the legislation being given primacy over the objectives of the legislation. The period may have been a turning point however as the Government's eagerness to specifically amend its legislation to overcome interventionist decisions would have been a strong indicator to the judiciary to approach the legislation in a spirit of realism reflecting the current policy of the Government toward arbitration and international arbitration in particular. In Singapore out of 13 cases analysed the TP I-Norm was engaged just three times and the JC I-Norm only once demonstrating the difficulty the Singapore courts were having in grasping the approach required by the UML despite the amendments to the SIAA referred to above.

In 1996 the internationalist Neil Kaplan had moved on from the bench to be Chairman of the Dispute Review Board of the contracts for the construction of the new Hong Kong International Airport.⁵⁷⁰ He had left behind an important internationalist foundation and legacy, which he would continue to passionately advocate in scholarly

⁵⁶⁷ [2002] NSWSC 1260 [31].

⁵⁶⁸ (n 547).

⁵⁶⁹ See the criticism of this case in M Pryles, 'Exclusion of the Model Law' (2001) 4 Int'l ALR 175.

⁵⁷⁰ See Bateson (n 505) 18.

writings in the past 20 years or so.⁵⁷¹ In this period Neil Kaplan's legacy would be tested and the internationalist approach remained strong in Hong Kong demonstrated most clearly in the CFA in *Hebei*⁵⁷² albeit there was still an obvious inconsistency between different judges in Hong Kong. Of 88 Hong Kong cases analysed in this period the UML I-Norm was engaged on one occasions (plus 7 indirect), the TP I-Norm on two (plus 8 indirect) and the JC I-Norm on 6 (plus 24 indirect).⁵⁷³ The degree of adoption of an internationalist approach would depend on which judge was hearing a case.

At the end of this period despite adoption of the NYC and UML for lengthy periods in all three jurisdictions there was no uniformity to any significant degree as regards juristic methodology.

5.2.3 2004 to 2010

By 2004 the UML had been part of the Singapore legislation for 10 years and there was still no judgment that could be said to have adopted a strong or purist internationalist approach. Indeed at this stage the courts were still not making any meaningful reference to the global jurisconsultorium. In *Luzon Hydro Corp. (Phillipines) v Transfield Phillipines Inc. (Phillipines)*⁵⁷⁴ Prakash J had to consider an Article 34 application and was apparently not referred to any international authority. There were however a number of cases where the principle of the UML of party autonomy and minimum curial intervention was referred to in arriving at a decision.⁵⁷⁵ Prakash continued this

⁵⁷¹ See for example N Kaplan, 'A Case by Case Examination of Whether National Courts Apply Different Standards When Assisting Arbitral Proceedings and Enforcing Awards in International Cases as Contrasting with Domestic Disputes. Is there a Worldwide Trend towards Supporting an International Arbitration Culture?' in Van den Berg A (ed), *International Dispute Resolution: Towards an International Arbitration Culture* ICCA Congress Series 8 (Kluwer 1998) 187.

⁵⁷² (n 536).

⁵⁷³ Tables, page 17.

⁵⁷⁴ [2004] 4 SLR(R) 705.

⁵⁷⁵ *Coop International* (n 552), *Tang Boon* (n 558), *WSG Nimbus v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603; *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR 646 (where the JC I-Norm was also engaged).

narrow approach in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*⁵⁷⁶ where she considered an Article 34 application based on public policy but referred only to English and Singapore cases. This case was appealed but before that appeal was heard Prakash J handed down a significant and important judgment in *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd*⁵⁷⁷ an enforcement case on the public policy ground. In this judgment Prakash J engaged the JC I-Norm in referring to authorities from Canada, England, Norway, Ireland, USA and Hong Kong. Of great importance she appeared to approve of the notion of public policy laid down in *Hebei*.⁵⁷⁸

[T]here is the principle of international comity enshrined in the Convention that strongly inclines the courts to give effect to foreign arbitration awards. As Litton PJ observed in the decision of the Hong Kong Court of Final Appeal in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205 ("the Hebei case"), woven into the concept of public policy as it applies to the enforcement of foreign arbitration awards "is the principle that courts should recognise the validity of decisions of foreign arbitral tribunals as a matter of comity, and give effect to them, unless to do so would violate the most basic notions of morality and justice."⁵⁷⁹

The judge relied upon this in finding that the award 'would not by any stretch of imagination offend against the most basic of the notions of justice that the Singapore court adheres to.'⁵⁸⁰ This judgment was the pathfinder for Singapore in the internationalist approach to interpretation of the NYC and the UML.⁵⁸¹ A few months later came *Front Carriers Ltd v Atlantic & Orient Shipping Corp*⁵⁸² where Ang J in continuing the trend engaged the TP I-Norm and JC I-Norm by relying on *Binder*,⁵⁸³

⁵⁷⁶ [2005] SGHC 197, [2006] 1 SLR 197.

⁵⁷⁷ [2006] SGHC 78, [2006] 3 SLR 174, CLOUT 740.

⁵⁷⁸ (n 536).

⁵⁷⁹ (n 577) [42].

⁵⁸⁰ (n 577) [76].

⁵⁸¹ Choo J in *Galsworthy Ltd v Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727 also relied on *Hebei* for a public policy case.

⁵⁸² [2006] SGHC 127.

⁵⁸³ P Binder, *International Commercial Arbitration and Conciliation in Model Law Jurisdictions* (3rd edn 2010 Sweet & Maxwell).

Broches⁵⁸⁴ and the Hong Kong decision of *Interbulk*⁵⁸⁵ to interpret Article 9 of the UML.

On the same day in December 2006 the like constituted Singapore Court of Appeal handed down important judgments in *Swift-Fortune Ltd v Magnifica Marine SA*⁵⁸⁶ and *Asuransi*,⁵⁸⁷ both appeals from Prakash J judgments. In the first case Prakash J had found that the Singapore court had no power under the SIAA to give injunctions in aid of foreign arbitrations (in *Front Carriers*⁵⁸⁸ Ang J had assumed jurisdiction on a similar application but under a different legislative provision). In giving the judgment of the Court of Appeal Keong CJ referred to the history of the introduction of the UML in Singapore including the Parliamentary speeches and then stated:

Counsel for Swift-Fortune has invited this court to consider the policy implications for Singapore of upholding the decision of Prakash J. He has argued for a broader objective for the IAA that "[i]f Singapore aims to be an international arbitration centre it must adopt a world view of international arbitration" (see the Report at para 8), and to this end should interpret the IAA (and the Model Law) to support all international arbitration (irrespective of the stipulated seat of arbitration), and that this court should not adopt an insular approach that is at odds with the general trend manifested in other jurisdictions which have adopted the Model Law.⁵⁸⁹

Thus, whilst we can accept counsel's realistic assessment of how international arbitrations are conducted today, the potentially adverse consequences spelt out by counsel are par excellence policy considerations within the purview of Parliament. Secondly, it is reasonable to assume that the framers of the IAA were aware of these considerations and would have factored them into the drafting of the IAA.⁵⁹⁰

⁵⁸⁴ (n 516).

⁵⁸⁵ (n 514).

⁵⁸⁶ [2006] SGCA 42, CLOUT 741 (CA).

⁵⁸⁷ [2006] SGCA 41, CLOUT 742 (CA).

⁵⁸⁸ (n 582).

⁵⁸⁹ (n 586) [15].

⁵⁹⁰ (n 586) [16].

Keong CJ engaged the TP I-Norm in referring to the ‘vast’ amount of *travaux preparatoires* and writings on Article 9 of the UML and decided that Article 9 had no bearing on the meaning of a ‘domestic law’.⁵⁹¹ After arriving at this conclusion the judge reverted to an analysis of the court’s ability to give injunctions for foreign arbitrations largely based on English decisions. Although Keong CJ had engaged an I-Norm this did not guarantee applied uniformity and the decision went against the trend in other jurisdictions with similar applications (including Hong Kong).⁵⁹² As a result Singapore again amended the SIAA in 2010 to ensure uniformity.⁵⁹³

In the second case the same court considered an Article 34 appeal from a Prakash J decision in which she had not engaged any I-Norm.⁵⁹⁴ Of particular note was the apparent reluctance of the court to adopt the Prakash J approach to a consideration of public policy in *Aloe Vera*.⁵⁹⁵ This might have been because that was a NYC case and this was an Article 34 case. However the court engaged the TP I-Norm and JC I-Norm as well as relying upon English and American cases that had been the original reliance source of important judgments such as *Hebei*.⁵⁹⁶ Given that *Hebei* was about a provision which was almost identical to Article 34 (acknowledged by Prakash J in *Aloe Vera*),⁵⁹⁷ it is at least curious as to why the court referred to the English and US cases and finally the *travaux preparatoires* of the UML and Holtzman and Neuhaus.⁵⁹⁸ This displays a willingness to adopt an internationalist approach but without the education of the cases that came before.⁵⁹⁹ A similarly constituted Court of Appeal continued this narrow

⁵⁹¹ (n 586) [31].

⁵⁹² C Parker, ‘Court-ordered Interim Relief in Support of “Foreign” Arbitrations in Hong Kong, Singapore and England’ (2007) Asian DR 82.

⁵⁹³ LS Chan, *Singapore Law on Arbitral Awards* (Academy 2011) paras 2.42-43; SC Leng, ‘Amendments to the Singapore International Arbitration Act’ (2010) 76 Arb. 200; See also J Ho, ‘Decoding Singapore’s International Arbitration Act, Section 12(7)’ (2008) 25 Arb Int’l 609.

⁵⁹⁴ *Asuransi* (n 576) (n 587) in the Court of Appeal.

⁵⁹⁵ (n 577).

⁵⁹⁶ (n 536).

⁵⁹⁷ (n 577) [55].

⁵⁹⁸ (n 515).

⁵⁹⁹ Prakash J herself did not adopt the precise formulation she had in *Aloe Vera* on the same question of public policy in *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1.

internationalist approach by engaging indirectly the JC I-Norm in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*⁶⁰⁰ where there was extensive consideration of NYC English cases on the question of public policy albeit arriving at the same conclusion of the meaning of public policy in Article 34.

An examination of Hong Kong cases in later years of the previous period and during this period reveals many stay, enforcement and other applications but little in the way of analysis of the UML or the approach to interpretation. Instead either an internationalist approach was not adopted or it seemed to be settled as to how the court should approach certain applications, the most common ones being enforcement and stay applications. For example in *Karaha Bodas Co LLC v Perusahaan Pertambangan*⁶⁰¹ when dealing with an enforcement case on the public policy ground, the Court of Appeal referred only to English cases on the question of fraud whilst the Court of Final Appeal in the same case simply referred to *Hebei*⁶⁰² as setting out the law for dealing with enforcement applications on grounds of public policy.⁶⁰³ Reyes J adopted the same approach in *Xiamen Xingjingdi Group Ltd v Eton Properties Ltd* when dealing not with a NYC award but a PRC Mainland one stating ‘as a matter of comity, the Courts must lean in favour of recognizing foreign arbitral awards.’⁶⁰⁴ However in *Jung Science Information Technology Co Ltd v ZTE Corporation*⁶⁰⁵ the judge had to deal with a challenge under Article 12 and approached the decision in a domestic manner (with no reference to any I-Norms). This was a missed opportunity to adopt the internationalist approach especially as there were no earlier decisions on this article in Hong Kong.

In *NCC International AB v Alliance Concrete Singapore Pte Ltd*⁶⁰⁶ the Singapore Court of Appeal considered interim injunctions and again analysed the SIAA in great depth in terms of its drafting history, object and purpose including the UML. The court, engaging the TP I-Norm and JC I-Norm (indirectly), examined the English, New

⁶⁰⁰ [2007] SGCA 28, CLOUT 743 (CA).

⁶⁰¹ [2008] HKEC 2063, [2007] 4 HKLRD 1002 (CA).

⁶⁰² (n 536).

⁶⁰³ [2009] 2 HKCFAR 84 (CFA).

⁶⁰⁴ [2008] 4 HKLRD 972 [56].

⁶⁰⁵ [2008] 4 HKLRD 776.

⁶⁰⁶ [2008] 2 SLR 565 (CA).

Zealand and ultimately Hong Kong position and arrived at a decision that it stated was consistent with the approach required by the UML of minimal curial intervention. *Dongwoo Mann+Humm el GmbH v Mann+Humm el GmbH*⁶⁰⁷ (engaging the TP I-Norm and JC I-Norm (indirectly)), *Sui Southern*⁶⁰⁸ and *AJT v AJU*⁶⁰⁹ (these two cases engaging the TP I-Norm and JC I-Norm) all included consideration of the *travaux preparatoires* in the context of Article 34 applications.

*Brunswick Bowling and Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd*⁶¹⁰ is the first reported or known Hong Kong case concerning setting aside under Article 34 and gave rise to a fresh look at the correct approach to interpretation where the court engaged the TP I-Norm and the JC I-Norm (indirectly). The legal point in issue was whether, if one of the grounds for setting aside was made out, the court should exercise its discretion in deciding whether to set aside. Neither counsel was able to find any authority on this so the court was directed to the *travaux preparatoires* and Holtzmann and Neuhaus.⁶¹¹ The material referred to indicated that an award might be set aside under Article 34 irrespective of whether the ground had materially affected the award. However the judge then referred to the equivalent ground in the NYC and referred to: ‘jurisprudence under the [NYC] as a guide to how the discretion...is to be exercised.’⁶¹² Reference is then made to a number of Hong Kong decisions (including *Paklito*)⁶¹³ which hold that the discretion whether to prevent enforcement would not be exercised where the court is satisfied that the tribunal would have arrived at the same conclusion notwithstanding the ground being made out. The court relied upon this and found that the ground for setting aside made out would not have impacted on the result and therefore did not set the award aside. This is very interesting as it is the only known Hong Kong case which referred to the UML *travaux preparatoires* to aid its interpretation of the UML but then finds reason for not following the result of that approach by relying on decisions of the Hong Kong courts on the NYC.

⁶⁰⁷ [2008] SGHC 67.

⁶⁰⁸ (n 599).

⁶⁰⁹ [2010] SGHC 201.

⁶¹⁰ [2011] 1 HKLRD 707, CLOUT 1252.

⁶¹¹ (n 515).

⁶¹² (n 610) [36].

⁶¹³ (n 518).

Singapore cases appear to have been referred to for the first time as authorities in a NYC enforcement application in *A v R*⁶¹⁴ where Reyes J had to deal with an application for enforcement resisted on the ground of public policy. In doing so he engaged all I-Norms indirectly as well as the JC I-Norm directly. He first cited *Hebei*⁶¹⁵ for the relevant test but did not rest there instead referring to case law from England and Singapore to elaborate upon the *Hebei* test. The Singapore cases he referred to were *Soh Beng Tee*⁶¹⁶ and *Asuransi*⁶¹⁷ the latter of which had relied upon the *Hebei* test source authorities but without referring to *Hebei* itself. His analysis was therefore an almost academic reconciliation of the Hong Kong and Singapore approaches to the test.

There were only a small number of relevant cases in Australia in this period and nothing of significance to the internationalist until December 2006 when a stay application came before the Full Court of the Federal Court and Allsop J gave the first indication of his strong pro-internationalist tendencies in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*.⁶¹⁸ In his detailed and well reasoned judgment Allsop engaged all three I-Norms (including citing Holtzmann and Neuhaus⁶¹⁹ and Van den Berg⁶²⁰), considered the interaction between the NYC and UML and even noted the textual dissimilarities between the two instruments under Australian law. In particular, after quoting in full the General Assembly Resolution introducing the UML⁶²¹ he recognised the importance for Australia to be a part of the unified legal framework of the UML: ‘These considerations are of particular concern to a nation such as Australia so significantly involved in international trade and commerce.’⁶²² This was perhaps the only overtly internationalist judgment of the Australian courts prior to the amendment of the IAA in 2010 with the

⁶¹⁴ [2009] 3 HKLRD 389.

⁶¹⁵ (n 536).

⁶¹⁶ (n 600).

⁶¹⁷ (n 587).

⁶¹⁸ [2006] FCAFC 192.

⁶¹⁹ (n 515).

⁶²⁰ (n 535).

⁶²¹ General Assembly Resolution 40/72 11 December 1985 available at <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/477/79/IMG/NR047779.pdf?OpenElement>> accessed 13 September 2014.

⁶²² (n 618) [194].

introduction of Section 2D of the IAA but highlights that the tools existed for a full internationalist approach well before the introduction of Section 2D or Article 2A.

Possibly the first Australian case which considered the interpretation of the UML (albeit indirectly in a domestic arbitration) following the introduction of Section 2D of the IAA⁶²³ in 2010 was *Gordian Runoff Ltd v Westport Insurance Corporation*⁶²⁴ a NSW Court of Appeal decision. The question to be decided was the extent that an arbitrator had to give reasons for an award under the domestic arbitration law, the Commercial Arbitration Act and in particular whether he had to adopt a judicial standard. The Victoria Court of Appeal case of *Oil Basins v BHP Billiton Ltd* had decided that a judicial standard was required as it was also under the UML.⁶²⁵ The court looked extensively at the *travaux préparatoires* of the UML and authorities from the UML global jurisconsultorium in deciding that a judicial standard was neither required under the domestic legislation or the UML and *Oil Basins* was wrongly decided. This case was probably only the second Australian case that adopted a fairly strong internationalist approach to the interpretation of the UML in engaging the TP and JC I-Norms.⁶²⁶ The decision was however overturned in the High Court where a narrow view of the domestic legislation was adopted albeit noting the different approach required of the same wording in the IAA because of the 2010 amendments to the IAA.⁶²⁷ A few months after the Court of Appeal decision in *Gordian Runoff* came the NSW Supreme

⁶²³ Requiring the court to look at the object and purpose of the legislation. See para 4.2.3.1 above.

⁶²⁴ [2010] NSWCA 57, (2010) 267 ALR 74.

⁶²⁵ [2007] VSCA 255.

⁶²⁶ In his address to the Financial Review International Dispute Resolution Conference, 15 October 2010 the then Chief Justice of the Federal Court, P Keane cited the introduction of Section 2D and this case as “The Judicial Shift” in approach of the Australian Courts toward arbitration. His successor J Allsop stated in 2011: ‘The clear trend in judicial decision-making about arbitration in Australia [has transformed] from suspicion, to respect and support.’ ‘International Arbitration and the Courts: The Australian Approach’ in CIArbs Asia Pacific Conference 2011 Investment & Innovation: International Dispute Resolution in the Asia Pacific (2011).

⁶²⁷ *Westport Insurance Corp v Gordian Runoff Ltd* [2011] HCA 37 (2011) 244 CLR 239 [21]-[23]; see the discussion about this case in P Keane, ‘The Prospects for International Arbitration in Australia: Meeting the Challenge of Regional Forum Competition or our House, Our Rules’ (2013) 79 Arb. 195, 202.

Court case of *Cargill*.⁶²⁸ Ward J engaged the TP and JC I-Norms and reviewed the *travaux préparatoires* and global jurisconsultorium of the UML in deciding that *Eisenwerk*⁶²⁹ was wrong.⁶³⁰ The court was conscious of the desire for uniformity of decisions between Australian State courts but were able to depart from *Eisenwerk* despite this, primarily based on much academic criticism of *Eisenwerk*. Interestingly the Queensland Court of Appeal came to a similar conclusion just nine days after *Cargill*, albeit by different reasoning, when they had to decide whether the incorporation of the UNCITRAL Rules in an arbitration agreement opted out of the UML in the same way as it had been found to in *Eisenwerk*. In *Wagners Nouvelle Calédonie Sarl v Vale Inco Nouvelle Calédonie SAS*⁶³¹ the court engaged the TP and JC I-Norms and again had in mind the need for uniformity of Australian State courts' decisions. Reference was also made to the interpretation provision in the IAA but not to article 2A. The court came to a different conclusion to *Eisenwerk* albeit distinguishing rather than departing from it. Whilst demonstrating an increased tendency to look at the international position these cases highlight the difficulty of achieving uniformity, even within Australia.⁶³²

In *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation*⁶³³ Ang J of the Singapore High Court engaged the JC I-Norm and set aside an award on the scope of submission ground. The court was not referred to any decisions on this ground (*Asuransi*⁶³⁴ was a decision on this ground but in respect of a different aspect) but referred to the analogous NYC ground and the Hong Kong decision of *Tiong Huat*.⁶³⁵ The Court of Appeal reviewed this decision (in July 2011)⁶³⁶ and in engaging the TP I-

⁶²⁸ (n 550).

⁶²⁹ (n 547).

⁶³⁰ 'Of further encouragement is Ward J's extensive reference in *Cargill* to international academic authority': N Rudge and C Miles, 'More Than an Empty Gesture: The Reversal of *Eisenwerk*' (2011) 77 Arb. 43, 52.

⁶³¹ [2010] QCA 219, CLOUT 1229.

⁶³² P Megens and B Cubitt, 'Emerging Trends in Judicial Approach to International Arbitration in Australia: The Winds of Change' (2011) 77 Arb. 33, 37;

⁶³³ [2010] SGHC 202.

⁶³⁴ (n 587).

⁶³⁵ (n 504).

⁶³⁶ *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33 (CA).

Norm (indirectly) and the JC I-Norm, first relied on *Asuransi* and *Sui Southern*⁶³⁷ for the test for this Article 34 ground and for the principle that mistakes of law and fact do not come within the ground. The court then agreed with Ang J and dismissed the appeal. It is noteworthy that the issue whether the court had discretion not to set aside despite the ground being made out had been considered in *Brunswick*⁶³⁸ over two years earlier but the court instead relied upon *Newspeed International Ltd v Citus Trading Pte Ltd*⁶³⁹ which had itself relied upon *Paklito*,⁶⁴⁰ decisions on the equivalent NYC ground.⁶⁴¹ Despite the reference to the Hong Kong case no reference was made to *Brunswick*, which had arrived at the same conclusion that a residual discretion existed not to set aside even where a ground had been made out but went on to hold, following cases including *Paklito*, that the discretion should be exercised to not set aside the award ‘if satisfied that the arbitral tribunal would not have reached a different conclusion but for the matter complained of’.⁶⁴² The Singapore Court of Appeal framed the discretion differently despite reliance on *Paklito* suggesting that the discretion ought to be exercised not to set aside an award ‘only if no prejudice has been sustained by the aggrieved party’.⁶⁴³ Again an illustration that an internationalist approach is not a panacea for applied uniformity of results.⁶⁴⁴

This was an interesting period for Hong Kong as its previous overtly internationalist approach arguably stagnated. Out of 35 cases analysed the UML I-Norm was engaged 8 times (but all indirect), the TP I-Norm twice (plus 8 indirect) and the JC I-Norm once (plus 11 indirect).⁶⁴⁵ If the indirect engagements are ignored the result was undoubtedly a backward step for Hong Kong’s development of the internationalist approach to the

⁶³⁷ (n 599).

⁶³⁸ (n 610).

⁶³⁹ [2003] 3 SLR(R) 1.

⁶⁴⁰ (n 518).

⁶⁴¹ In a bizarre twist the award in this case was from a tribunal that Neil Kaplan was chairman of and *Paklito* was a Kaplan J decision.

⁶⁴² (n 610) [38]-[39] relying upon *Apex Tech* (n 534) and Morgan R and Hill T (eds) ‘Arbitration’ in *Halsbury’s Laws of Hong Kong* 1(2) Reissue (LexisNexis 2008).

⁶⁴³ (n 636) [100].

⁶⁴⁴ See the criticism of this case in P Megens, ‘Singapore Arbitration and the Courts: *Quo Vadis?*’ (2012) 78 Arb. 26, it being suggested that it represented an interventionist approach.

⁶⁴⁵ Tables, pages 17-18.

UML. On the other hand Singapore had started to develop a more consistent approach to the interpretation of the UML. Of the 34 cases analysed the TP I-Norm was engaged 9 times (but only once indirect) and the JC I-Norm was engaged 14 times (plus 10 indirect).⁶⁴⁶ These results demonstrate a more enhanced internationalist approach than Hong Kong even though Singapore did not have Article 2A as part of its law. Australia was also starting to grapple with the different approaches required by the UML. Of the 11 cases analysed, one engaged the UML I-Norm and three engaged the TP and JC I-Norms (plus one indirect for each).⁶⁴⁷ However, save for *Comandate*⁶⁴⁸ (which was truly exceptional), all these came at the end of the period and notably after the introduction of Section 2D of the IAA and Article 2A of the UML, both in 2010. Section 2D (and Article 2A by inference) clearly made a big difference to the court's approach although given Allsop's judgment in *Comandate*, might have reflected the change in policy toward internationalism rather than a necessary precondition to an internationalist approach.

The period is therefore dominated by two things, firstly the emergence of the Singapore court's obvious and present development of the internationalist approach in cases such as *Aloe Vera*,⁶⁴⁹ *Asurans*,⁶⁵⁰ *Swift Fortune*,⁶⁵¹ *NCC International*,⁶⁵² *Dongwoo*,⁶⁵³ *Sui Southern*,⁶⁵⁴ *AJT*⁶⁵⁵ and *CRW*.⁶⁵⁶ Secondly the stagnation of any development of the internationalist approach in Hong Kong. *Brunswick*⁶⁵⁷ is the notable exception, perhaps because it was the first Article 34 case in Hong Kong. In Australia the first signs of a developing relationship between international arbitration aspirations and the Australian

⁶⁴⁶ Tables, pages 17-18.

⁶⁴⁷ Tables, pages 17-18.

⁶⁴⁸ (n 618).

⁶⁴⁹ (n 577).

⁶⁵⁰ (n 587).

⁶⁵¹ (n 586).

⁶⁵² (n 606).

⁶⁵³ (n 607).

⁶⁵⁴ (n 599).

⁶⁵⁵ (n 609).

⁶⁵⁶ (n 636).

⁶⁵⁷ (n 610).

judiciary were emerging in cases such as *Comandate*,⁶⁵⁸ *Gordian Runoff*,⁶⁵⁹ *Cargill*⁶⁶⁰ and *Wagners Nouvelle*.⁶⁶¹ However this development was clearly hampered by the difficulty in achieving uniformity in approach across 8 federal jurisdictions and these cases were in a relative minority.

Despite these differences and staggered development, when the position is compared with the previous period the beginnings of a convergence are clearly evident. Each of the three jurisdictions were now adopting, albeit not consistently, an internationalist approach with the type of internationalist approach adopted by Singapore and Australia arguably of a type more akin to that anticipated by the drafters of the UML.

5.2.4 2011 to 2015

Altain Khuder LLC v IMC Mining Inc,⁶⁶² an enforcement case, was probably the first Australian case where great care was taken to adopt an internationalist approach in the engagement of all I-Norms. The trigger for this appears to have been expressly the newly introduced Section 2D of the IAA. Croft J of the Victoria Supreme Court handed down a lengthy and detailed analysis of the enforcement regime under the IAA and before relying upon decisions from other jurisdictions, carried out what was a rather superficial comparison of the enforcement regime in the IAA with that under the NYC and that in Singapore before stating:

[T]o the extent that the express provisions do not repeat verbatim or substantially identically the provisions of sub-s 8(1) of the IAA, the meaning of these provisions is, in my view, in context the same in substance. Consequently, the approach of the Singapore High Court in *Aloe Vera* and the cases to which reference has been made in support of that approach, make these decisions very

⁶⁵⁸ (n 618).

⁶⁵⁹ (n 624).

⁶⁶⁰ (n 550).

⁶⁶¹ (n 631).

⁶⁶² [2011] VSC 1.

significant persuasive authority in support of the approach to the interpretation of sub-s 8(1) of the IAA.⁶⁶³

The judge consequently followed the approach of *Hebei*⁶⁶⁴ in finding that the failure to set aside an award in the supervisory jurisdiction does not debar an unsuccessful applicant from resisting enforcement of the award. In applying the test and on the question of estoppel the court referred to the global jurisconsultorium including a number of Hong Kong decisions as well as *Aloe Vera*.⁶⁶⁵ In particular, following *Aloe Vera* the judge found that whether a respondent was a party to the arbitration agreement was something to be considered as part of the defence to enforcement. This meant that the respondent would have to prove it was not a party which is a position consistent with the general consensus on the NYC.⁶⁶⁶ The decision was appealed to the Court of Appeal of Victoria.⁶⁶⁷ In a careful and detailed judgment Warren CJ considered how the interpretation of domestic legislation which implemented the NYC should be approached:

Both parties made extensive reference to international authorities. Insofar as the Act implements an international treaty, Australian courts will, as far as they are able, construe the Act consistently with the international understanding of that treaty. Uniformity also accords with the Act's stated purpose to facilitate the use of arbitration as an effective dispute resolution process.⁶⁶⁸

Ultimately, this Court is required to construe an Australian statute. That process must be performed in accordance with established principles of Australian statutory interpretation. International case law may be useful and instructive, but it cannot supersede the words used in the Act. The weight to be accorded to such

⁶⁶³ Ibid [51].

⁶⁶⁴ (n 536).

⁶⁶⁵ (n 577).

⁶⁶⁶ See for example P Nacimiento, 'Article V(1)(a)' in H Kronke, P Nacimiento, D Otto and C Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Wolters Kluwer 2010) 205, 211.

⁶⁶⁷ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248, CLOUT 1224.

⁶⁶⁸ Ibid [35].

authority will depend upon the similarity of the language used in foreign statutes being construed to the terms of the Act.⁶⁶⁹

The court identified differences in the IAA and the NYC equivalent and therefore the SIAA and declined to follow *Aloe Vera*.⁶⁷⁰ The court found that the question of whether the respondent was a party to the arbitration agreement was a threshold issue which the applicant had the burden to prove (and therefore departing from international NYC norms). Leaving aside whether the decision was ‘correct’⁶⁷¹ this case demonstrates both an internationalist approach (the UML and JC I-Norms engaged) but also appropriate regard for textual dissimilarities. It is a rare case in this regard.

However the Australian Federal Court case of *Dampskibsselskabet Norden A/S v Beach Building and Civil Group Pty Ltd*,⁶⁷² also an enforcement case, demonstrates the difficulty of achieving uniformity within Australia as although the court adopted an internationalist approach (engaging the UML and TP I-Norms), it declined to follow Warren CJ in *Altain Khuder*,⁶⁷³ instead following Lord Mance in an English case on the question of what is necessary to satisfy the first stage of enforcement, the mechanistic stage.⁶⁷⁴ However the case turned on whether the contract was a sea carriage one effectively excluded from arbitration.⁶⁷⁵

In the Hong Kong case of *Gao Hai Yan v Keeneye Holdings Ltd*⁶⁷⁶ Reyes J considered a PRC Mainland award enforcement application and found the public policy ground made

⁶⁶⁹ (n 667) [37].

⁶⁷⁰ (n 577).

⁶⁷¹ For a view that it is not correct see S Harder, ‘Enforcing Foreign Arbitral Awards in Australia against Non-Signatories of the Arbitration Agreement’ (2012) 8 A.I.A.J. 131.

⁶⁷² [2012] FCA 696, CLOUT 1222.

⁶⁷³ (n 667).

⁶⁷⁴ *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyds Rep 326.

⁶⁷⁵ The judge held that it was and therefore the arbitration agreement was ineffective although this was overturned on appeal by a majority, citing the pro-enforcement legislation of the IAA: *Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd (Formerly Beach Building & Civil Group Pty Ltd)* [2013] FCAFC 107, Rares J at [64]; see also A Monichino and A Fawke, ‘International Arbitration in Australia: 2013/2014 in Review’ (2014) 25 ADRJ 187, 189.

⁶⁷⁶ [2011] 3 HKC 157.

out adopting the *Hebei*⁶⁷⁷ test. The Court of Appeal overturned his decision adopting the same test and citing *Hebei* as the ‘leading authority’.⁶⁷⁸ The interesting thing about this case is that it highlights the uncertainty introduced into the Hong Kong legislation by the textual dissimilarity between the NYC Article V and its adoption into the HKAO whereby it is stated that the public policy is that of the country where enforcement is sought. Reyes J interpreted the relevant section of the HKAO as requiring the test to be the public policy of Hong Kong. Although not clearly departing from this test, the Court of Appeal gave the test a broad application such that primacy seemed to be accorded to the public policy of the PRC where the award was made although this can also be suggested to be no more than ‘appreciating the cross-cultural nuances of operating’ in the PRC.⁶⁷⁹ In other words although it may have been contrary to the public policy of Hong Kong to have enforced the award had it been made in Hong Kong, it was not so having being made in the PRC. There was no engagement of any I-Norm by either court (other than indirectly). *Altain Khuder*⁶⁸⁰ had of course considered this point just two months previously (at first instance) but there was no reference to the case.

*FG Hemisphere Associates LLC v Democratic Republic of the Congo*⁶⁸¹ was a NYC enforcement case where the sole issue was whether the State concerned could rely upon sovereign immunity to avoid enforcement in Hong Kong. In the Court of Appeal⁶⁸² Stock VP examined the global jurisconsultorium on the question whether a submission to arbitration amounted to a waiver of sovereign immunity. After referring to a number of commentaries and cases he found that the position was not settled: ‘The Practice internationally would require a much more detailed study than has been presented to this Court and amongst respected scholars there appears to be no consensus on the point.’⁶⁸³ The Court of Final Appeal handed down a heavy majority judgment holding

⁶⁷⁷ (n 536).

⁶⁷⁸ [2011] HKEC 1626 Tang VP [49].

⁶⁷⁹ D Ang and F Yeoh, ‘Reflections on Gao Haiyan – Of “Arb-Med”, “Waivers”, and Cultural Contextualisation of Public Policy Arguments’ (2012) 29 J.Int’l Arb. 285, 296.

⁶⁸⁰ (n 662).

⁶⁸¹ [2008] HKEC 175.

⁶⁸² [2010] 2 HKLRD 66 (CA).

⁶⁸³ Ibid [143]; discussed in T Cheng, ‘State Immunity, Public Policy and International Commercial Arbitration’ in A Van den Berg (ed), *Arbitration Advocacy in Changing Times* ICCA Congress Series, 15 (Kluwer 2011) 362.

that absolute State immunity applied in Hong Kong and therefore the award was not enforced.⁶⁸⁴ Although this was not strictly a case which even indirectly concerned the UML and was ultimately a domestic issue of whether absolute or restrictive immunity applied in Hong Kong, the judges explored in great depth the international position on these issues, including academic writings and the case is relevant to the extent of an internationalist approach applied to a domestic issue.

In *Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd*⁶⁸⁵ Saunders J approached this setting aside case in the context of Article 34 seldom having come before the courts in Hong Kong although, as has been seen, the position was different in Singapore. In dealing with the issues arising out of Article 34 Saunders J first considered the nature of the application and relying upon Hong Kong NYC cases and Van den Berg⁶⁸⁶ found that ‘It is accordingly quite plain that the merits of the award are quite irrelevant in an application to enforce an award. The merits of the award must be equally irrelevant in an application to set aside an award.’⁶⁸⁷ Secondly he considered the nature of the discretion to set aside if a ground was made out and again referred to previous Hong Kong NYC cases, Van den Berg as well as *Brunswick*⁶⁸⁸ and held that the applicant must show that ‘it cannot be said that if the violation had not occurred the result could not have been different.’⁶⁸⁹ In setting aside the award however the judge did not directly engage any I-Norm although did refer to a British Virgin Islands decision (which was not a UML jurisdiction at that time). The Court of Appeal overturned his decision in May 2012 and in doing so engaged the TP and JC I-Norms.⁶⁹⁰ In dealing with the grounds canvassed however there is little reference to authority at all save for *Brunswick* and one commentary. There was not even any discussion about the approach to the application of the grounds. The I-Norms were

⁶⁸⁴ [2010] FACV 5 (CFA).

⁶⁸⁵ [2011] HKEC 878.

⁶⁸⁶ (n 535).

⁶⁸⁷ (n 685) [59].

⁶⁸⁸ (n 610).

⁶⁸⁹ (n 685) [102].

⁶⁹⁰ [2012] 4 HKLRD 1 (CA). A judgment described as of a ‘very high standard’ by Yves Fortier, ‘Hong Kong – “Trouver le pot aux roses” (2014) Asian DR 166.

engaged on the question of discretion, with reference to decisions from England, Hong Kong and Canada as well as to commentaries (in particular Holtzmann and Neuhaus).⁶⁹¹

The Singapore Court of Appeal decision in August 2011 in the setting aside case of *AJU v AJT*,⁶⁹² just one month after the same court's decision in *CRW*⁶⁹³ is very important to this chapter's analysis (but was not cited in *Grand Pacific*, which came about 9 months later).⁶⁹⁴ At first instance Onn J, after engaging the TP and JC I-Norms and considering the *travaux préparatoires* of the UML and cases from England, Australia and Singapore, decided that he was able to re-open a decision of the tribunal that a contract was not illegal under Thai law. He found it was illegal and set the award aside under the public policy ground. The Court of Appeal (also engaging the TP I-Norm (indirectly) and JC I-Norm) overturned this decision.⁶⁹⁵ The court first considered whether public policy under Article 34(2)(b) was the same public policy as under the enforcement regime in section 31 of the SIAA because Onn J had relied upon NYC cases in making a decision under Article 34. Despite the authors of the main text on the Singapore legislation taking the view that 'the worldwide jurisprudence on the Model Law has confirmed that 'public policy' for the purposes of the New York Convention has an international focus, and is really concerned with the most serious forms of transgression',⁶⁹⁶ and therefore that the concept of public policy under Article 34 was a narrower one than under the NYC, the court disagreed 'because the legislative purpose of the IAA is to treat all IAA awards as having an international focus'.⁶⁹⁷ The court therefore concluded that the public policy objection must involve 'exceptional circumstances' or a violation of 'the most basic notions of morality and justice'.⁶⁹⁸ It is interesting that the first part of the test seems to be a unique Singapore test and the cases relied upon by the court were all Singapore

⁶⁹¹ (n 515).

⁶⁹² [2011] SGCA 41 (CA).

⁶⁹³ (n 636).

⁶⁹⁴ (n 690).

⁶⁹⁵ (n 692).

⁶⁹⁶ R Merkin and J Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (Informa 2009) 75.

⁶⁹⁷ (n 692) [37].

⁶⁹⁸ (n 692) [38].

decisions⁶⁹⁹ whereas the latter part of the test has its genesis *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier*⁷⁰⁰ but is commonly cited by reference to *Hebei*,⁷⁰¹ as it was by this court, noting also that *Hebei* had been relied upon by two of the three cases cited for the first test. The court then 'clarified' *Asuransi*⁷⁰² which had held that 'errors of law or fact do not engage the public policy of Singapore' by holding that an error of law but not of fact could come within the public policy ground and stated:

[L]imiting the application of the public policy objection in Art 34(2)(b)(ii) of the Model Law to findings of law made by an arbitral tribunal - to the exclusion of findings of fact would be consistent with the legislative objective of the IAA that, as far as possible, the international arbitration regime should exist as an autonomous system of private dispute resolution to meet the needs of the international business community.⁷⁰³

In *AJT*⁷⁰⁴ therefore the court adopted an internationalist approach, reciting the need for an international view of public policy and relying upon a Hong Kong NYC case. However there was no reference to the *travaux preparatoires* (despite Onn J at first instance having done so) or any cases from other UML jurisdictions and a decision that an error of law could engage the public policy ground seems out of step with international jurisprudence. Megens suggests that this case, along with *CRW*,⁷⁰⁵ represent a move of the Singapore courts' to being more interventionist.⁷⁰⁶

In January 2012 Murphy J handed down judgment in the very important Australian Federal Court case of *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd*, a case that would be heard by the High Court of Australia a year later. The case

⁶⁹⁹ *Re Hainan* (n 527), *Aloe Vera* (n 577) and *Galsworthy* (n 581).

⁷⁰⁰ [1974] USCA2 836; 508 F 2d, 969.

⁷⁰¹ (n 536).

⁷⁰² (n 587).

⁷⁰³ (n 692) [69].

⁷⁰⁴ (n 692).

⁷⁰⁵ (n 636).

⁷⁰⁶ Megens (n 644) 33.

gave rise to a number of judgments related to first jurisdiction and secondly setting aside/enforcement on the grounds of public policy. The first decision considered the argument that the Federal Court had no jurisdiction under the IAA. As part of this important question the court examined the role of the UML in Australia and the approach to its interpretation.⁷⁰⁷ Murphy J stated, engaging the UML I-Norm (but otherwise engaging no other I-Norm), in finding that it did have jurisdiction:

The adoption of the Model Law provisions into the national law of participating countries is intended to unify and harmonise the law between nations in this field. In arbitrations conducted in one of the many recognised Model Law jurisdictions business people from around the world are therefore less likely to be surprised by differences in local arbitration law.⁷⁰⁸

UNCITRAL documents also make clear that the drafters intended a common approach to the enforcement of foreign and non-foreign awards. The Model Law seeks to enable enforcement to be sought by the successful party in whichever country that party considers appropriate.⁷⁰⁹

The appeal came before the High Court in March 2013.⁷¹⁰ Although not a setting aside case this decision was very important in demonstrating the approach that Australian courts should adopt to the interpretation of the UML. All three I-Norms were engaged in finding that the Federal Court had jurisdiction and more importantly that the UML did not contravene the Australian Constitution. Had the decision gone the other way it would have been a hammer blow for international arbitration in Australia in the short to medium term. In engaging the UML I-Norm, French and Gageler JJ stated:

The IAA requires that regard be had to its objects in the interpretation of the Model Law. The relevant object is to give effect to the UNCITRAL Model Law. The IAA also specifically facilitates reference in the interpretation of the Model

⁷⁰⁷ [2012] FCA 21.

⁷⁰⁸ Ibid [5].

⁷⁰⁹ (n 707) [27].

⁷¹⁰ *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2013] HCA 5, CLOUT 1246.

Law to documents of UNCITRAL and of the UNCITRAL working group for the preparation of the UNCITRAL Model Laws.⁷¹¹

The Model Law itself requires in its interpretation that regard be had "to its international origin and to the need to promote uniformity in its application and the observance of good faith". The origin of some of its key provisions, including Arts 35 and 36, may be traced to provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958 ("the New York Convention").⁷¹²

The *TCL* decision was at that time the strongest internationalist approach of any court since the path finding judgments of *Kaplan J* and was widely welcomed in Australia:

The strong unanimous and pro-arbitration findings of the High Court (consisting of six justices) confirm that Australia sits well within international standards and norms for the enforcement of awards. It also reinforces the legislative measures taken in recent times to position Australia as a pro-arbitration jurisdiction.⁷¹³

The Federal Court also showed an overt internationalist approach in an enforcement case a year earlier in *Traxys Europe SA v Balaji Coke Industry Pvt Ltd*⁷¹⁴ engaging all I-Norms (the TP I-Norm indirectly) and adopting *Hebie*⁷¹⁵ in considering the public policy ground. In particular the court had to address the question of which jurisdiction's public policy had to be considered bearing in mind the textual dissimilarity between Section 8(7)(b) of the IAA and the NYC ground:

⁷¹¹ Ibid [6].

⁷¹² (n 710) [7].

⁷¹³ Allsop (n 484); see also: 'It seems that the Australian courts have now "come to the party" and recent decisions demonstrate a pro-arbitration judicial stance.' T Wilson, 'Australian Courts Taking Arbitration Seriously: Recognizing the Limitations on the Review of Arbitral Awards' (2014) 80 Arbitration 353; A Monichino and A Fawke, 'International Arbitration in Australia: 2012/2013 in Review' (2013) 24 ADRJ 208, 214.

⁷¹⁴ [2012] FCA 276, CLOUT 1223.

⁷¹⁵ (n 536).

Having regard to s 2D and s 39(2) of the IAA, s 8(7)(b) should be interpreted in a manner which is consistent with Art V(2)(b) of the Convention. For this reason, s 8(7)(b) should be interpreted as requiring the Court to consider the public policy of Australia when the public policy ground of refusal is invoked by an award debtor.⁷¹⁶

This approach also ensures that due respect is given to Convention-based awards as an aspect of international comity in our interconnected and globalised world which, after all, are the product of freely negotiated arbitration agreements entered into between relatively sophisticated parties.⁷¹⁷

Of this judgment Allsop has commented:

The importance of this decision lies in the way in which Foster J analysed and emphasised the purpose of the IAA provisions as being directed to the application and implementation of the New York Convention and its pro-enforcement provisions contained in the Australian IAA. It follows that any infelicity in the drafting of the IAA should not be taken to stand in the way of the application of the New York Convention according to its terms as understood internationally.⁷¹⁸

This comment suggests that the principle and object of the NYC and perhaps by inference the UML in UML cases, should override a degree at least of textual dissimilarity.

Following *Traxys* the second installment of *TCL*⁷¹⁹ took place in December 2012 when Murphy J dealt with the application to set aside the award on the grounds of public policy. It was suggested that the tribunal had made decisions contrary to the no evidence and hearing rule and these were breaches of the rules of natural justice and therefore contrary to public policy within Section 19(b) of the IAA, which as seen above states that a breach of the rules of natural justice is contrary to the public policy

⁷¹⁶ (n 714) Foster J [94].

⁷¹⁷ (n 714) Foster J [105].

⁷¹⁸ (n 484).

⁷¹⁹ *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* (No 2) [2012] FCA 1214.

of Australia.⁷²⁰ Extending the internationalist approach he had adopted in his first decision in this case on jurisdiction, Murphy J engaged all three I-Norms in a detailed and carefully reasoned judgment. He first considered whether public policy had the same meaning in the enforcement and setting aside contexts and held that it did.⁷²¹ He then addressed the question of natural justice and in particular the textual dissimilarity in the IAA arising out of the natural justice clarification in the IAA. He noted that New Zealand has the same textual dissimilarity and relied upon New Zealand decisions for concluding that ‘any’ breach of the rules of natural justice would be contrary to the public policy of Australia because of Section 19(b). However in referring to the overriding discretion the judge stated: ‘the thrust of the authorities is that the discretions should only be exercised when fundamental notions of fairness of justice are offended’ and therefore qualifying the natural justice ground by imposition of the global public policy test.⁷²² Of more importance to this chapter the judge then referred to the need for uniformity in the interpretation of public policy: ‘[T]he objects of the IAA also indicate the desirability of some uniformity between Convention countries’⁷²³ and ‘[a]lthough the decisions of the courts in Convention countries are not binding, there is an obvious importance to taking them into account’.⁷²⁴ The application to set aside was rejected and was appealed to the Full Court of the Federal Court.

Following his judgment in *Traxys*⁷²⁵ Foster J again had regard to the important Section 2D (engaging two I-Norms indirectly) in the enforcement case of *Eopply New Energy Technology Co Ltd v EP Solar*.⁷²⁶ The Federal Court strongly affirmed the pro-enforcement approach in *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd*⁷²⁷ both at first instance and on appeal consistent with ‘international arbitration jurisprudence and norms’.⁷²⁸ In *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd*⁷²⁹ a

⁷²⁰ Para 4.4.6.

⁷²¹ (n 719) [23]-[28].

⁷²² (n 719) [33].

⁷²³ (n 719) [38].

⁷²⁴ (n 719) [36].

⁷²⁵ (n 714).

⁷²⁶ [2013] FCA 356.

⁷²⁷ [2013] FCA 918, [2013] FCAFC 109.

⁷²⁸ Monichino (n 713) 219.

⁷²⁹ [2013] WASCA 66.

stay and interim measures application before the Court of Appeal of Western Australia, the court adopted a fairly strong internationalist approach engaging the UML and JC I-Norms (and citing in particular cases from Hong Kong and Singapore). However there was some tension between the judgments on the exact issue of the internationalist approach with McClure P stating: 'I am not persuaded that the notion of mutual 'comity' between Contracting States to the [NYC] and the courts thereof (*Traxys*;⁷³⁰ *Hebei*⁷³¹) applies as between courts exercising federal judicial power'.⁷³² A tension between the Federal Court and that of Western Australia is immediately apparent. This tension was highlighted in the appeal to the Full Federal Court in the final part of the *TCL* saga in July 2014.⁷³³ The judgment of the Full Court of the Federal Court in *TCL* is probably the most internationalist judgment of the courts in Australia, even more so than the High Court in the *TCL* jurisdiction case.⁷³⁴ Whilst the point at issue concerned public policy the court extensively engaged the UML I-Norm stating:⁷³⁵

The IAA also reflects Australia's acceptance of the [UN] General Assembly's recommendation to give 'due consideration' to the [UML] in the interests of international uniformity. Though the [UML] is not a treaty, it was the product of detailed international discussion born of a recognition of the lack of harmony and of consistent modern form of national laws on arbitration: see generally the explanatory note by the UNCITRAL secretariat on the [UML].⁷³⁶

Contrary to the submission of the appellant, it is not only appropriate but essential, to pay due regard to the reasoned decisions of other countries where their laws are either based on, or take their content from, international conventions or instruments such as the [NYC] and the [UML]. It is of the first importance to attempt to create or maintain, as far as the language ...in the IAA

⁷³⁰ (n 714).

⁷³¹ (n 536).

⁷³² (n 729) [109].

⁷³³ *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83.

⁷³⁴ (n 710).

⁷³⁵ The judges were Allsop CJ, Middleton J and Foster J but the judgment is given in the name of 'The Court'.

⁷³⁶ (n 733) [57].

permits, a degree of international harmony and concordance of approach to international commercial arbitration. This is especially so by reference to the reasoned judgments of common law countries in the region, such as Singapore, Hong Kong and New Zealand. Such is a reflection of the growing recognition of the harmony of what can be seen as the ‘law of international commerce’.⁷³⁷

This approach should not be confined to treaties proper to which there are contracting State parties. Where, as with the [UML], there has been extensive discussion and negotiation of a model law under the auspices of a [UN] body, such as UNCITRAL, and where the [UML] has been adopted by the General Assembly...with recommendation of ‘due consideration’ by member states to advance uniformity of approach, the same appropriate respect for, and, where necessary, sensitivity or deference to, reasoned decisions of other countries, should be shown.⁷³⁸

Whilst this is a long extract from the judgment it is very important to this thesis. Not only is the UML I-Norm engaged, the court has here given substantial support to the internationalist approach for both the NYC and UML, as well as the justification for it notwithstanding that the UML is not a treaty, as also detailed in Chapter 3 above. Moreover it has effectively confirmed the immateriality of Article 2A stating that the internationalist approach is ‘also required by’ this provision relegating the provision to a confirmatory or clarification provision.⁷³⁹

The court also considered the question of textual uniformity between Articles 34, 36 and the NYC confirming that the similarity in the context of public policy is ‘immediately striking’.⁷⁴⁰ Relying on the global jurisconsultorium and in particular cases from New Zealand, Hong Kong and Singapore as well as a detailed examination of the *travaux preparatoires* leading to the legislation in each of those jurisdictions, the

⁷³⁷ (n 733) [75] quoting from *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40 at [31] per Lord Hope.

⁷³⁸ (n 733) [75].

⁷³⁹ Ibid.

⁷⁴⁰ (n 733) [63].

court dismissed the appeal arriving at the same decision as Murphy J albeit by a slightly different route that will be examined in Chapter 6.

In May 2012 in *PT Prima International Development v Kempinski Hotels SA*,⁷⁴¹ another Article 34 case, the Singapore Court of Appeal made no attempt to adopt an internationalist approach, referring only to English cases in the interpretation of the relevant ground from Article 34. Following this Prakash J also made little attempt at an internationalist approach in *Quarella Spa v Scelta Marble Australia Pty Ltd*⁷⁴² although did have to deal with an Egyptian case that was cited by the party seeking a setting aside of the award. In a notable development however the Singapore Court of Appeal in *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd*⁷⁴³ referred to the *travaux préparatoires* in Holtzman and Neuhaus⁷⁴⁴ and Broches⁷⁴⁵ in a domestic setting aside case, as they considered the legislation required that the domestic law on this subject should be aligned with the position under the SIAA.

In Hong Kong *Pang Wai Hak v Hua Yunjian*⁷⁴⁶ concerned a setting aside application and, in engaging only the TP I-Norm and JC I-Norm (indirectly), continued the rather limited approach of the court in *Grand Pacific*.⁷⁴⁷ The court referred to a limited number of authorities on the approach to be adopted to an application under Article 34, namely *Brunswick*,⁷⁴⁸ *Grand Pacific* and some English cases. Again there was no reference to any authorities on the actual application of the approach to the facts. In *R v F*⁷⁴⁹ the limited approach was continued in another setting aside case. Au J received submissions relying upon the Singapore cases of *Soh Beng*⁷⁵⁰ and *CRW*⁷⁵¹ (thereby engaging the JC I-Norm) but did not analyse those cases in any detail. This case

⁷⁴¹ [2012] SGCA 35 (CA).

⁷⁴² [2012] SGHC 166.

⁷⁴³ [SGCA] 57, [2013] 1 SLR 125 (CA).

⁷⁴⁴ (n 515).

⁷⁴⁵ (n 516).

⁷⁴⁶ [2012] 4 HKLRD 113.

⁷⁴⁷ (n 690).

⁷⁴⁸ (n 610).

⁷⁴⁹ [2012] HKEC 1291.

⁷⁵⁰ (n 600).

⁷⁵¹ (n 636).

however does illustrate that practitioners are looking at cases from other jurisdictions but in a very limited way.

Ang J handed down a seminal decision in the enforcement case of *Astro Nusantara International BV v PT Ayunda Prima Mitra*⁷⁵² which considered the relationship between the UML and NYC. The question before the court was whether it was open to resist enforcement on the ground of lack of jurisdiction when no application had been made to invoke jurisdiction under Article 16 or to set aside under Article 34. The applicant was represented by London Leading Counsel who relied upon the ‘underlying principles, policy considerations and drafting history’⁷⁵³ of the UML in submitting that a party can invoke jurisdiction either at the award stage or enforcement stage. This submission however rested on the presence of Articles 34 and 36 and in Singapore Article 36 is not present. It was because of this that the judge rejected the application. The judge made some important comments on the need for a different analysis to the UML than normal common law legislation:

The Model Law is not a creature typical of the statutes emanating from common law jurisdictions; it more properly resembles civil law drafting..... I find that any sensible discussion of the Model Law must draw from arbitration law in civil law jurisdictions. Harmonisation of the Model Law draws heavily from these jurisdictions.

I find that the appropriate jurisdictions which I should examine are those which, like Singapore via the 1AA, treat domestic international awards separately from foreign awards and either exclude or modify the application of Art 36 of the Model Law.⁷⁵⁴

Finally the court gave a detailed consideration of Article 16 and in doing so was referred to cases from the Digest from Canada and Germany (which although not a UML jurisdiction incorporates Article 16 in almost identical terms) and also from Hong

⁷⁵² [2012] SGHC 212, [2013] 1 SLR 636.

⁷⁵³ Ibid [9].

⁷⁵⁴ (n 752) [84] - [85].

Kong, Bermuda and scholarly writings about such decisions. Ang J's decision is seminal for the internationalist approach (all three I-Norms engaged) she undoubtedly adopted but it is interesting that two London Senior Counsel addressed her. In a subsequent judgment in a setting aside case Ang J did not go so far down the internationalist approach, referring only to English and Singapore cases⁷⁵⁵ and scholarly writings on international arbitration. It is not clear whether this was because of limited submissions made to her.

In the setting aside case of *TMM Division Maritime SA de CV v Pacific Richfield Marine Pte Ltd*⁷⁵⁶ Onn J, in an apparent backward step for a purest internationalist cause (albeit engaging the JC I-Norm), justified his reliance on primarily English cases by drawing the similarity between parts of the English legislation and the UML although agreeing that regard should be had to UML jurisdictions 'such as Australia, Malaysia and Hong Kong'.⁷⁵⁷ However the Singapore Court of Appeal in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd*⁷⁵⁸ engaged all I-Norms and decided to put English authorities aside on the question of whether a supplemental agreement had incorporated an arbitration agreement in the original contract, having identified that Article 7(2) of the UML suggested a less strict approach to the question than the English authorities suggested. Menon CJ drew on the *travaux préparatoires* and Holtzman and Neuhaus⁷⁵⁹ and the judgments of Kaplan J in *Astel-Peiniger*⁷⁶⁰ and *Gay Construction Pty Ltd v Hanison Construction Co Ltd*⁷⁶¹ to find that the UML had a less strict approach than the English cases suggested. Just two weeks later Menon CJ handed down judgment in the appeal from Ang J's decision in *Astro*, in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara international BV*.⁷⁶² It appears that the same two London Senior Counsel placed the same extensive materials before the court. Menon CJ again engaged all I-Norms and

⁷⁵⁵ *BLB v BLC* [2013] SGHC 196.

⁷⁵⁶ [2013] SGHC 186.

⁷⁵⁷ *Ibid* [48].

⁷⁵⁸ [2013] SGCA 55 (CA).

⁷⁵⁹ (n 515).

⁷⁶⁰ (n 523).

⁷⁶¹ [1995] 2 HKLR 35, CLOUT 87.

⁷⁶² [2013] SGCA 57 (CA).

drew decisively on the ‘overarching philosophy’ of the UML of allowing a passive remedy of resisting enforcement as per Article 36. He examined the history of both the NYC and UML (and extensively its *travaux preparatoires*) in arriving at the decision to find that Article 36 would apply to both international and domestic enforcement questions. This was the ‘choice of remedies’ which the judge said was ‘not just a facet of the Model Law enforcement regime; it is the heart of its entire design.’⁷⁶³ The judge also considered that the NYC and UML should be similarly regarded ‘given the objective of uniform treatment of international arbitral awards is common to both instruments.’⁷⁶⁴ The decision of the court was therefore that the grounds available for resisting enforcement of a domestic award in Article 36 were available in Singapore even though Article 36 was expressly excluded from the SIAA.

As we have held, the content of the power to refuse enforcement under s 19 must be construed in accordance with the purpose of the IAA which, as we have stated, is to embrace the Model Law. Given that de-emphasising the seat of arbitration by maintaining the award debtor's ‘choice of remedies’ and alignment with the grounds under the New York Convention are the pervading themes under the enforcement regime of the Model Law, the most efficacious method of giving full effect to the Model Law philosophy would, in our view, be to recognise that the same grounds for resisting enforcement under Art 36(1) are equally available to a party resisting enforcement under s 19 of the IAA.⁷⁶⁵

Menon CJ based his decision on the policy in the UML of choice of remedies, finding that the mere exclusion of the application of Article 36 was not sufficient to suggest an intention to remove this policy for domestic awards. This judgment comes very close to a purist internationalist approach as it gives paramount importance to a philosophy of the UML which then informs the interpretation of the domestic legislation. The review of the *travaux preparatoires* and global jurisconsultorium (including the Australian cases of *Altain Khuder*⁷⁶⁶ and *Gujarat*⁷⁶⁷ which was handed down just one month

⁷⁶³ Ibid [65].

⁷⁶⁴ (n 762) [75].

⁷⁶⁵ (n 762) [84].

⁷⁶⁶ (n 667).

earlier) ably presented to the court by counsel make this a seminal decision of Singapore's highest court on the internationalist approach to the interpretation of the SIAA. Following this case one commentator suggested:

The current state of the law in Singapore, Australia and Hong Kong as to the choice of remedies available to parties, particularly at the stage of enforcement, is synonymous. Given the current move towards consistency of court decisions in respect of arbitrations across jurisdictions, the decision of the Singapore Court of Appeal is a welcome addition to the international jurisprudence.⁷⁶⁸

However this was not to be the end of the Astro saga because on the same day as the Singapore Court of Appeal handed down judgment the Hong Kong court issued a garnishee order against First Media and then Astro sought to have enforcement set aside in Hong Kong resulting in a series of court proceedings. Toward the end of 2013 a new judge was appointed to the Hong Kong High Court Construction and Arbitration List, Madam Mimmie Chan and her first setting aside case was in November 2013 in *Po Fat Construction Co Ltd v The Incorporated Owners of Kin Sang Estate*.⁷⁶⁹ Whilst her judgment does not display an overt internationalist approach the TP and JC I-Norms were indirectly engaged by reliance on *Brunswick*⁷⁷⁰ and *Grand Pacific*⁷⁷¹ in dismissing the application. The *Astro* case came before her in January 2014 when she granted a stay of enforcement because of the decision setting aside enforcement in Singapore and in particular the court's finding that there was no arbitration agreement and no power to join in First Media into the arbitration (both under Singapore law).⁷⁷² Astro sought leave to appeal but the Court of Appeal dismissed the application stating:

⁷⁶⁷ (n 727).

⁷⁶⁸ D McKimmie and M Steadman, 'Case Comment' (2014) Int. A.L.R. N-18. However Doug Jones has described it as 'disturbing...and with serious implications' suggesting that it has emasculated the UML albeit agreeing that it is 'well reasoned'; see D Thomson, 'A Year in Asia' (2014) 9(6) GAR 21, 22.

⁷⁶⁹ HCCT 15/2013 unreported.

⁷⁷⁰ (n 610).

⁷⁷¹ (n 690).

⁷⁷² *Astro Nusantara International BV v PT First Media TBK (formerly known as PT Broadband Multimedia TBK)* HCCT 45/2010 unreported.

[I]t will indeed be remarkable if, despite the Singapore Court of Appeal judgment on the invalidity of arbitration awards, Astro will still be able to enforce a judgment here based on the same arbitration awards that were made without jurisdiction.⁷⁷³

Before the next installment of the *Astro* saga Chan J would hand down a number of judgments. Her next case was *X Chartering v Y*,⁷⁷⁴ an enforcement case based on the unable to present its case and public policy grounds. Again the judge engaged the TP and JC I-Norms indirectly, in particular relying upon *Hebei*⁷⁷⁵ in rejecting the application to resist enforcement. This was repeated in *Shanghai Fusheng Soya-Food Co Ltd v Pulmuone Holdings Co Ltd*⁷⁷⁶ where additionally the judge relied upon the setting aside case of *Grand Pacific*⁷⁷⁷ in this enforcement case. Shortly afterward in *A v B*⁷⁷⁸ the judge dealt with a stay application in a purely domestic manner relying primarily on English cases.

However in the setting aside case of *S Co v B Co*⁷⁷⁹ Chan J had the benefit of being addressed by two of Hong Kong's leading counsel in arbitration matters who clearly had an internationalist approach in mind in referring the court to the Digest and Hong Kong, Canadian and Singaporean (*PT Tugu Pratama Indonesia v Magma Nusantara Ltd*,⁷⁸⁰ *Insignia Technology Co Ltd v Alsthom Technology Ltd*⁷⁸¹ and *Kempinski*⁷⁸²) cases on the issue of whether a jurisdictional challenge was to be heard *de novo* (as well as English cases). In dismissing the application the court consequently engaged the TP and JC I-Norms and even the UML I-Norm indirectly. The internationalist approach is strongly overt in the judgment. Just four days later the judge engaged no I-Norm in the

⁷⁷³ *Astro Nusantara International BV v PT First Media TBK (formerly known as PT Broadband Multimedia TBK)* HCMP 835/2014 unreported; Cheung JA at [13].

⁷⁷⁴ HCCT 20/2013 unreported.

⁷⁷⁵ (n 536).

⁷⁷⁶ HCCT 48/2012 unreported.

⁷⁷⁷ (n 690).

⁷⁷⁸ HCCT 2315/2012 unreported.

⁷⁷⁹ HCCT 16/2013 unreported.

⁷⁸⁰ [2003] SGHC 204.

⁷⁸¹ [2009] SGCA 24 (CA).

⁷⁸² (n 741).

stay application in *T v TS*⁷⁸³ but this seems to be because the law on the subject has been settled for many years and so she relied only upon the Hong Kong cases which settled the law. The good work that Chan J had been doing for the internationalist approach for Hong Kong has however been potentially overshadowed by the latest installment of the Astro saga. The enforcement setting aside application came before Chow J in February 2015.⁷⁸⁴ Chow J heard argument from the same Leading Counsel from London who had addressed the Singapore Court of Appeal and it can be speculated that a similar array of the global jurisconsultorium was likely to have been referred to the court. However in Chow's judgment there is no I-Norm directly engaged and the judgment is reflective of a domestic approach (albeit citing a number of English decisions). Chow cited *Nanhai*⁷⁸⁵ and the similar *Hebei*⁷⁸⁶ for the proposition that the court has a discretion to refuse enforcement where there has been a breach of the good faith or bona fide principle.⁷⁸⁷ The judge then went on to find that First Media should not be permitted to resist enforcement because it had acted in breach of this principle. Curiously the judge then held, as a separate decision, that he would not exercise his discretion to permit enforcement but having already found that he would allow enforcement to proceed. The merits of this judgment appear questionable and the Court of Appeal will likely have to consider whether it can be correct in Hong Kong that where enforcement is refused by the Singapore Court of Appeal because of no applicable arbitration agreement (a decision Chow J stated he could not review because it was a decision on Singapore law), nevertheless enforcement can proceed in Hong Kong. This is Hong Kong's *Hilmarton*⁷⁸⁸ and casts a shadow over the cause of uniformity.

In the stay application decision of the High Court of Singapore in *The "Titan Unity"*⁷⁸⁹ Leong AR appears to have followed the lead of the Singapore Court of Appeal by

⁷⁸³ HCA 2315/2012 unreported.

⁷⁸⁴ *Astro Nusantara International BV v PT First Media TBK (formerly known as PT Broadband Multimedia TBK)* [2015] HKEC 330.

⁷⁸⁵ (n 517).

⁷⁸⁶ (n 536).

⁷⁸⁷ (n 784) [81].

⁷⁸⁸ *Hilmarton (Societe Hilmarton v Societe Omniunde Traitment et de Valorisation, Cass. Civ. L'ere, 1994 Rev, Arb. 327.*

⁷⁸⁹ [2013] SGHCR 28.

engaging the TP and JC I-Norms on the question of the interpretation of Article 16. The judge noted that there was a divergence of views on the subject of Kompetenz-Kompetenz between the drafters of the UML and the English cases referred to the judge and stated:

It would in my view be more useful to refer to the decisions of jurisdictions which have accorded the Model Law the force of law, in order to achieve a more uniform interpretation of the relationship between article 16 of the Model Law and section 6 of the IAA consistent with international normative conceptions of Kompetenz-Kompetence.⁷⁹⁰

The judge then examined cases from Canada, Hong Kong and India as well as scholarly writings before deciding that primacy for deciding jurisdiction was given to the tribunal not, as suggested by the English cases, the courts. This is a very good example of the approach of Menon CJ in *Astro*⁷⁹¹ being followed by the lower court and strongly suggests the contemporary settled adoption of the internationalist approach in Singapore. The same judge followed this up with a very interesting internationalist approach judgment in *Firstlink Investments Corp Ltd v GT Payment Pte Ltd*,⁷⁹² a stay application (engaging the TP and JC I-Norms). The stay was opposed because it was suggested that the arbitration was null and void. The judge relied upon his own judgment in the *Titan Unity*⁷⁹³ in proposing that the court has only to be satisfied that an arbitration agreement exists on a prima facie basis but then went further and relied upon the *travaux préparatoires* and decisions from Hong Kong, Canada and India in support of such proposition. In an interesting twist the judge then referred to the applicant's suggested proposition of the need for there to be an 'arguable case' relying upon Merkin and Hjalmarsson⁷⁹⁴ who in turn relied upon English authority. He stated however that '[t]he reasons why authorities from England (where the Model Law does not have the force of law) are unhelpful in this context have been highlighted in the decision of *The*

⁷⁹⁰ Ibid [21].

⁷⁹¹ (n 762).

⁷⁹² [2014] SGHCR 12.

⁷⁹³ (n 789).

⁷⁹⁴ (n 696) 24.

“*Titan Unity*”⁷⁹⁵ He then went on to consider whether this threshold test had been passed and in doing so had to conclude what the *lex arbitri* was in the context of the parties making a highly unusual choice of *lex contractus* of the Stockholm Chamber of Commerce Arbitration Institute. It was because of this choice that the applicant submitted that the arbitration agreement was null and void. The judge found that the parties had implicitly agreed for Swedish law to govern their arbitration agreement but the judgment is notable for the extent of knowledge of international arbitration, transnational principles and even the *lex mercatoria* that it displays. Whether the parties’ representatives made submissions in this regard is not clear from the judgment.

In a judgment just before *Firstlink*⁷⁹⁶ Loh J gave a highly sophisticated internationalist approach judgment in *Silica Investors Ltd v Tomolugen Holdings Ltd*,⁷⁹⁷ a stay application. In arriving at the correct test to apply in the circumstances the judge engaged the JC I-Norm extensively (although did not refer to any Hong Kong cases) and adopted the Australian approach, which was also adopted in Canada and England, stating: ‘There is much to commend and little to detract from a uniform approach in the constructions of similar provisions across jurisdictions in international arbitration.’⁷⁹⁸ Coomaraswamy J rejected a setting aside application in *ADG v ADI*⁷⁹⁹ and adopted a fairly strong internationalist approach in engaging the TP and JC I-Norms. However in the recent setting aside case of *AKM v AKN*⁸⁰⁰ Coomaraswamy J set aside an award overwhelmingly on a number of grounds. In doing so the court engaged the TP and JC I-Norms only indirectly by relying upon *CRW*⁸⁰¹ and *Kempinski*.⁸⁰² Whilst the decision may have been surprising⁸⁰³ the court did not depart from an internationalist approach. In the recent setting aside application of *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd*⁸⁰⁴ Ang J was faced with a setting aside application on various grounds and adopted

⁷⁹⁵ (n 789) [8].

⁷⁹⁶ (n 792).

⁷⁹⁷ [2014] SGHC 101.

⁷⁹⁸ *Ibid* [19].

⁷⁹⁹ [2014] SGHC 73.

⁸⁰⁰ [2014] SGHC 148.

⁸⁰¹ (n 636).

⁸⁰² (n 741).

⁸⁰³ N Dewan ‘The Lord of the Rings Part 4: The Quest for Natural Justice’ 9(5) GAR 37.

⁸⁰⁴ [2014] SGHC 220.

a sophisticated internationalist approach, citing expert commentary and engaging the TP and JC I-Norms.

The significant developments in this period are crucial for the objectives of this thesis. First, Singapore experienced a large number of cases, in the initial part of the period, *AJT*⁸⁰⁵, *Kempinski*⁸⁰⁶ and *Quarella Spa*⁸⁰⁷ signaled a slight slow down of the internationalist cause (harking back to a time when the Singapore courts were more interventionist) but in the latter part of the period with *LW Infrastructure*,⁸⁰⁸ and in particular *Astro*⁸⁰⁹ (and, it must be observed, the judgment of Menon J in the Court of Appeal) the court not only regained any lost ground but leaped forward to some of the most impressive internationalist judgments seen across the three jurisdictions. After *Astro* followed the internationalist judgments at first instance in *Titan Unity*,⁸¹⁰ *Firstlink*,⁸¹¹ *Silica*⁸¹² and *Triulzi*.⁸¹³ It would seem very clear that not only are practitioners in Singapore engaging the internationalist cause (noteworthy in particular in *Astro* although in that case the counsel were Queens Counsel from England) but the courts are no doubt becoming educated by the judgments that have come before.

In Australia there were also highly significant internationalist judgments, notably in *Altain Khuder*,⁸¹⁴ *Traxys*,⁸¹⁵ the *TCL*⁸¹⁶ saga, *Eopply*⁸¹⁷ and *Gujarat*.⁸¹⁸ The overtly internationalist approach in these judgments represented a significant development of the internationalist cause from the previous period and continues the push toward

⁸⁰⁵ (n 692).

⁸⁰⁶ (n 741).

⁸⁰⁷ (n 742).

⁸⁰⁸ (n 743).

⁸⁰⁹ (n 762).

⁸¹⁰ (n 789).

⁸¹¹ (n 792).

⁸¹² (n 797).

⁸¹³ (n 804).

⁸¹⁴ (n 667).

⁸¹⁵ (n 714).

⁸¹⁶ (n 710) (n 733).

⁸¹⁷ (n 726).

⁸¹⁸ (n 727).

making Australia a centre for international commercial arbitration. Interestingly one of the first important judgments on the adoption of the UML for domestic arbitration in each State was handed down by the Victorian Court of Appeal in July 2014 (just before *TCL*) in *Subway Systems v Ireland*.⁸¹⁹ This was a stay application and by a majority the court allowed the appeal and stayed the proceedings to arbitration. The majority judges, Maxwell P and Beach JA, construed the Victorian Commercial Arbitration Act as requiring uniformity with the IAA and thus required the interpretation to be governed not by domestic considerations but by rules similar to those adopted in the interpretation of treaties in Australia, namely an internationalist approach. The judges therefore engaged both the UML I-Norm and TP I-Norm gaining guidance from the Analytical Commentary.⁸²⁰ The third judge, Kyrou AJA, disagreed with this approach and this, as well as Croft J's decision at first instance,⁸²¹ highlights that inconsistency remains depending on the judge or court in Australia exercising jurisdiction.⁸²² An example of the tension between Australian courts is the question of public policy given a broad interpretation in New South Wales⁸²³ and Queensland⁸²⁴ and a narrow international I-Norm interpretation in the Federal Court as exemplified in *TCL*.⁸²⁵ In particular the Australian judiciaries are regarded as too ready to rely on English and USA cases.⁸²⁶

The position in Hong Kong is complex. In this period the NHKAO came into effect and signaled more setting aside cases than had been reported in the previous 20 years, possibly because with the new law a setting aside application is possible in domestic

⁸¹⁹ [2014] VSCA 142.

⁸²⁰ The Report of the Secretary-General dated 25 March 1985 and entitled 'Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration' (UN document A/CN.9/264, available at <<http://www.uncitral.org/uncitral/en/commission/18th.html>> accessed 22 March 2014.

⁸²¹ [2013] VSC 550.

⁸²² See A Monichino, 'International Arbitration in Australia: The Need to Centralize Judicial Power' (2012) 86 ALJ 118, for the argument that the Federal Court be given exclusive appellate jurisdiction over IAA matters; in *Flint Link NZ Ltd v Huhtamaki Aust Pty Ltd* [2014] VSCA 166 the Victorian Court of Appeal engaged the UML and JC I-Norms but did not reason their judgments based on any overtly internationalist approach.

⁸²³ *Corvetina Technology Ltd v Clough Engineering Ltd* [2004] NSWSC 700.

⁸²⁴ *Resort Condominiums v Bolwell* [1995] 1 QDR 406.

⁸²⁵ (n 733) in particular see [80].

⁸²⁶ Nelson (n 548) 117.

arbitration. The important cases of *Gao Hai Yan*⁸²⁷ and *Grand Pacific*⁸²⁸ nevertheless represent internationalist approach judgments (although very limited in their internationalist approach) with a similar position continuing with *Pang Wai*⁸²⁹ and *R v F*.⁸³⁰ The internationalist cause did not improve significantly through *Po Fat*,⁸³¹ *X Chartering*,⁸³² *Shanghai Fusheng*⁸³³ and *A v B*.⁸³⁴ However Chan J handed down what appears to be her first fairly strong internationalist interpretation of Article 34 in *S Co*⁸³⁵ but the lack of any detailed discussion about the nature of the UML and the proper approach to its interpretation in the way carried out in *TCL*⁸³⁶ and *Astro*⁸³⁷ suggests that Hong Kong is behind the other two jurisdictions in terms of a qualitative assessment of the strength of the internationalist approach. The recent Hong Kong decision in *Astro*⁸³⁸ has not furthered the internationalist approach or uniformity and in a recent judgment Chan J had a fairly novel point to decide concerning jurisdiction under Article 16 of the UML and apart from referring to one Canadian case there is no reference to any international authorities almost certainly signifying that the practitioners involved did not refer her to any *travaux perparatoires* or global jurisconsultorium.⁸³⁹ Chan J and a previous judge, Anselmo Reyes, certainly consider that the Hong Kong courts adopt an internationalist approach⁸⁴⁰ but they may not be aware of how Hong Kong judgments measure up as against the other two jurisdictions in this regard given that it appears that

⁸²⁷ (n 678).

⁸²⁸ (n 690).

⁸²⁹ (n 746).

⁸³⁰ (n 749).

⁸³¹ (n 769).

⁸³² (n 774).

⁸³³ (n 776).

⁸³⁴ (n 778).

⁸³⁵ (n 779).

⁸³⁶ (n 733).

⁸³⁷ (n 762).

⁸³⁸ (n 784).

⁸³⁹ *Z v A* [2015] HKEC 289.

⁸⁴⁰ They responded to a question by the author following a presentation by Chan J on the Hong Kong court's approach to its supervisory jurisdiction under the HKNAO at Hong Kong International Arbitration Centre on 18 August 2014. The question was whether they felt that the Hong Kong court adopted an internationalist approach (without defining the expression) to interpretation of the UML in view of Article 2A. They both considered it did.

Hong Kong practitioners do not appear to be regularly citing those decisions to them. Nevertheless some international commentators still maintain Hong Kong is a jurisdiction ahead of Australia in its internationalist judgments.⁸⁴¹ If however *S Co* represents the Hong Kong courts' current state of juristic methodology it can be argued that there is a fairly high degree of convergence between the three jurisdictions in this area subject to treating the unusual decision in *Astro* as an exceptional case.

Quantitatively, out of 30 cases analysed in Hong Kong the UML I-Norm was engaged 12 times (but all indirect), the TP I-Norm twice (plus 16 indirect) and the JC I-Norm 4 times (plus 15 indirect).⁸⁴² If the indirect engagements are ignored the result consolidated the previous period's backward step for Hong Kong's development of the internationalist approach to the UML. On the other hand in Singapore of the 33 cases analysed the UML I-Norm was engaged on 3 occasions, the TP I-Norm was engaged 12 times (plus 10 indirect) and the JC I-Norm was engaged 22 times (plus 6 indirect).⁸⁴³ These results further demonstrate the more enhanced internationalist approach of Singapore first evident in the previous period even though Singapore does not have Article 2A as part of its law. The situation was similar in Australia. Of the 30 cases analysed from Australia a staggering 10 engaged the UML I-Norm (plus 3 indirectly), 6 engaged the TP I-Norm (plus 6 indirectly) and 11 engaged the JC I-Norm (plus 5 indirectly).⁸⁴⁴

These results demonstrate quantitatively the deeper engagement of I-Norms by Singapore and Australia and when the qualitative analysis of cases like *Astro* and *TCL* are compared with the most recent cases in Hong Kong (such as *S Co*) it is fairly clear that practitioners and the courts in Hong Kong are not as overtly internationalist as the courts of Singapore and Australia.⁸⁴⁵ This might change if a setting aside or enforcement case reaches the Court of Final Appeal. It is interesting that the view still persists that Hong Kong is the leader in the internationalist interpretation arena. For example Nelson states in a 2014 article: 'Given the longstanding legislative attention

⁸⁴¹ Nelson (n 548) 120; albeit based on some older Hong Kong judgments.

⁸⁴² Tables, page 18.

⁸⁴³ Tables, page 18.

⁸⁴⁴ Tables, page 18.

⁸⁴⁵ Although note the views of Chan J and A Reyes (n 840).

given to internationalism in Hong Kong, it is unsurprising that Hong Kong judgments consistently evince a keen awareness of the international origins of the [UML] and the [NYC].’ However the cases relied upon for this statement were *Hebei*⁸⁴⁶ and *Brunswick*.⁸⁴⁷ Whilst *Hebei* was strongly internationalist, *Brunswick* was less so and there were of course many cases that did not venture into the internationalist approach.

It is interesting to see how the views of commentators have changed about Australia in the last few years. In 2013 Nottage suggested that the 2010 revisions to the IAA and subsequent case law, with one exception,⁸⁴⁸ did little to further an internationalist approach in Australia.⁸⁴⁹ He suggested a more direct legislative directive to the courts to the *travaux préparatoires* and other documents.⁸⁵⁰ His analysis raises an interesting issue as to whether a jurisdiction can adopt an internationalist approach but get the result wrong, at least in the mind of the international arbitration protagonist. The analysis in Chapter 3 does not require a particular result of an internationalist approach, even if that particular result is an international norm of international commercial arbitration. If this was required it would render otiose a consideration of textual uniformity as an internationalist approach would require an international norm to be achieved by a jurisdiction’s courts irrespective of how that jurisdiction adopted the UML. It is not considered therefore that a test of juristic methodology should include a result test. This is best left to applied uniformity in Chapter 6.

By 2013 commentators were being more positive. On the High Court judgment in *TCL*⁸⁵¹ Monichino and Fawke commented: ‘is extremely welcome and confirms that Australia is an arbitration-friendly jurisdiction’⁸⁵² and on *Gujarat*:⁸⁵³ ‘is yet another arbitration-friendly judgment of the Federal Court applying arbitration principles

⁸⁴⁶ (n 536).

⁸⁴⁷ (n 610); Nelson (n 548) 116.

⁸⁴⁸ *Cape Lambert* (n 729).

⁸⁴⁹ Nottage (n 491).

⁸⁵⁰ Nottage (n 491) 490-492.

⁸⁵¹ (n 710).

⁸⁵² Monichino and Fawke (n 713) 214.

⁸⁵³ (n 727).

consistently with international arbitration jurisprudence and norms.’⁸⁵⁴ Monichino continued his positive thoughts a year later: ‘the broad direction of arbitration in Australia is overwhelmingly positive’.⁸⁵⁵ Nelson however maintains a view that Australian courts maintain a ‘narrow’ internationalism in not referring to enough of the global jurisconsultorium (other than UA and English decisions).⁸⁵⁶

5.3 Article 2A and the I-Norms

Chapter 3 contains a detailed analysis of Article 2A and draws certain conclusions from the analysis leading to the formulation of the three I-Norms. Where Article 2A is included there is, it is suggested, an express direction to engage the I-Norms. Where not included it was considered that this might not matter as even without Article 2A the nature of the UML arguably requires an internationalist approach in any event. The analysis of the hundreds of cases in the three jurisdictions is notable for the almost total lack of reference by the courts to Article 2A. As Article 2A expressly provides the underpinning for the internationalist approach this might be considered as very surprising. However for two reasons it may not be surprising. First Article 2A was only introduced into Australia in 2010 and in Hong Kong in 2011 leaving very little time for citation. Secondly Article 2A has not been introduced into Singapore. Thirdly the analysis in Chapter 3 demonstrates that an internationalist approach to interpretation of the UML exists even without Article 2A and far from being surprising the absence of citation in the two jurisdictions actually supports the Chapter 3 analysis.

It has been seen that the HKAO included an equivalent to Article 2A in the form of Section 2(3).⁸⁵⁷ As early as 1992 Kaplan J referred to this section in *Katron Shipping Co Ltd v Kenven Transportation Ltd*⁸⁵⁸ stating that it ‘enabled’ the court to have regard to the international origin of the UML, the need for uniformity and the *travaux*

⁸⁵⁴ (n 713) 219.

⁸⁵⁵ A Monichino and A Fawke, ‘International Arbitration in Australia: 2013/2014 in Review’ (2014) 25 ADRJ 187, 203.

⁸⁵⁶ Nelson (n 548) 119.

⁸⁵⁷ Para 4.2.1.1 above.

⁸⁵⁸ [1992] 1HKC 538, [1992] ADRLJ 235, CLOUT 39.

preparatoires.⁸⁵⁹ Kaplan J again referred to the section in *Astel-Peiniger* when he stated it was included in the HKAO ‘fortunately’ suggesting an importance to the internationalist approach to interpretation.⁸⁶⁰ The only other reference to Section 2(3) up until the time it was replaced by Article 2A in the HKNAO came in *S Co*⁸⁶¹ where the provision was referred to by counsel as support for referring to the *travaux preparatoires*. Article 2A has been present in the HKNAO since 2011 but has yet to be mentioned in any judgment. It can be argued that Hong Kong has adopted an internationalist approach to the interpretation of the UML even without any consideration of Article 2A in the vast majority of cases where an internationalist approach was adopted.

In Australia Article 2A has been included in the IAA only since 2010. Its introduction, along with Sections 2D and 39, appear to have been the defining legislative acts so far as the adoption of the internationalist approach to interpretation of the UML was concerned.⁸⁶² However whether this should have been entirely the case is not free from doubt given that even before their introductions Section 17 allowed reference to the *travaux preparatoires*.⁸⁶³ Allsop J also well demonstrated the adequacy of the legislation for an internationalist approach in *Comandate*.⁸⁶⁴ Section 17 was also expressly relied upon in *Wagners Nouvelle*.⁸⁶⁵ Section 2D was referred to for the first time in *Altain Khuder*⁸⁶⁶ when all I-Norms were engaged. In *TCL* the High Court seems to have relied upon Section 2D, Section 17 and Article 2A in their analysis.⁸⁶⁷ The court interpreted Article 2A in a way which linked it with the NYC and strongly suggested an autonomous method of interpretation. Section 2D was also referred to in *Traxys*,⁸⁶⁸ *Eopply*⁸⁶⁹ and *Cape Lambert*⁸⁷⁰ and seemed to be enough to engage the UML I-Norm

⁸⁵⁹ Ibid [10].

⁸⁶⁰ (n 523).

⁸⁶¹ (n 779).

⁸⁶² See para 5.2.4 above.

⁸⁶³ See para 4.2.3.1 above.

⁸⁶⁴ (n 618).

⁸⁶⁵ (n 631).

⁸⁶⁶ (n 667).

⁸⁶⁷ (n 710).

⁸⁶⁸ (n 714).

⁸⁶⁹ (n 726).

without any overt reference to Article 2A. In the Federal Court Full Court decision in *TCL* however all the relevant provisions were considered and it was stated that Article 2A is a clarification in that it ‘also’ provides for an internationalist approach to interpretation.⁸⁷¹ In Australia the absence of Article 2A (but in particular Sections 2D and 39) resulted in a very slow if almost non-existent adoption of an internationalist approach to interpretation of the UML. After its introduction there is a sea change in approach being developed although according to the judges in *TCL* not because of the introduction of Article 2A. This seismic shift in the approach of some (but not yet all) of the Australian courts coincides with a push for Australia to develop its attraction to users of international arbitration.⁸⁷²

As has been seen above, Singapore has not included Article 2A although it does have its own equivalent of Section 17 of the IAA in Section 4 of the SIAA enabling reference to the *travaux préparatoires*.⁸⁷³ Section 4 was first referred to in *Coop International*⁸⁷⁴ in 1998 and the *travaux préparatoires* referred to in support of the judge’s decision. A similar situation occurred in *Tang Boon*⁸⁷⁵ in 2001 where the court relied upon the *travaux préparatoires* to expressly depart from English authorities. As has been seen above, there were a number of cases in Singapore adopting strong internationalist approaches to the interpretation of the UML. In particular in *International Research*⁸⁷⁶ Menon J referred to Section 4 as empowering him to look at the *travaux préparatoires* but actually engaged all I-Norms, not only the TP I-Norm. In *Astro*⁸⁷⁷ he did the same thing except he explained how he considered he was able to do so. He referred to Section 4(2) of the SIAA which directs to the Interpretation Act and via that to the purpose or object of the legislation. From this he held that this required him to give effect to the ‘overarching philosophy’ of the UML, at least regarding enforcement (which was the subject of the case). As with *TCL* in Australia, there was a strong

⁸⁷⁰ (n 729).

⁸⁷¹ See para 5.2.4 above.

⁸⁷² C Croft, ‘Recent Developments in Arbitration in Australia’ (2011) 28 J. Int’l Arb. 599.

⁸⁷³ Para 4.2.2.1 above.

⁸⁷⁴ (n 552).

⁸⁷⁵ (n 558).

⁸⁷⁶ (n 758).

⁸⁷⁷ (n 762).

linkage to the NYC and consequently an interpretation consistent with how a treaty would be interpreted. It is also interesting that the strong development of the internationalist approach in Singapore in recent years has, like Australia, coincided with the push to become a regional force in international arbitration⁸⁷⁸ albeit that this was supposed to be the driver for implementing the UML many years previously.⁸⁷⁹

The adoption of an internationalist approach in Singapore has been entirely without Article 2A and the approach of Menon J is consistent with treaty methods of interpretation being applied for the UML. The analysis of cases in Hong Kong, Singapore and Australia indicate that the presence in legislation of Article 2A is not crucial and may even not be relevant. Courts which are current in their outlook and in jurisdictions that promote international arbitration (such as Singapore) are clearly prepared to adopt strong internationalist approaches to interpretation of the UML irrespective of the Article 2A tool and others appear to be able to do so without overt reliance on Article 2A.⁸⁸⁰ The detailed academic discussion possible about the approach that Article 2A dictates and the vagaries and misgivings about it are clearly just academic in the eyes of practitioners and the courts, embarked upon the development of the UML global jurisconsultorium. Juristic methodology convergence has occurred despite the different legislative interpretive frameworks in the three jurisdictions and in particular the absence of Article 2A in Singapore. This, as well as the *TCL* decision, significantly support the immateriality of Article 2A to the internationalist interpretation of the UML.

⁸⁷⁸ This was expressly referred to by Menon J in *Astro* (n 762) [54]. Pillay notes it in the context of the speed of legislative changes to the SIAA following cases that went against such drive: Pillay (n 557) 386; see also Monichino (n 822).

⁸⁷⁹ A Yeo, 'Harmonisation, Party Autonomy and Mandatory Provisions under the UNCITRAL Model Law' in UNCITRAL-SIAC Conference, *Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration* (SIAC 2006) 50, 56.

⁸⁸⁰ In response to a question by the author on at a presentation by Lou Mistelis at Hong Kong International Arbitration Centre on 1 November 2013, the presenter, who had been involved in the introduction of Article 2A at UNCITRAL, agreed that the introduction of Article 2A had probably made little difference to how courts interpreted the UML.

This conclusion is consistent with Canada where it was recognised early on in the development of the UML jurisprudence that an internationalist approach was required, even without Article 2A:

There can be no doubt that the proposed appeal involves matters of considerable importance to the development of consistency in the application of the Model Law throughout the nations that have adopted it. As I understand it, the purpose and spirit of the [International Commercial Arbitration Act] in adopting the Model Law, was to make Ontario commercial arbitration law consistent with the law of other international trading countries so as to enhance and encourage international commerce in Ontario and the resolution of disputes by rules of international commercial arbitration: for this it is important that appellate courts address the issues emerging in this case.⁸⁸¹

5.4 UML/NYC Relationship

Table 6 shows that out of 48 cases analysed where a setting aside application was considered, 20 of them included referral to the NYC grounds as an aid to interpreting Article 34.⁸⁸² The first setting aside case which seems to have done this is *Asuransi*⁸⁸³ where the Singapore Court of Appeal relied on NYC enforcement cases that are referred to often on the meaning of public policy: the English case of *Deutsch Schachbau v Shell International Petroleum Co Ltd*⁸⁸⁴ and the US case of *Parsons*.⁸⁸⁵ The court also referred to an extract from Holtzmann and Neuhaus⁸⁸⁶ aligning the concept in Article 34 with the NYC. Ong J in *Dongwoo*,⁸⁸⁷ Prakash J in *Swiss Singapore Overseas*

⁸⁸¹ Henry J in *Rio Algom Ltd v Sammi Steel Co* (1991) 47 C.P.C. (2d) 251 (Ont. Gen. Div.) referred to by P Mazzacano, 'Canadian Jurisprudence and the Uniform Application of the UN Convention on Contracts for the International Sale of Goods' (2006) 18 Pace Int'l L.Rev. 3.

⁸⁸² Tables, pages 77-94.

⁸⁸³ (n 587).

⁸⁸⁴ [1987] 2 Lloyd's Rep 246.

⁸⁸⁵ (n 700).

⁸⁸⁶ (n 515).

⁸⁸⁷ (n 607).

*Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd*⁸⁸⁸ and *Sui Southern*⁸⁸⁹ and Onn J in *AJT*⁸⁹⁰ cited the same cases or the relevant part of *Asuransi*.⁸⁹¹

In *Brunswick*⁸⁹² Lam J referred to NYC cases as an aid to the interpretation of three of the other grounds in Article 34 and in particular on the subject of whether there was a residual discretion not to set aside where a ground was made out. Ang J also referred to NYC cases as an aid to interpreting the scope of submission ground in *CRW*,⁸⁹³ in particular to Hong Kong cases. *Grand Pacific*⁸⁹⁴ was a case dealing with an application under the unable to present case ground and NYC cases in aid of the interpretation of this ground and the question of discretion were extensively cited by Saunders J, all of which were Hong Kong cases. He also relied upon Van den Berg.⁸⁹⁵ The Court of Appeal made a similar extensive reference to the NYC global jurisconsultorium although coming to a different conclusion on the application.⁸⁹⁶ In *CRW*⁸⁹⁷ the Singapore Court of Appeal referred to a Hong Kong case under the NYC on the subject of discretion and in *AJT* it confirmed that there was ‘no difference’ between the grounds relating to public policy under the NYC and UML and was the first Singapore setting aside case that cited *Hebie*.⁸⁹⁸ In the Singapore case of *Quarella SpA* one of the parties unsuccessfully relied on NYC cases and commentaries to advance its case on the failure to apply the procedure agreed between the parties ground⁸⁹⁹ and the Court of Appeal in *L W Infrastructure*⁹⁰⁰ referred to previous Singapore enforcement cases stating that the

⁸⁸⁸ [2009] SGHC 231.

⁸⁸⁹ (n 599).

⁸⁹⁰ (n 609).

⁸⁹¹ (n 587).

⁸⁹² (n 610).

⁸⁹³ (n 633).

⁸⁹⁴ (n 685).

⁸⁹⁵ (n 535).

⁸⁹⁶ (n 690) as did Chow SC in *Pang Wai* (n 746).

⁸⁹⁷ (n 636).

⁸⁹⁸ (n 692) [37]-[38]; *Hebei* (n 536). This was followed in *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2013] SGHC 248.

⁸⁹⁹ (n 742).

⁹⁰⁰ (n 743).

grounds for enforcement and setting aside were in ‘*pari materia*’.⁹⁰¹ In *Triulzi* Ang J cited an enforcement case from the USA holding it ‘relevant’ to an Article 34 case because of the alignment of the UML/NYC grounds.⁹⁰²

Allsop J in *Comandate*⁹⁰³ noted the interaction between the NYC and UML⁹⁰⁴ but the Australian High Court in *TCL*⁹⁰⁵ probably had the most detailed discussion on any of the cases analysed of the relationship between the UML and NYC. This was for the purpose of establishing the method of interpretation of the UML rather than analogous case citation. However the views of the court in confirming the close relationship between the two instruments were clear:⁹⁰⁶

Those considerations of international origin and international application make imperative that the Model Law be construed without any assumptions that it embodies common law concepts or that it will apply only to arbitral awards or arbitration agreements that are governed by common law principles. The first of those considerations makes equally imperative that so much of the text of the Model Law as has its origin in the New York Convention be construed in the context, and in the light of the object and purpose, of the New York Convention.⁹⁰⁷

The manner in which s8 of the IAA implements Art III of the New York Convention assists in the translation and application of Art 35 of the Model Law. That is particularly so having regard to the intention, revealed by the UNCITRAL analytical commentary, that the UNCITRAL Model Law should operate in harmony with the New York Convention and that the operation of Art 35 with

⁹⁰¹ (n 743) [41].

⁹⁰² (n 804) [57].

⁹⁰³ (n 618).

⁹⁰⁴ (n 618) [191]-[192].

⁹⁰⁵ (n 710).

⁹⁰⁶ A similar discussion was contained in the Federal Court Full Court judgment in *TCL*: see para 5.2.4 above.

⁹⁰⁷ (n 710) Gageler J [8].

respect to recognition of an arbitral award should be distinct from the operation of Art 35 with respect to enforcement of an arbitral award.⁹⁰⁸

The Singapore case that provides a detailed analysis of the relationship is *Astro*⁹⁰⁹ but paradoxically in this enforcement case the Court of Appeal relied upon the relationship to establish that the approach to ‘choice of remedies’ under the NYC was the same as under the UML:

There is also authority that the New York Convention permits a party to resist enforcement even after an unsuccessful active challenge, save and except for the operation of any issue estoppel recognised by the enforcing court.

In so far as this is accurate of the New York Convention we see no reason to regard the Model Law as any different, given that the objective of uniform treatment of international arbitral awards is common to both instruments.⁹¹⁰

Importantly however in this way Menon J reinforced the relationship in the context of the common objective of uniformity.

In *Shanghai Fusheng*⁹¹¹ Chan J had to deal with an application on the public policy ground and stated that the ‘authorities are clear’ that the ground was to be ‘narrowly construed in the context of setting aside or refusing enforcement’ and then relied upon NYC cases, including *Hebie*⁹¹² to establish the correct principle. In the latter *S Co* the same judge again relied upon *Hebei*, other enforcement cases on public policy⁹¹³ and the exercise of discretion but also upon a decision of Au J in *Grant Thornton International Ltd v JBPB & Co*⁹¹⁴ which although an enforcement decision on the scope of submission ground, was clearly seen by her as precisely the same as the Article 34

⁹⁰⁸ (n 710) [22].

⁹⁰⁹ (n 762).

⁹¹⁰ (n 762) Menon J [65].

⁹¹¹ (n 776).

⁹¹² (n 536).

⁹¹³ (n 779) [113].

⁹¹⁴ [2013] HKEC 477.

equivalent ground as she did not even note that the Au J decision was an enforcement one.⁹¹⁵

In a number of places in this thesis the linkage between the NYC and UML, as regards the grounds for setting aside in Article 34, has been explained in theory and been referred to in writings.⁹¹⁶ The case law described in this chapter has unequivocally demonstrated the linkage in the juristic methodology of the application of the UML and NYC.

5.5 Textual Dissimilarity Impacts

Table 1 demonstrates a number of potentially significant textual dissimilarities between the NYC grounds and Articles 34/35 and as those provisions have been incorporated into the legislation of the selected jurisdictions. Out of the hundreds of cases analysed however it is striking how little consideration is given to any textual dissimilarities either as a matter of principle or specifically. However there have been a small number of courts that have considered this.

In *Hebei*⁹¹⁷ it is noteworthy that the Court of Final Appeal seemed to prefer to interpret the articles of the NYC, rather than the slightly differently worded implementing provisions of the HKAO. To this extent the ostensible textual differences or low degree of textual uniformity, is rendered immaterial. Indeed the textbooks on the subject are sometimes equally guilty; for example: “*The Hong Kong courts are generally regarded as having an excellent record in enforcing foreign arbitral awards in accordance with the New York Convention*”.⁹¹⁸ In addition in the latest detailed commentary on the HKNAO it is simply presumed that the reference to public policy in Section 89(3)(b) is to the public policy of Hong Kong, no doubt reflecting the interpretation in *Hebei* without at least observing that there is a difference in wording with the equivalent

⁹¹⁵ (n 779) [65].

⁹¹⁶ See para 3.6 above and Chapter 4 generally.

⁹¹⁷ (n 536).

⁹¹⁸ D Brock, ‘Recognition and Enforcement of the Arbitral Award’ in G Ma (ed), *Arbitration in Hong Kong: A Practical Guide* (Thomson 2003) para 15-24.

article of the NYC.⁹¹⁹ This resulted in problems in *Gao Hai Yan* where the Hong Kong Court of Appeal relied upon the test in *Hebei* for overturning *Reyes J.*⁹²⁰

In *Altain Khuder* Croft J at first instance identified differences in the enforcement provisions of the IAA and the SIAA but still found Singapore cases to be ‘persuasive authority’.⁹²¹ In the same case Kyrou AJA of the Victorian Court of Appeal highlighted the importance of identifying relevant differences in the legislation:

Thirdly, as the Act gives effect to the Convention, decisions of overseas courts on the meaning of provisions of domestic legislation that adopt the wording of the Convention may be of assistance in the interpretation of the Act. Apart from promoting comity, there are obvious advantages in consistency in the interpretation of legislation that gives effect to an international convention. In that regard, however, it will be important to note any relevant differences in the legislation of another jurisdiction.⁹²²

However the court still was able to rely upon Singapore cases as being ‘significant persuasive authority’⁹²³ albeit declining to follow *Aloe Vera*⁹²⁴ and arriving at a decision that was out with established international NYC norms. In *Traxys*⁹²⁵ the Australian Federal Court relied upon *Hebei*⁹²⁶ for the narrow approach to public policy but, like the court in *Hebei*, did not give consideration to the textual dissimilarity between the IAA and the NYC ground but on the contrary proceeded on the basis that the provisions were synonymous.⁹²⁷ The Federal Court at first instance and the Full Court also did this in *TCL*.⁹²⁸ Kaplan J proceeded in a similar way in *Quinhuangdao Tongda Enterprise*

⁹¹⁹ J Choong and J Weeramantry, *The Hong Kong Arbitration Ordinance – Commentary and Annotations* (Sweet & Maxwell 2011) para 89.38

⁹²⁰ (n 678).

⁹²¹ (n 662) [50]-[51].

⁹²² (n 667) [130].

⁹²³ (n 667) [50]-[51].

⁹²⁴ (n 577).

⁹²⁵ (n 714).

⁹²⁶ (n 536).

⁹²⁷ (n 714) [105].

⁹²⁸ See para 5.2.4 above.

Development Company v Million Basic Company Ltd (HK).⁹²⁹ On the other hand the Hong Kong Court of Appeal in *Apex Tech* pointed out that the not given proper notice ground of the HKAO ‘follows precisely the words of the’ NYC⁹³⁰ and Lam J in *Brunswick* stated that Article 34 and Article V of the NYC are ‘worded basically in similar terms’.⁹³¹

In *Dalian*, a stay application, Woo J identified some differences between Article 8(1) of the UML and the equivalent provision of the SIAA but was able to refer to the global jurisconsultorium because he found them ‘substantially the same’⁹³² and Prakash J in *Quarella SpA* accepted a comparison between the scope of reference ground in the UML and NYC to be ‘in *pari materia*’.⁹³³ In *Titan Unity* Leong AR did not consider the differences between Article 8 of the UML and the equivalent provision in the SIAA prevented him engaging the TP I-Norm and JC I-Norm on Article 8.⁹³⁴

The few references above where the court has considered whether textual dissimilarities exist serve to reinforce the qualitative sense from the case analysis that potentially significant textual dissimilarities (in particular relating to the public policy ground) are usually not treated as significant by the courts of the selected jurisdictions.⁹³⁵

5.6 English Cases Citation

A feature of the analysis of cases is the clear predilection of most courts with reliance upon English cases. This is no doubt the result of counsel referring to such cases. From Table 2 it can be seen that very many of the cases analysed included English case

⁹²⁹ [1993] 1 HKLR 173, CLOUT 812.

⁹³⁰ (n 534) [7].

⁹³¹ (n 610) [36].

⁹³² (n 575).

⁹³³ (n 742) [43].

⁹³⁴ (n 789).

⁹³⁵ Locknie suggested when the SIAA was first enacted that modifications to the UML could have the effect of enhancing the ‘creation of a more uniform pattern of overall treatment’; H Locknie, ‘The Adoption of the UNCITRAL Model Law on International Commercial Arbitration in Singapore’ (1994) Sing. JLS 387, 392.

citation.⁹³⁶ However many of the cases analysed relate to the NYC which England is a party to and cases on this may of course be relevant to similar cases in the selected jurisdictions. Table 2B summarises the analysis of enforcement cases only and out of 83 cases analysed in the three jurisdictions English cases were cited in 42 of them (for example *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs* was referred to in numerous cases).⁹³⁷ Table 2C summarises the analysis of setting aside cases and out of 48 cases analysed English cases were cited in 36 of them.⁹³⁸ As previously mentioned, as the NYC cases are relevant to how the UML is approached, certainly as regards Article 34, decisions in England on the NYC are potentially relevant to enforcement and setting aside applications in UML jurisdictions. Indeed as can be seen Table 2B and Table 2C demonstrate that the proportion of cases on setting aside citing English cases is even higher than those dealing with enforcement. Moreover the degree of such reference has not apparently diminished in the latter periods. Given that the cases analysed relate to the UML, which England has not adopted, this may be surprising. The research for this thesis does not reveal the reasons for this. For whatever reasons, many counsel continue to look to jurisprudence from England.

A small number of courts however have specifically decided that English cases are not relevant to decisions under the UML: the Singapore Court of Appeal in *Tang Boon* (because England had not adopted the UML),⁹³⁹ *International Research* (because the UML suggested a different approach to that advocated by the English authorities);⁹⁴⁰ the Singapore High Court in *Titan Unity* (to achieve a uniform interpretation with UML jurisdictions)⁹⁴¹ which was followed by the same court in *Firstlink*;⁹⁴² the New South Wales Supreme Court in *Gordian Runoff* (because the UML reads ‘strangely’ compared with Australian and English statutes).⁹⁴³ However there are some cases where the court

⁹³⁶ Tables, pages 17 to 18.

⁹³⁷ Tables, pages 21 to 22; [2010] UKSC 46, [2011] 1 AC 763, CLOUT 1323.

⁹³⁸ Tables, pages 23 to 24.

⁹³⁹ (n 558).

⁹⁴⁰ (n 758).

⁹⁴¹ (n 789).

⁹⁴² (n 792).

⁹⁴³ (n 567) [31].

draws a specific similarity between English legislation and the UML as reason for relying on English cases (for example *TMM*⁹⁴⁴).

There is no settled approach to the citing of English cases in setting aside cases. It might be argued that as the UML jurisprudence continues to develop reference to cases on the NYC will diminish and therefore the relevance of English cases will also diminish. This is a doubtful argument. First, the relationship between cases dealing with the UML and those dealing with the NYC is strong. It is hard to conceive of a time when an important case dealing with, for example, public policy under the NYC will not be relevant to cases under Article 34. Secondly there are already cases under the NYC which are regarded as leading cases (for example *Hebei*⁹⁴⁵) and again it is hard to conceive of a time when these cases will no longer be relevant to cases under Article 34. Thirdly English cases on general common law issues such as waiver and estoppel will remain important to those types of considerations as they relate to NYC and Article 34 issues. It is considered therefore that for the foreseeable future English cases will continue to be cited in a large proportion of cases dealing with setting aside applications under the UML.

5.7 Setting Aside Case Trend

It is immediately apparent from Table 2C that the number of setting aside cases included in the total number of potentially relevant cases analysed, is relatively low, save for Singapore.⁹⁴⁶ In Hong Kong out of 189 relevant cases only 9 concerned setting aside applications (including two appeals) and 8 of these occurred between 2011 and 2015 with the first as late as 2009. In Singapore however of the 80 relevant cases analysed 34 concerned setting aside applications (including 8 appeals), which is a very large proportion. The position in Australia is similar to Hong Kong with only 5 setting aside cases out of 37 cases analysed (including two appeals) and the first not until 2010.

⁹⁴⁴ (n 756).

⁹⁴⁵ (n 536).

⁹⁴⁶ Tables, pages 23 to 24.

Perhaps of more importance than the respective proportions is the disparity between the actual number of setting aside cases.

The reason for this disparity, in particular between Hong Kong and Singapore is not clear. Hong Kong has had the UML as part of its arbitration law since 1990 although only for international arbitration until 2011. Australia has had it since 1989 only for international arbitrations (although most Australian States have revamped their domestic arbitration law since 2010 with legislation largely reflecting the UML, including Article 34).⁹⁴⁷ Singapore however has had the UML only since 1995 and like Australia only for international arbitration (again the domestic arbitration law has been amended in 2001 to reflect the UML albeit extending the narrow grounds of setting aside in Article 34).⁹⁴⁸

A possible reason for the disparity might be simply that there have been significantly more international arbitrations in Singapore than the other two jurisdictions. This is a feasible reason for the lack of cases in Australia as it has only recently begun its push for regional international arbitration business. Hong Kong however has been the apparent dominant force in regional international arbitration for many years and Singapore appears to have only in the last few years or so challenged this position. This does not explain therefore the disparity between Hong Kong and Singapore.

It might be suggested that tribunals in Hong Kong are less prone to mistakes than tribunals in Singapore or that lawyers in Singapore are more prone to advise on applications being made than those in Hong Kong. These reasons seem far-fetched particularly as many international tribunals in Singapore are drawn from foreigners and

⁹⁴⁷ For example the Commercial Arbitration Act 2010 of New South Wales available at <http://www.austlii.edu.au/au/legis/nsw/consol_act/caa2010219/> accessed 11 December 2014; A Baykitch, *Arbitration Law of Australia: Practise and Procedure*, (Juris 2013) 5-6. This notes that parties can opt in to wider appeal grounds including merits based.

⁹⁴⁸ Arbitration Act 2001 available at <<http://www.jus.uio.no/lm/singapore.arbitration.act.2001/portrait.a4.pdf>> accessed 11 December 2001; L Chew, *Introduction to the Law and Practice of Arbitration in Singapore* (LexisNexis 2010) 21.

foreign lawyers have the right of representation for arbitrations in Singapore.⁹⁴⁹ Table 6 shows that there has only been two successful applications in Hong Kong and one of those was overturned on appeal whereas in Singapore there have been 8 successful applications although half of these were overturned on appeal. The relative degree of success is almost the same for the two jurisdictions and does not help in understanding the disparity.

In Hong Kong there have been many more setting aside cases since the HKNAO in 2011 which allows setting aside applications for domestic cases. Most of the applications in Hong Kong however have been in international cases and so this also does not seem like a feasible rationale. It might however be that the type of international arbitrations in Hong Kong has been different to the type in Singapore. There is no statistic which might prove or disprove this possible reason.

5.8 Conclusions

In the recent English case of *Honeywell International Middle East Ltd v Meydan Group LLC*⁹⁵⁰ Ramsey J dealt with an enforcement application. Section 103 of the Arbitration Act puts into force Article V of the NYC. This then is an area where it might be said that cases from the global jurisconsultorium relating to enforcement and setting aside would be relevant to aid in the interpretation of Section 103. In this case enforcement was resisted on various grounds with the factual basis being that the contract out of which the dispute arose was allegedly procured by a bribe. In a well-reasoned and detailed judgment there is no reference whatsoever to any cases other than English cases (save for one ICSID arbitral award) and this case highlights the difference in approach of practitioners in UML jurisdictions and England. It also highlights the analysis in this chapter that the selected jurisdictions have adopted the internationalist approach to interpretation of the UML (and indeed the NYC). However the recent Court of Appeal

⁹⁴⁹ Legal Profession Act Cap. 161, section 35 available at

<<https://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/linkclickd354.pdf>> accessed 11 December 2014.

⁹⁵⁰ [2014] EWHC] 1344, [2014] BLR 401.

case of *Anthony Lombard-Knight v Rainstorm Pictures Inc*⁹⁵¹ is in stark contrast. The court adopted a strong internationalist approach to interpret the NYC, even citing a Hong Kong decision. One Court of Appeal decision is of course insufficient to indicate anything other than the inconsistent approach of the courts in England to interpretation of the NYC.

The qualitative basis for the proposition that the courts have adopted the internationalist approach to interpretation of the UML is surely evident in the period discussion above. Hong Kong adopted it from the early path-finding days of Kaplan J and whilst in recent years the development has arguably stagnated, there are some recent positive signs with the progressive decision of Chan J in *S Co.*⁹⁵² Singapore had a slow start right up until around 2006 but has rapidly developed its approach since *Asuransi*⁹⁵³ and has consistently adopted an internationalist approach in most cases since with the seminal enforcement decision in *Astro*⁹⁵⁴ setting out in a clear way that Singapore have bought in to the UML and will adopt a strong internationalist approach. This approach is being noticed by international commentators: '[I]n some jurisdictions, such as Singapore, courts already seem to have fully embraced the idea underlying the *Model Law Digest*, namely the need to consider the case law of other Model Law States or States with a comparable legal system'.⁹⁵⁵ Singapore itself will utilise the embracement of the internationalist approach as part of its push to be a hub for arbitration in Asia:

In the development of jurisprudence concerning international arbitration in Singapore, the courts endeavour to consider the persuasiveness of international arbitration law so that their position remains, as far as it is possible, consistent with internationally accepted norms of arbitration law. Consideration is given to the interpretive significance of the international normative context ...A study of the decided cases will show the extensive importance that Singapore courts accord

⁹⁵¹ [2014] EWCA Civ 356.

⁹⁵² (n 779).

⁹⁵³ (n 587).

⁹⁵⁴ (n 762).

⁹⁵⁵ S Kroll, 'The Public Policy Defence in the Model Law Jurisprudence: The *ILA Report Revisited*' in Bachand F and Gelinas F (eds), *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (JurisNet 2013) 143.

sources of international arbitration law, despite the often divergent statements of the law that these sources offer.⁹⁵⁶

Australia are the most recent convert to the internationalist approach starting in 2006 with *Comandate* (with an exceptional judgment by Allsop J)⁹⁵⁷ with little thereafter until 2010 with *Cargill*⁹⁵⁸ and strongly supported by the Victoria Court of Appeal in *Altain Khuder*,⁹⁵⁹ the Federal⁹⁶⁰ and High Court in *TCL*⁹⁶¹ and Federal Court in *Traxys*.⁹⁶² Overall there is a fairly high degree of convergence and thus uniformity of juristic methodology.

The quantitative analysis corroborates the qualitative conclusions. Table 2 shows that in Hong Kong the UML I-Norm was directly engaged 6 times up to 2003 but has not been directly engaged since.⁹⁶³ Moreover those engagements were all enforcement cases suggesting a lack of appreciation by the courts of the uniformity objective of the UML. The TP I-Norm has been directly engaged 14 times and 10 of those were in the periods up to 2003.⁹⁶⁴ The JC I-Norm has been directly engaged 24 times with 19 of those in the periods up to 2003.⁹⁶⁵ This suggests either a very settled body of principles or that the internationalist approach was in a state of stagnation in Hong Kong, which is the conclusion from the qualitative analysis. Table 2C also supports the qualitative analysis that in recent years with an increase in setting aside cases there is a limited resurgence

⁹⁵⁶ Q Loh, 'The UNCITRAL Model Law and the Pro-arbitration Approach: Judicial Internationalism and International Interpretation – The Singapore Experience' in Bachand F and Gelinas F (eds), *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (JurisNet 2013) 190.

⁹⁵⁷ (n 618).

⁹⁵⁸ (n 550).

⁹⁵⁹ (n 667).

⁹⁶⁰ (n 733).

⁹⁶¹ (n 710).

⁹⁶² (n 714).

⁹⁶³ Tables, pages 17 to 18.

⁹⁶⁴ Tables, pages 17 to 18.

⁹⁶⁵ Tables, pages 17 to 18.

of the internationalist approach with 2 direct engagements of the TP I-Norm and 3 of the JC I-Norm, out of 8 cases.⁹⁶⁶

For Singapore Table 2 shows that the UML I-Norm has been directly engaged 3 times (but again 2 out of 3 were enforcement cases), the TP I-Norm 23 times and the JC I-Norm 38 times.⁹⁶⁷ However in the last period considered since 2011, with 33 cases considered, the respective direct engagements were 3, 12 and 22 which is consistent with the qualitative analysis above.⁹⁶⁸

The quantitative analysis for Australia is similar to Singapore. Table 2 shows that the UML I-Norm has been directly engaged a staggering 11 times, the TP I-Norm 9 times and the JC I-Norm 16 times.⁹⁶⁹ However in the last period considered since 2011, with 30 cases considered, the respective direct engagements were 10, 6 and 11 which is consistent with the qualitative analysis above.⁹⁷⁰

Table 2C shows that out of 48 cases considered there was only two direct engagements of the UML I-Norm (both in Australia) but there were 19 direct engagements of the TP I-Norm and 23 of the JC I-Norm.⁹⁷¹ This is consistent with the apparent irrelevance of Article 2A in a number of cases adopting the internationalist approach.

In Chapter 3 the idea of relative uniformity was developed where absolute uniformity is unnecessary for the UML to achieve its objective of harmonisation and uniformity. In the uniformity formula the first symbol which contributes to the uniformity test is the internationalist approach. A degree of uniformity might well be possible even without a degree of uniformity of juristic methodology. This might be more likely in a common law tradition. However this thesis is not testing this hypothesis. It is testing whether the courts of the three jurisdictions have adopted a similar juristic methodology to the

⁹⁶⁶ Tables, pages 20 to 21.

⁹⁶⁷ Tables, pages 17 to 18.

⁹⁶⁸ Tables, page 18.

⁹⁶⁹ Tables, pages 17 to 18.

⁹⁷⁰ Tables, page 18.

⁹⁷¹ Tables, pages 23 to 24.

interpretation of the UML (and NYC). One thing is clear and this is that the courts of the three jurisdictions have not abrogated their right to decide cases in accordance with their domestic laws. There is very little reference in the cases to the UML I-Norm nor any suggestion of an autonomous body of case law that discounts decisions from jurisdictions other than UML ones. It is not suggested in Chapter 3 that this is a necessary requirement for the achievement of an acceptable degree of uniformity although if there was a high proportion of cases making such pronouncements this would have been fairly indicative of a very high degree of uniformity. This would suggest, on the contrary, that the UML I-Norm is unnecessary to the testing of uniformity.

What does come across very strongly is the high degree of juristic methodology (TP I Norm and JC I-Norm) between Hong Kong in the period when Kaplan J (as he then was) presided over the Construction and Arbitration List and Singapore and Australia in the most recent period between 2011 and 2015. This is not to say that Hong Kong has abandoned the internationalist approach, far from it. Chan J's decision in *S Co*⁹⁷² is evidence that the internationalist approach is still (just) alive in Hong Kong but until the Court of Appeal or Court of Final Appeal have cause to review the approach to the interpretation of the UML (possibly in the Hong Kong *Astro*)⁹⁷³ it may be difficult for Hong Kong to produce a judgment of the internationalist calibre of those produced by Menon J in Singapore and the Federal and High Court of Australia (and of course by the Court of Final Appeal many years ago in *Hebei*⁹⁷⁴). However this cross-period juristic methodology uniformity is still uniformity. Hong Kong has not expressly disavowed the internationalist approach. It was dormant for a number of years but given the rapid emergence of Singapore and Australia (and no doubt other jurisdictions in due course) as actual, or want to be, major players in the international commercial arbitration business, this has resulted in Hong Kong's dominance being eroded. It is unlikely that Hong Kong will allow this to continue without a significant effort to regain its dominance. One of the things which Hong Kong should look at is the approach in the courts and in particular those practitioners involved in arbitration

⁹⁷² (n 779).

⁹⁷³ (n 784).

⁹⁷⁴ (n 536).

matters will likely need to become more internationalist in their approach to submissions as the knowledge of the UML increases because of its application to domestic arbitration.

This chapter has concluded that the degree of uniformity of juristic methodology between the three jurisdictions is fairly high. This is only half of the applied uniformity test and Chapter 6 will now explore the degree of uniformity achieved in terms of the similarity of results.

Chapter 6: Applied Uniformity of the UNCITRAL Model Law – Testing Uniformity of Article 34

The acid test occurs with the actual adoption in practice and application by a domestic court of a uniform rule in a contested situation. Comparison of the outcome in such a case with the uniform lawyers' expectations and with the outcome in the jurisdictions of other parties where the rule is interpreted in similar situations is the final basis on which to judge whether uniformity has been achieved.⁹⁷⁵

6.1 Introduction

This Chapter will consider the extent to which the selected jurisdictions have achieved applied uniformity in terms of the interpretation adopted by the courts of Article 34 of the UML. This will entail consideration of the decisions by the courts of the selected jurisdictions not only concerning Article 34 but also decisions on the equivalent grounds in the NYC. The decisions will be categorised first into the grounds or principle which they deal with and secondly in chronological order as this naturally demonstrates the impact (or non-impact) of a decision on subsequent decisions.

The analysis in this chapter lends itself to a form of empirical analysis by the identification of *ratio decidendi* in the cases and identifying cases that adopt that *ratio decidendi*.⁹⁷⁶ It has however been seen that there is no *stare decisis* within the UML (or NYC) and the status of cases considered across borders with the UML is not certain. This does not matter to the focus of testing uniformity however, as the comparison is functional. It is not suggested that a court of one jurisdiction has made a bad decision because it did not follow a case from another. It is simply identified that the decision is different and therefore there is no uniformity. But if there is no *stare decisis* the

⁹⁷⁵ A Rose, 'The Challenges for Uniform Law in the Twenty-First Century' (1996) 1 Unif.L.Rev. 9 14.

⁹⁷⁶ 'the rule of law upon which the decision is founded': see G Williams, *Learning the Law* (13th edn, Thomson 2006) 92.

question arises as to what to call the very thing that is being tested. It is a decision of a court on Article 34. Each case will be factually different and under the *stare decisis* system it is the *ratio decidendi* that is the norm applied to later cases. Similarly decisions on Article 34 will result in *ratio decidendi* which will be persuasive or binding on the same jurisdiction's courts and it is precisely those *ratio decidendi* which will be considered by the courts of other jurisdictions. It might also be the case that *obiter dictum* could be included as part of an I-Ratio given that there is no question of a principle of law in such dictum being binding but it might be a principle that is followed.⁹⁷⁷

This chapter therefore includes a quantitative empirical analysis of the export of *ratio decidendi* of Article 34 (and NYC) cases. However given that the *ratio decidendi* with an Article 34 case will be not only binding on the jurisdiction's own court but potentially considered by and adopted by another jurisdiction's court it merits a different name to denote its international character. This thesis will refer to these as "International Ratio Decidendi" or "I-Ratio".⁹⁷⁸ It would not have been feasible across the numbers of cases analysed to identify each and every part of the *ratio decidendi* in every case and many of these will in any event relate closely to the facts in each case. To have done so would have produced an unwieldy and confusing number of I-Ratios. The I-Ratios selected for analysis therefore are predominantly those which are more in the nature of principles of law unrelated to the facts of each case.

The test for uniformity in this chapter therefore requires the identification of I-Ratios and a qualitative analysis as to whether those I-Ratios have been utilised by other jurisdictions. Analyses of uniformity with NYC cases has tended to test uniformity by reference to deviations from internationally recognised norms.⁹⁷⁹ These norms are fairly limited in number and, so far as the UML is concerned can be suggested as recognition of party autonomy and minimal curial intervention. Conversely a court that does not recognise party autonomy is likely to also not recognise minimal curial intervention and

⁹⁷⁷ See generally I McLeod, *Legal Method* (Palgrave 2005) Chapter 9.

⁹⁷⁸ They could equally be termed 'transnational norms', a term used by many including Park to denote non-binding international norms in international commercial arbitration: W Park, 'Non-Signatories and the New York Convention' (2008) 2 DRI 92-95.

⁹⁷⁹ M Hwang and C Yeo, 'Recognition and Enforcement of Arbitral Awards' in M Pryles and M Moser, (eds), *The Asian Leading Arbitrators' Guide to International Arbitration* (Juris 2007) 414.

can be classified as ‘interventionist’. This international norm pervades throughout all the issues and grounds under consideration in this chapter. The approach of identifying the I-Ratio or norm by reference to cases in the jurisdictions being tested, is an even more accurate test of uniformity because it takes the test of international norms to the next level of detail. There might be absolute applied uniformity as regards the international norms but little uniformity as to the principles of law the courts hold applicable in arriving at a decision. Where there is complete uniformity with an I-Ratio across not only the three jurisdictions but also a majority of other jurisdictions it can be suggested that the I-Ratio be elevated to an international norm.

The application of an I-Ratio does not however necessarily mean that it is applied to the facts correctly and this is something that is not easy to assess. What can be done however is a quantitative analysis of decisions as regards the application of I-Ratios and the success rate of applications on the various grounds. The I-Ratios analysis is summarised in Tables 7 to 10.⁹⁸⁰ Table 7 (including Tables 7A, 7B and 7C, one for each jurisdiction) contains summaries of the analysis of setting aside and enforcement cases where the grounds have been considered.⁹⁸¹ Table 9 contains the list of I-Ratios identified for study⁹⁸² and Table 8 contains the data as to the cases in which each I-ratio has been cited.⁹⁸³ Table 10 contains the summary of the analysis of each case.⁹⁸⁴

6.2 Article 34 – General Matters

6.2.1 No Appeal on the Merits

None of the grounds in Article 34(2) refer to a mistake on a point of law or a mistake of fact and there are no textual dissimilarities to take into account between the selected jurisdictions. An Article 34 application is not an appeal from the award of a tribunal. However it is still possible for a court to interpret Article 34 as providing a right of

⁹⁸⁰ Tables, pages 95 to 186.

⁹⁸¹ Tables, pages 95 to 102.

⁹⁸² Tables, pages 107 to 112.

⁹⁸³ Tables, pages 103 to 106.

⁹⁸⁴ Tables, pages 113 to 186.

appeal. The Digest refers to eight decisions from Egypt, Kenya, Spain, Uganda and Singapore in suggesting that courts in numerous jurisdictions have made it clear that setting aside proceedings are not appeal proceedings.⁹⁸⁵ No case is cited where a court took a different view. The position is stated to be the same for the NYC grounds.⁹⁸⁶

In *Shenshen Nan Das Industrial and Trade United Co Ltd. v FM International Ltd*⁹⁸⁷ Kaplan J stated: ‘the whole tenor of Part IV...is to discourage unmeritorious technical points and to uphold Convention awards except where complaints of substance can be made good.’ In *JJ Agro Industries (P) Ltd v Texuna International Ltd* Kaplan J stated: ‘In international cases there is now the Model Law which does not permit any court interference on the merits.’⁹⁸⁸ In *Shenshen* it was suggested that the arbitrations were carried out pursuant to the wrong rules, despite the fact that the defendant accepted the rules and took full part in the arbitration. Kaplan J had no difficulty in rejecting this on the basis that it was an attempt to appeal on the merits. He took a similar view in *Quinhuangdao Tongda Enterprise Development Company v Million Basic Company Ltd (HK)*⁹⁸⁹ where a party tried to introduce fresh evidence after a deadline imposed by the tribunal: ‘It makes no difference that the Defendant couches his submissions in terms of public policy and an attempt to mislead the arbitral tribunal. He is trying to appeal the merits of the case and that is not allowed.’⁹⁹⁰ In the more recent enforcement case of *Xiamen Xinglindi Group Ltd v Eton Properties Ltd*⁹⁹¹ Reyes J formulated the ratio slightly differently holding that such an application was not an opportunity to re-litigate the tribunal’s award.

⁹⁸⁵ Digest 134 including *Government of the Republic of the Philippines v Philippines International Air Terminals Co Inc* [2006] SGHC 206.

⁹⁸⁶ See for example ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, The Hague 2011 available at <www.arbitrationicca.org/media/1/1309129848200/iccas_guide_to_the_1958_ny_convention_with_footer_final_with_disclaimer.pdf> accessed 7 March 2015..

⁹⁸⁷ [1992] 1 HKC 328.

⁹⁸⁸ [1994] 1 HKLR 89, CLOUT 687 [32].

⁹⁸⁹ [1993] 1 HKLR 173, CLOUT 812.

⁹⁹⁰ Ibid [16]. See also *Anhui Provincial Chemicals Import & Export Corporation v Hua Qing (Hong Kong) Development Ltd* HCMP 1748/1993 unreported para 11, where Kaplan J referred to the application as an attempt to have a ‘second bite at the merits’.

⁹⁹¹ [2008] 4 HKLRD 972.

In *Wah Sin Electronics Industrial Company Limited Fujian v Tan Lok trading as Wahton Company (HK)*⁹⁹² a party tried to reopen up the merits by suggesting that the arbitrators had made their decision based on a wrong contract. Citing Kaplan J in *Qinhuangdao* Leonard J stated: ‘The New York Convention is clear that it is not for the enforcing court to rehear the case on the merits.’⁹⁹³ Relying upon Kaplan in *Shenshen*⁹⁹⁴ Sears J in *Haikoo City Bonded Area Wansen Products Trading Company v Logy Enterprises Ltd* put it as being necessary for there to be a ‘substantial complaint’.⁹⁹⁵ The Hong Kong Court of Final Appeal has put to rest any suggestion that a re-opening of the merits can be carried out: ‘It is of course well-established that the Hong Kong court, sitting as an enforcing court, does not review the merits of the Tribunal’s award.’⁹⁹⁶ The cases referred to above are all enforcement cases but that the position is the same in setting aside proceedings in Hong Kong was confirmed in *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* where Saunders J held, relying upon the enforcement cases of *Apex Tech Investment Ltd v Chuang’s Development (China) Ltd*,⁹⁹⁷ *Qinhuangdao*⁹⁹⁸ and *Karaha Bodas*⁹⁹⁹ and a passage from Van den Berg:¹⁰⁰⁰

It is well established that the court, whether an enforcing court or a court that is asked to set aside an award, will not consider the substantive merits of the dispute, or the correctness of the award, whether concerning errors of fact or law.¹⁰⁰¹

⁹⁹² [1995] HKLY 81, CLOUT 691.

⁹⁹³ Ibid [31].

⁹⁹⁴ (n 987).

⁹⁹⁵ HCMP 2900/1995 unreported [4].

⁹⁹⁶ *Karaha Bodas Co LLC v Perusahaan Pertamina Minyak Dan Gas Bumi Negasra (otherwise known as Pertamina)* [2009] 12 HKCFAR (CFA) 84 Ribeiro PJ [47].

⁹⁹⁷ [1996] 2 HKLRD 155, CLOUT 704 (CA).

⁹⁹⁸ (n 989).

⁹⁹⁹ (n 996).

¹⁰⁰⁰ A Van den Berg, *The New York Arbitration Convention of 1958* (Kluwer 1981) 302.

¹⁰⁰¹ [2011] HKEC 878 [54-59]. See the slightly different approach of Stone J in [*Chinese Name*] v *Eton Properties Ltd* [2012] HKEC 859 [141] although arriving at a similar conclusion that the process of enforcement should be ‘mechanistic’ ‘and that which the registering/enforcing court is not to do is to examine the substantive merits of the dispute nor to subvert nor otherwise intrude upon the thought-processes of the arbitrators who have handed down the arbitral award in question.’

The Court of Appeal agreed with Saunders J on this point¹⁰⁰² and given, first that the I-Ratio is consistent with the ratios of all previous Hong Kong enforcement cases that have referred to the ratio¹⁰⁰³ and secondly that a number of subsequent setting aside cases in Hong Kong have either relied upon *Grand Pacific* for this principle or stated the principle without reference,¹⁰⁰⁴ it is clear that it is a *Grand Pacific* I-Ratio that there is no appeal on the merits for an Article 34 application.¹⁰⁰⁵

In *Government of the Philippines*¹⁰⁰⁶ Prakash J stated: ‘An application to set aside an award made in an international arbitration is not an appeal on the merits and cannot be considered in the same way as the court would consider the findings of a body over whom it had appellate jurisdiction.’¹⁰⁰⁷ This is the *Government of the Philippines* I-Ratio. Prakash J rejected an argument that a decision was outrageous or irrational in *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd*¹⁰⁰⁸ and this decision was cited by the Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*.¹⁰⁰⁹ The Court of Appeal stated similar (as regards errors of law) in *PT Asuransi Indonesia (Persero) v Dexia Bank SA*¹⁰¹⁰ and Ong J stated similar in *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH*.¹⁰¹¹ In *TMM Division*

¹⁰⁰² *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* (In Liquidation) (No 1) [2012] 4 HKLRD 1 (CA).

¹⁰⁰³ *Shenshen* (n 987), *Qinhuangdao* (n 989), *Wah Sin* (n 992), *Haikoo* (n 995) and *Wuzhou Port Foreign Trade Dev Corp v New Chemic Ltd* HCCT 44/2000 unreported, CLOUT 519.

¹⁰⁰⁴ *Pang Wai Hak v Hua Yunjian* [2012] 4 HKLRD 113; *R v F* [2012] HKEC 1291; *X Chartering v Y* HCCT 20/2013 unreported; *Shanghai Fusheng Soya Food Co Ltd v Pulmuone Holdings Co Ltd* HCCT 48/2012 unreported.

¹⁰⁰⁵ The previous setting aside case of *Brunswick* appears to have been based on the same I-Ratio but this is not clear: *Brunswick Bowling & Billiards Corp. v Shanghai Zhonglu Industrial Co. Ltd* [2011] 1 HKLRD 707, CLOUT 1252 [69]. This I-Ratio now has statutory backing in Hong Kong in section 81(3) of the NHKAO.

¹⁰⁰⁶ (n 985) and in the Court of Appeal [2006] SGCA 42 (CA).

¹⁰⁰⁷ *Ibid* [35].

¹⁰⁰⁸ [2010] 3 SLR 1

¹⁰⁰⁹ [2011] SGCA 33 (CA).

¹⁰¹⁰ [2006] SGCA 41, CLOUT 742 (CA).

¹⁰¹¹ [2008] SGHC 67.

Maritime SA de CV v Pacific Richfield Marine Pte Ltd Onn J stated: ‘Unfortunately, as this case exemplifies, sieving out the genuine challenges from those which are effectively appeals on the merits is not easy under the present law.’¹⁰¹² In a slightly different formulation it was stated in *BLB v BLC* (at first instance and in the Court of Appeal) that errors of law or fact are not within Article 34.¹⁰¹³

Although there has not been any express citation of the *Government of the Philippines* I-Ratio in Hong Kong or the *Grand Pacific* I-Ratio in Singapore it is clear that they are almost identical and represent the law in each of these jurisdictions.

In Australia there have been few cases which have considered the Article 34 grounds or the approach to them since the courts there recently bought in to the internationalist approach to interpretation of the UML and NYC. However in the enforcement case of *Altain Khuder LLC v IMC Mining Inc*¹⁰¹⁴ Croft J analysed the approach necessary by considering a number of English authorities but also Reyes J’s slightly different formulation of the I-Ratio in *Xiamen*¹⁰¹⁵ and held that an application to resist enforcement was not an opportunity to re-litigate the tribunals award. This decision however was reversed on appeal¹⁰¹⁶ and reflects the tension between the pro-enforcement mantra and a challenge under the invalidity ground, where the courts in Singapore at least have been inconsistent in their approach to this ground under the enforcement regime.¹⁰¹⁷ However in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*¹⁰¹⁸ the Full Court of the Federal Court made it very clear that in a setting aside application there should not be any review of the findings of fact of the

¹⁰¹² [2013] SGHC 186 [2].

¹⁰¹³ [2013] SGHC 196 [68]; [2014] 4 SLR 79 [53] (CA).

¹⁰¹⁴ [2011] VSC 1.

¹⁰¹⁵ (n 991).

¹⁰¹⁶ *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248, CLOUT 1224.

¹⁰¹⁷ See *Aloe Vera of America Inc v Asianic Food (S) PTE Ltd* [2006] SGHC 78, [2006] 3 SLR 174, CLOUT 740; *Strandore Invest A/S v Soh Kim Wat* [2010] SGHC 151; *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd* [2010] 3 SLR 661.

¹⁰¹⁸ [2014] FCAFC 83 [54]-[56].

tribunal but did not go so far as to deal with mistakes of law. Given the lengthy analysis in that case and in particular the strong statements about uniformity it is certain that the courts in Australia will eventually hold in terms of the *Grand Pacific* 1 I-Ratio and *Government of the Philippines* I-Ratio. However it cannot now be said unequivocally therefore that Australian courts have adopted the *Government of the Philippines* or *Grand Pacific* I-Ratio.

In summary the *Government of the Philippines* and *Grand Pacific* I-Ratio that there is no appeal on the merits for an Article 34 application demonstrates a limited but not yet complete applied uniformity in the selected jurisdictions (because although the I-Ratios are almost identical there is no cross border reliance or citation). This is however an important I-Ratio and is exemplified below in a number of cases on the individual grounds. It is almost certain that Australia will follow suit and adopt this I-Ratio as it is considered as a ‘norm’ in the context of the NYC¹⁰¹⁹ and is fundamental enough to the approach to the interpretation of Article 34 as to be considered an international norm.¹⁰²⁰ However it has not been universally adopted in Asia.¹⁰²¹

6.2.2 Discretion

The Digest records that cases in Canada and Hong Kong have held that even if an Article 34 ground exists, the Court retains a residual jurisdiction as to whether to set aside the award.¹⁰²² This discretion (not textually altered by any of the selected jurisdictions) also exists under the corresponding provisions of the NYC and was exercised in the very first enforcement case to come before the Hong Kong Court of Appeal in *Werner A Bock KG v The N's Co Ltd*¹⁰²³ where the discretion was exercised

¹⁰¹⁹ M Hwang and C Yeo, ‘Recognition and Enforcement of Arbitral Awards’ in Pryles M and Moser M (eds), *The Asian Leading Arbitrators’ Guide to International Arbitration* (Juris 2007).

¹⁰²⁰ For a view that the norm, if there is one, is incorrect, see M Hwang and Z Su, ‘Egregious Errors and Public Policy: Are the Singapore Courts Too Arbitration Friendly’ in M Hwang, *Selected Essays on International Arbitration* (SIAC 2013).

¹⁰²¹ Hwang (n 1019) referring to China; also Ibid referring to cases from Canada, Zimbabwe, India and Hong Kong (the inclusion of Hong Kong is, with respect to the authors of the article, incorrect).

¹⁰²² Digest 141.

¹⁰²³ [1978] HKLR 281.

because the court did not consider any prejudice was suffered.¹⁰²⁴ The NYC I-Ratio in this case was that the discretion should be exercised except where complaints of substance were made out. Subsequent cases have shown this to be a superficial analysis although the general position under the NYC is not entirely clear.¹⁰²⁵

In Hong Kong it is not easy to discern a clear I-Ratio as regards the test for the exercise of discretion. The question was initially considered in a number of enforcement cases. In *Paklito Investment Ltd v Klockner East Asia Ltd*,¹⁰²⁶ Kaplan J adopted Van den Berg's criteria for exercising the discretion: 'Thus only if it is beyond any doubt that the decision could have been the same would a court be allowed to override the serious violation.'¹⁰²⁷ This is the *Paklito* I-Ratio. In *Nanhai*¹⁰²⁸ Kaplan J found that the tribunal had been wrongly constituted but exercised his discretion to allow enforcement based on estoppel where the applicant failed to bring up its objections to the tribunal during the arbitration. This is the *Nanhai* I-Ratio.

The Hong Kong Court of Appeal had cause to consider the discretion issue in *Apex Tech*.¹⁰²⁹ At first instance the judge had found that the Defendant had been unable to present his case but then went on to consider the exercise of his discretion to refuse setting aside of the judgment. Citing the *Paklito* I-Ratio the court said that it could not say with certainty that had the defendant been given the opportunity to make submissions on the results of inquiries the tribunal had independently conducted, there would have been no affect on the tribunals decision. It therefore departed from the first instance judge and set aside enforcement, one of the few cases to do so in Hong Kong.

¹⁰²⁴ See also *Nanjing Cereals, Oils and Foodstuffs Import & Export Corporation v Luckmate Commodities Trading Ltd* [1994] 3 HKC 552, CLOUT 88, where Kaplan J held that he would have exercised his discretion to refuse to set judgment aside even if grounds for doing so had been made out. See also *China Nanhai Oil Joint Service Corporation v Gee Tai Holdings* [1995] 2 HKLR 215 CLOUT 76; *Haikoo City* (n 995).

¹⁰²⁵ See for example ICCA's Guide (n 986) 83; but see Hwang and Yeo (n 1019) 411.

¹⁰²⁶ [1993] 2 HKLR 39, CLOUT 1441.

¹⁰²⁷ *Ibid* [74].

¹⁰²⁸ (n 1024).

¹⁰²⁹ (n 997).

In *Zhangjiang City Qiming Industrial Corporation v Fumei Ltd*¹⁰³⁰ Keith J held that if it was shown that the Defendant would have made submissions responding to supplementary submissions which they had not received from the tribunal (on which he adjourned to hear oral evidence before deciding), he would be unable to conclude that the result would not have been different although he reserved his decision as to whether he would exercise his discretion to refuse to set aside. In *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* the Court of Final Appeal held there was still discretion in public policy cases in appropriate situations.¹⁰³¹

In the Hong Kong setting aside case of *Brunswick*,¹⁰³² where the unable to present a case ground was made out, Lam J gave much consideration to the question of when and how to exercise his discretion:

In *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39 at p.49, Kaplan J referred to the view taken by Professor Albert Jan Van Den Berg (without expressly adopting it) that,

“Thus only if it is beyond any doubt that the decision could have been the same would a court be allowed to override the serious violation.”

Similar approach was adopted by the Court of Appeal in *Apex Tech Investment Ltd v Chuang’s Development (China) Limited* [1996] 2 HKLR 155.I am of the view that the same approach is appropriate when one considers how the discretion under Article 34 is to be exercised.¹⁰³³

Applying this to the facts the judge found that the failure to allow the party an opportunity to present its’ case on the secret conclusion of the tribunal on PRC law had no real impact on the result and he was satisfied that the tribunal would have reached the same conclusion so declined to set aside this part of the award. However on another aspect of the case where a ground was made out Lam J declined to exercise his

¹⁰³⁰ HCMP 2765/1995 unreported.

¹⁰³¹ [1999] 2 HKCFAR 111, [1999] 2 HKC 205, [1999] 1 HKLRD 665, CLOUT 599 (CFA).

¹⁰³² (n 1005).

¹⁰³³ Ibid [37]-[38].

discretion because he was not convinced that the result would have been the same, had the parties made submissions on PRC law. The award was therefore set aside.

The approach to the exercise of discretion in a setting aside case was considered extensively in *Grand Pacific*¹⁰³⁴ where Saunders J, after reviewing all the apparently inconsistent Hong Kong authorities and the commentaries of Van den Berg,¹⁰³⁵ held that the test for exercising discretion was: ‘Is the court able to say that it can exclude the possibility that if the violation established had not occurred, the outcome of the award would not be different?’¹⁰³⁶ In this way the burden of establishing this was for the party seeking to set aside the award and ‘Whether or not the result could have been different, is a determination which must be made, not by examining the merits of the award, but by examining the nature of the violation and the potential consequences that flow from the violation.’¹⁰³⁷ In the Court of Appeal¹⁰³⁸ Tang VP reviewed the authorities on this question including Holzmann and Neuhaus and Van den Berg. He found that the discretion can be exercised to refuse to set aside the award if the applicant proves that the arbitral tribunal could not have reached a different conclusion.¹⁰³⁹ This was stated to be in line with Saunders J decision (despite the loose wording of Saunders, as described by counsel in *Grand Pacific*)¹⁰⁴⁰ and whilst the appeal was allowed on other grounds (and therefore Tang VP’s views were *obiter*), Lam J and Saunders J’s analysis remains good law on this topic (in Hong Kong) and was applied in the Hong Kong cases of *Pang Wai*¹⁰⁴¹ and *Po Fat Construction Co Ltd v The Incorporated Owners of Kin Sang Estate*.¹⁰⁴²

¹⁰³⁴ (n 1001).

¹⁰³⁵ (n 1000).

¹⁰³⁶ (n 1001) [90].

¹⁰³⁷ (n 1001) [103]. He went on to say that if a party had been denied an opportunity to make a submission central to its case, it will rarely be that the court could say that the result could not have been different [104].

¹⁰³⁸ (n 1002).

¹⁰³⁹ Described by one commentator as a ‘high threshold’: R Weeramantry, ‘Setting Aside under Article 34 of the UNCITRAL Model Law: New Limitations on Court and Arbitrator Discretion in Hong Kong?’ (2012) Asian DR 55

¹⁰⁴⁰ (n 1002) [83].

¹⁰⁴¹ (n 1004).

¹⁰⁴² HCCT 15/2013 unreported.

The *Brunswick/Grand Pacific* I-Ratio can be formulated as: ‘A court may refuse to set aside an award notwithstanding a violation if the applicant proves it has been prejudiced and that the outcome could have been different.’ This is a clarification of the formulations of the various courts which have not taken into account the burden of proof albeit it being recognised that the burden is on the applicant.¹⁰⁴³

Although Singapore has had many setting aside cases, the first consideration of discretion appears to have been in *CRW*¹⁰⁴⁴ where, after referring to (but not expressly adopting) extracts of Kaplan J’s judgment in *Paklito*¹⁰⁴⁵ the Court of Appeal accepted:

that the court may, in its discretion, decline to set aside an arbitral award even though one of the prescribed grounds for setting aside has been made out. However, in our view, the court ought to exercise this residual discretion only if no prejudice has been sustained by the aggrieved party.¹⁰⁴⁶

The *CRW* I-Ratio can therefore be formulated as: ‘A court may refuse to set aside an award notwithstanding a violation if no prejudice has been sustained by the applicant.’ This could be interpreted as encompassing the *Brunswick/Grand Pacific* I-Ratio and possibly adding to it but this is not clear.¹⁰⁴⁷ Ang J considered this in *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd*¹⁰⁴⁸ citing the obiter dictum in the *Grand Pacific*¹⁰⁴⁹ Court of Appeal judgment, *Downer-Hill Joint Venture v Government of Fiji*¹⁰⁵⁰ and *Cargill International SA v Peabody Australia Mining Ltd*¹⁰⁵¹ before referring to and

¹⁰⁴³ See *Hebei (n 1031)* [55].

¹⁰⁴⁴ (n 1009).

¹⁰⁴⁵ (n 1026).

¹⁰⁴⁶ (n 1009) [100]. The idea of prejudice was mentioned in the Review of Arbitration Laws by the Attorney General’s Chambers in 2001 together with ‘severity of transgression’: Law Reform and Revision Division, Attorney-General’s Chambers, *Review of Arbitration Laws* (LRRD No 3/2001) 29.

¹⁰⁴⁷ Note the different formulation in R Merkin and J Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (Informa 2009) 116 but without citing any authority.

¹⁰⁴⁸ [2014] SGHC 220.

¹⁰⁴⁹ (n 1002).

¹⁰⁵⁰ [2005] 1 NZLR 554 at [103].

¹⁰⁵¹ [2010] NSWSC 887 at [242].

developing the *CRW* I-Ratio by stating that ‘prejudice is merely a relevant factor that the supervising court considers in deciding whether the breach in question is serious and, thus, whether to exercise its discretionary power’.¹⁰⁵² Although this is arguably inconsistent with the Court of Appeal’s *CRW* I-Ratio this is nevertheless the *Triulziu* I-Ratio.¹⁰⁵³

In Australia there has been almost no discussion about the discretion until the obiter dictum in *Cargill* referred to above where Ward J stated:

‘I would have approached the question of discretion cognizant of the weight evident from the legislation placed on the exercise of judicial restraint in interference with or intervention in arbitral decisions which otherwise would be final and binding...Similar issues arise when considering the exercise of discretion under the [UML].’¹⁰⁵⁴

This was a long way from an adequate discussion and not even approaching the analysis in *Grand Pacific*.¹⁰⁵⁵ In *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (no 2)*¹⁰⁵⁶ Murphy J relied upon the discretion to modify the test for the breach of natural justice ground as it impacted on the public policy ground. There was no discussion of any cases however and in any event the Full Court of the Federal Court, although agreeing with his conclusion, did not arrive at it via the discretion and his reasoning is therefore overruled.¹⁰⁵⁷

As regards the question of discretion therefore there is a low degree of uniformity between the three jurisdictions (given also that there has been no decided case in Australia). There is also no agreement by academics that a discretion should be

¹⁰⁵² Ibid [64].

¹⁰⁵³ In *ADG v ADI* [2014] SGHC 73 Coomaraswamy appears to have followed a different line of Singapore authority on the test of prejudice: [142]-[147].

¹⁰⁵⁴ (n 1051).

¹⁰⁵⁵ (n 1002).

¹⁰⁵⁶ [2012] FCA 1214 [177]-[178].

¹⁰⁵⁷ (n 1018).

exercised in enforcement cases,¹⁰⁵⁸ whilst the main UML texts contain little about how this discretion has been exercised.¹⁰⁵⁹ The formulation of the *Grand Pacific* I-Ratio and *CRW* I-Ratio are arguably inconsistent with the UML *travaux preparatoires* and uniformity is going to be difficult to achieve across all jurisdictions with this concept.¹⁰⁶⁰ The position appears similar in other UML jurisdictions where consistency ‘remains elusive’.¹⁰⁶¹

6.3 The Grounds

6.3.1 Article 34(2)(a)(i) – Incapacity, Invalid Arbitration Agreement¹⁰⁶²

It is identified above that there is a textual dissimilarity between the NYC and the UML ground and this should be borne in mind if a NYC case is being relied upon in a setting aside case.¹⁰⁶³ In particular before a NYC I-Ratio can be considered applicable to Article 34 this dissimilarity must be discounted as being immaterial. Moreover given

¹⁰⁵⁸ In some translations of the NYC, all equally binding, for example the French one, the wording suggests no discretion and some have suggested that a no discretion approach is best as otherwise different court treatment of the discretion would lead to a non-uniform approach to interpretation. See P Nacimiento, ‘Article V(1)(a)’ in H Kronke, P Nacimiento, D Otto and C Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Wolters Kluwer 2010) 208; B Hanotiau and O Caprasse, ‘Public Policy in International Commercial Arbitration’ in E Gaillard and D Pietro (eds), *Recognition and Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2009) 802-803; LS Chan, *Singapore Law on Arbitral Awards* (Academy 2011) para 6.80.

¹⁰⁵⁹ A Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer 1990); P Binder, ‘*International Commercial Arbitration and Conciliation in Model Law Jurisdictions*’ (3rd edn Sweet & Maxwell 2010).

¹⁰⁶⁰ J Choong and J Weeramantry, *The Hong Kong Arbitration Ordinance – Commentary and Annotations* (Sweet & Maxwell 2011) para 81.23.

¹⁰⁶¹ A Kawharu, ‘Exercising Discretion under Articles 34 and 36 of the Model Law: A Review of Practice’ in F Bachand and F Gelinas (eds), ‘*The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration*’ (JurisNet 2013) 118.

¹⁰⁶² See generally in the context of the NYC C Anzorena, ‘The Incapacity Defence Under the New York Convention’ in Gaillard (n 1058) 615; Nacimiento (n 1058) 206.

¹⁰⁶³ Para 4.4.2.

that the test for incapacity or invalidity in any case will be decided on the basis of the *lex arbitri* this could result in a narrow series of I-Ratios although there could be ratios which could be said to apply to most or all jurisdictions. The I-Ratios identified for this ground represent general principles rather than ratios purely dependent on the *lex arbitri*. However there has not been a single setting aside case identified in the selected jurisdictions where this ground has been relied upon. Therefore it remains to be seen whether the NYC I-Ratios identified below for this ground will promote uniformity for Article 34.

In *Werner Bock*¹⁰⁶⁴ the agreement provided for ‘Arbitration: Hamburg Friendly Arbitration’ and it was unsuccessfully argued that this was invalid. The court however said that it was common sense that this was an arbitration agreement. In *Tiong Huat Rubber Factory (SDN) BHD v Wah-Chang International (China) Co. Ltd*¹⁰⁶⁵ Kaplan J found that an agreement was wide enough to cover payment disputes. In *Zhejiang Province Garment Import and Export Co v Siemssen & Co (Hong Kong) Trading Ltd*¹⁰⁶⁶ Kaplan J was faced with a situation where a party to the contract had changed its name and stated that this was not enough to make out this ground. It was necessary to show that a different party had entered into the arbitration agreement.

In *Jiangxi Provincial Metal and Minerals Import and Export Corporation v Sulanser Company Ltd.*¹⁰⁶⁷ It was argued that there was no arbitration agreement under the PRC law but Leonard J relied upon letters written by the defendant to the PRC court and CIETAC accepting arbitration as estopping the Defendant from raising this plea in the Hong Kong court, relying upon Kaplan J’s I-Ratio in *Nanhai*.¹⁰⁶⁸

The incapacity ground was tested in *Hebei Peak Harvest Battery Company Ltd. v Polytek Engineering Co Ltd*¹⁰⁶⁹ Where Findlay J refused to accept PRC legal opinions that a company had ceased to exist and was legally unable to enter into an arbitration

¹⁰⁶⁴ (n 1023).

¹⁰⁶⁵ [1990] 2 HKC 450, CLOUT 674.

¹⁰⁶⁶ [1993] ADRLJ 183, CLOUT 811.

¹⁰⁶⁷ [1996] ADRLJ 249, CLOUT 1440.

¹⁰⁶⁸ (n 1024).

¹⁰⁶⁹ [1998] 1 HKC 192.

agreement because the facts underlying the legal opinions were not supported by evidence. However the Court of Appeal allowed the appeal and remitted the matter to the judge to hear evidence about the capacity of the company to enter into the arbitration agreement.¹⁰⁷⁰

In *Commonwealth Development Corporation v Montague*¹⁰⁷¹ the Court of Appeal of Queensland was faced with an interesting argument. The tribunal had found that it did not have jurisdiction because there was no arbitration agreement. The tribunal awarded costs to the successful party but it was contended that as there was no arbitration agreement the tribunal had no power to award costs. This argument was rejected, it being found that by agreeing to the terms of reference to allow the tribunal to determine jurisdiction there was a separate agreement to arbitrate. In *Shandong Textiles Import and Export Corp v Da Hua Non-Ferrous Metals Co Ltd*¹⁰⁷² Ma J received expert evidence of principles of PRC law but departed from the expert's conclusion as to the application of those principles to the facts, finding that the agreement containing the arbitration agreement, contained in a supplementary agreement not even signed by the enforcing party, was valid as it was signed with his permission and did apply to the agreement between them as a supplementary agreement.

In the enforcement case of *Altain Khuder*¹⁰⁷³ Croft J of the Victorian Supreme Court, relying upon Reyes J's decision in *A v R*¹⁰⁷⁴ decided that the appropriate costs order for these types of applications was an order for indemnity costs. The majority in the Court of Appeal¹⁰⁷⁵ reversed Croft J's costs order declining to follow Reyes J in *A v R*. This judgment has been subjected to criticism.¹⁰⁷⁶

¹⁰⁷⁰ [1998] 1 HKC 676, [1998] 1 HKLRD 287.

¹⁰⁷¹ [2000] QCA 252.

¹⁰⁷² [2002] 2 HKLRD 844.

¹⁰⁷³ (n 1014).

¹⁰⁷⁴ [2009] 3 HKLRD 389.

¹⁰⁷⁵ (n 1016).

¹⁰⁷⁶ A Monichino, 'International Arbitration in Australia: the Need to Centralize Judicial Power' (2012) 86 ALJ 118, 123-124.

In *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd*¹⁰⁷⁷ the Australian Federal Court considered an enforcement application in respect of a Ugandan award where the defendant had ignored the arbitral proceedings. Under this ground it was argued that the arbitration agreement was invalid as it did not specify the *lex arbitri* or other procedural matters such as how the tribunal was to be appointed. Foster J found that the relevant arbitration law governed all the matters that it was suggested were missing from the agreement and therefore the agreement was not invalid. Whilst this was a factual finding it is in line with the common international standard of interpreting arbitration agreements broadly.¹⁰⁷⁸

In *PT First Media TBK (formerly known as PT Broadband Multimedia TBK v Astro Nusantara International BV*¹⁰⁷⁹ the Singapore Court of Appeal set aside enforcement where the tribunal had joined in parties to the arbitration where there was no arbitration agreement. However it was disputed in this case whether the existence of an arbitration agreement came within this ground and the decision results in the *Astro* I-Ratio that the existence of an arbitration agreement is subsumed within this ground.¹⁰⁸⁰

In summary there is almost no evidence of any consistently applied I-Ratios with this ground.

6.3.2 Article 34(2)(a)(ii) – Unable to Present Case¹⁰⁸¹

There is a textual dissimilarity between Article 34 as applied in Singapore and Australia/Hong Kong because of the change in the latter jurisdictions from ‘full’ to ‘reasonable’ opportunity to present a case (also not present in the NYC ground).¹⁰⁸²

¹⁰⁷⁷ [2011] FCA 131, CLOUT 1226.

¹⁰⁷⁸ Nacimiento (n 1058) 228.

¹⁰⁷⁹ [2013] SGCA 57 (CA).

¹⁰⁸⁰ This I-Ratio is reflected in the ICCA Guide (n 986) 86, but the Digest suggests that there are different views: Digest Chapter VIII para 15.

¹⁰⁸¹ See generally in the context of the NYC H Verbist, ‘Challenges on Grounds of Due Process Pursuant to Article V(1)(b) of the New York Convention’ in Gaillard (n 1058) 679; J Jana, A Armer and J Kranenberg, ‘Article V(1)(b)’ in Kronke (n 1058) 231.

¹⁰⁸² Paragraph 4.4.3.

However even in Singapore the case law applies a standard of reasonable opportunity and therefore this textual dissimilarity is irrelevant.¹⁰⁸³

The first in a series of enforcement cases on this ground in Hong Kong was *Werner A Bock KG v The N's Co Ltd*¹⁰⁸⁴ where enforcement was set-aside at first instance, the defendant having refused to take part in arbitral proceedings in Germany (after putting in a defence) because of ignorance of the law. The Court of Appeal reversed this decision on a technicality as the Plaintiff had not sought to rely on the ground.¹⁰⁸⁵ In *Quinhuangdao*¹⁰⁸⁶ the parties had taken full part in the arbitration proceedings and the tribunal had fixed a date for final submissions. The defendant tried to put in fresh evidence after the deadline set by the tribunal and ended up doing so on the same day as the award was issued. Kaplan J had little difficulty in finding that this was an attempt by a party to have a second attempt to present its case. This can be contrasted with *Guangdong Overseas Shenzhen Co Ltd v Yao Shun Group International Ltd*¹⁰⁸⁷ where Woolley J set aside enforcement where the defendant had misunderstood the tribunal's directions and failed to submit important submissions until the day of the award.

*Paklito*¹⁰⁸⁸ was the first case in Hong Kong where enforcement of a CIETAC award was set aside (out of 40 applications).¹⁰⁸⁹ The tribunal had commissioned its own expert evidence and despite requests made by the defendant, refused to allow the parties to make submissions on or question the expert. Kaplan J's judgment is interesting because it does not seem to conclude whether in testing this ground one looks at the *lex fori* or the *lex arbitri*. Therefore he considered both.¹⁰⁹⁰ He received expert evidence on what the position would be under Chinese law and found that under both Hong Kong and Chinese law this would amount to procedural irregularity. A broad *Paklito* I-Ratio can

¹⁰⁸³ Merkin (n 1047) 73, 116; *ADG* (n 1053) [118] cited in *Triulzi* (n 1048) [123].

¹⁰⁸⁴ HCMP 664/1977 unreported.

¹⁰⁸⁵ (n 1023).

¹⁰⁸⁶ (n 989).

¹⁰⁸⁷ [1998] 1 HKC 451.

¹⁰⁸⁸ (n 1026).

¹⁰⁸⁹ (n 1026) [79].

¹⁰⁹⁰ An approach stated by some to be a 'general consensus': see for example W Ma, 'Recommendations on Public Policy in the Enforcement of Arbitral Awards' (2009) 75 Arb. 14, 22.

be discerned that there is a minimum requirement of fairness and due process under this ground. In *Nanjing*¹⁰⁹¹ Kaplan J was presented with evidence that suggested that a party was not given an opportunity to make submissions on quantum evidence considered by the tribunal. However he stated that this was not enough where it was clear that the complaining party had not taken the opportunity to present its own evidence on quantum (this seems to be based on estoppel or discretion).¹⁰⁹²

In *Wah Sin*¹⁰⁹³ the tribunal had incorrectly recorded the date of the hearing in the award and it was unsuccessfully suggested that the applicant was unable to attend that hearing, despite it being clear that it was an error. In *Apex Tech*¹⁰⁹⁴ it was found that a tribunal had made its own secret enquiries and not invited the parties to make submissions on the results. This was held to be an irregularity within this ground. In *Zhangjiang*¹⁰⁹⁵ Keith J held that the inability to make submissions responding to supplementary submissions also represented an inability to present a case. These cases were decided on the basis of their own facts and it is not possible to discern an I-Ratio from them.

*Hebei*¹⁰⁹⁶ concerned the purchase by a Chinese company from a Hong Kong company of equipment used to produce rubber powder, which was alleged to be defective. The tribunal in China found for the purchaser and ordered the seller to pay compensation. An unsuccessful application to set aside the award was brought in China and enforcement in Hong Kong was resisted. At first instance Findlay J refused to find this ground had been made out where experts appointed by the tribunal made an inspection in the presence of the Plaintiff's employees but in the absence of the defendant. The experts had made a written report on their inspection which the defendant had had opportunity to make submissions upon.¹⁰⁹⁷ In the Court of Appeal however the case was put slightly differently in that it was alleged that the chief arbitrator had also attended

¹⁰⁹¹ (n 1024).

¹⁰⁹² Similar to the situation in *Shenzhen ACG Industrial Imp & Exp Corp v Authority Profit Ltd* HCOMP 1109/1997 unreported.

¹⁰⁹³ (n 992).

¹⁰⁹⁴ (n 997).

¹⁰⁹⁵ (n 1030).

¹⁰⁹⁶ [1996] 3 HKC 725, [1998] 1 HKC 192, [1998] 1 HKLRD 287 (CA), (n 1031) (CFA).

¹⁰⁹⁷ (n 1096) [6].

the inspection with the experts and the Plaintiff's employees but without informing the defendant. The Court of Appeal found that as the defendant had not had an opportunity to make submissions to the experts before they produced their report, this ground was made out.¹⁰⁹⁸ However the Court of Final Appeal reversed this decision, finding that the defendant had failed to make any complaint about not attending the inspection until enforcement demonstrating that their non-attendance at the inspection did not affect their ability to have their case put forward.¹⁰⁹⁹

In *Shandong*¹¹⁰⁰ Ma J relying upon *Paklito*¹¹⁰¹ held that 'a party must show that it has been prejudiced to a significant degree in not being allowed to present its case such that the proceedings or an important part of them, have been conducted unfairly'¹¹⁰² and found there was no unfairness where both parties had been unable to obtain a copy of a tribunal appointed expert report. This is the *Shandong* I-Ratio which is a development of the *Paklito* I-Ratio.

In *Karaha Bodas Co LLC v Perusahaan Pertamina Minyak Dan Gas Bumi Negasra (otherwise known as Pertamina)*¹¹⁰³ it was suggested by the defendant that the arbitrator's refusal to grant an adjournment and to give discovery of documents satisfied this ground. At first instance Burrell J found this overstated, holding procedural matters are essentially matters for the tribunal and it was not shown that the defendant did not get a fair hearing. In fact it was shown that the defendant elected during the hearing not to proceed with its discovery application.¹¹⁰⁴

In *Government of the Philippines*¹¹⁰⁵ concession agreements in the Philippines had been declared null and void as being in contravention of the Philippines constitution. Prior to

¹⁰⁹⁸ (n 1096) Chan CJHC [52].

¹⁰⁹⁹ (n 1031) Mason NPJ [102].

¹¹⁰⁰ (n 1072).

¹¹⁰¹ (n 1026).

¹¹⁰² (n 1072) [37].

¹¹⁰³ [2003] HKEC 511.

¹¹⁰⁴ Ibid [41] affirmed in the Court of Appeal [2008] HKEC 2063, [2007] 4 HKLRD 1002 (CA) Tang VP at [108].

¹¹⁰⁵ (n 985).

the declaration an arbitration in Singapore had commenced. The tribunal gave a partial award finding that the law of the arbitration agreement was Singapore based on the principle of severability. The applicant argued that it had no opportunity to present its case on severability because this was not an issue before the tribunal. Prakash J found that severability had been an issue before the tribunal and the applicant had ample opportunity to present its case. An application on this ground was also rejected by Prakash J (and the Court of Appeal) in *Asuransi*.¹¹⁰⁶

In *Dongwoo*¹¹⁰⁷ the respondent failed to fully comply with a disclosure order. Onn J, citing Holtzmann and Neuhaus,¹¹⁰⁸ held that the applicant had plenty of opportunity to present its case as to why an adverse inference should be drawn at trial (and in fact did so) and if the tribunal made a wrong decision on this it was an error of fact and/or law and not amenable to setting aside.

The setting aside case of *Brunswick*¹¹⁰⁹ gave rise to a number of I-Ratios. The case concerned the tribunal's interpretation of an agreement which neither party had put forward at the hearing or in submissions. In turn the tribunal, as it was put by counsel, embarked upon its own assessment of the requirements of the validity of contracts under PRC law without regard to the evidence adduced by the parties on that law. In addition, as the claimant did not adduce any evidence on PRC law contradicting the respondent's evidence on PRC law, the tribunal took it upon itself to decide the PRC law requirements. It was argued that the defendant did not have an opportunity to present its case because they were not given an opportunity to deal with the tribunals 'secret' view on requirements under PRC law. The defendant relied upon the *Paklito* I-Ratio and an English case¹¹¹⁰ which suggested that a tribunal should not give evidence to itself. The defendant also relied upon another English case for the proposition that the tribunal must give the parties an opportunity of addressing it on all material facts.¹¹¹¹

¹¹⁰⁶ [2005] SGHC 197 [2006] 1 SLR 197; (n 1010).

¹¹⁰⁷ (n 1011).

¹¹⁰⁸ H Holtzmann and J Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer 1994).

¹¹⁰⁹ (n 1005).

¹¹¹⁰ *Fox v Wellfair Ltd* [1981] 2 LIRep 514.

¹¹¹¹ *The Pamphilos* [2002] 2 LI Rep 681.

Lam J decided that this ground was made out (although, as seen above, exercised his discretion to decline to set aside this part of the award):

[T]he Tribunal should have canvassed with the parties the particular provision in the PRC law on the topic and gave them an opportunity to respond before making a decision on the same. The failure of the Tribunal in this regard furnished the Respondents a valid ground of complaint under Article 34(2)(a)(ii).¹¹¹²

This finding results in the *Brunswick* I-Ratio 1 that a tribunal should not give evidence to itself and must give the parties an opportunity of addressing it on all material facts. This appears to be the position in some other jurisdictions.¹¹¹³

Lam J also had to consider whether the tribunal's decision to award damages on a basis different to that claimed by the Claimant came within this ground. Relying upon *Karaha Bodas*¹¹¹⁴ the judge rejected this submission, holding that the tribunal is not bound by the position of the parties on quantum. This finding results in the *Brunswick* I-Ratio 2 that a tribunal is not bound by the parties' cases on quantum.

In *Uganda*¹¹¹⁵ it was argued that the defendant was unable to present his case because he was not prepared to attend the arbitration in Uganda as he was fearful for his safety. This argument did not get off the ground because there was no evidence to support it.

In *Grand Pacific*¹¹¹⁶ Saunders J found this ground made out where the tribunal changed the procedure for exchange of submissions from contemporaneous to sequential, where those submissions were required to be 'best case' submissions, without agreement of the parties and the claimant was therefore unable to present his case. However Tang VP in the Court of Appeal pointed out that the reason for the change in procedure was due to a late application to amend. Because of this the tribunal felt it appropriate to change the procedure and were entitled to do so. There could therefore be no question of PCH

¹¹¹² (n 1005) [27]-[28].

¹¹¹³ Digest Chapter VII para 65.

¹¹¹⁴ (n 996).

¹¹¹⁵ (n 1077).

¹¹¹⁶ (n 1001).

being denied an opportunity to present its case.¹¹¹⁷ The judge made the following finding, resulting in the *Grand Pacific* I-Ratio: a sufficiently serious error might be regarded as coming within this ground being one that undermined due process¹¹¹⁸ or that was serious or egregious.¹¹¹⁹

Saunders J also found that the tribunal's refusal to allow the applicant to respond to the Respondent's submissions on a point of law also came within this ground. Tang VP in the Court of Appeal considered this was a 'case management decision, which was fully within the discretion of the tribunal to make' and overturned Saunders J.¹¹²⁰ In addition Tang VP considered that the tribunal had been entitled to refuse to allow the applicant to respond further to the respondent's submissions on a point of law. The applicant was trying to have the final word when they had already had two opportunities to make submissions on the particular point. Therefore Saunders J's judgment was also overturned on this ground.¹¹²¹

In *Pang Wai*¹¹²² Chow SC cited the *Brunswick* I-Ratio 1, the *Grand Pacific* I-Ratio and Van den Berg's commentary¹¹²³ as well as English authorities on the question of new points being raised late in proceedings. This question was central to the factual question as the tribunal had considered a late submission of limitation and rejected it on the basis that it had not been pleaded and no evidence had been lead to prove it. The complaint was that this had not been raised with the parties to give them a chance to rectify these defects. The judge found that the tribunal's failure to give the parties an opportunity to plead the limitation issue 'can properly be regarded as a denial of due process' and therefore comes within this ground (but the application was rejected on discretion). This gives rise to the *Pang Wai* I-Ratio that a tribunal should not carry out its own investigation on primary facts or decide a case on a wholly new point of law or fact, without giving the parties a fair opportunity to address this.

¹¹¹⁷ (n 1002) [52].

¹¹¹⁸ (n 1002) [98]-[105].

¹¹¹⁹ (n 1002) [84]-[94].

¹¹²⁰ (n 1002) [68].

¹¹²¹ (n 1002) [77].

¹¹²² (n 1004).

¹¹²³ (n 1000).

In the enforcement case of *X Chartering*¹¹²⁴ it was argued that the tribunal had made an erroneous award on damages without inviting submissions on the approach. Chan J cited the *Grand Pacific 2* I-Ratio and found the application ‘devoid of merit’.¹¹²⁵ The *Grand Pacific 2* I-Ratio was also cited by the same judge in the setting aside case of *Po Fat*.¹¹²⁶ This approach is quite different from that adopted in the subsequent Singapore case of *AKM v AKN*¹¹²⁷ where Coomaraswamy J cited cases dealing with denial of natural justice to assist in identifying an I-Ratio applicable to this ground.¹¹²⁸ This is that to come under this ground a decision must be unexpected to such a degree that it can be said that the parties were truly deprived of an opportunity to argue it. There is no requirement of serious or egregious conduct. The tribunal had assessed damages on a basis not addressed by either party (loss of opportunity) and the award was set-aside on this ground. This appears inconsistent with *Brunswick* I-Ratio 2. Although not discussed, the different approach may be justified on the basis of the textual dissimilarity above (full rather than reasonable opportunity to present case). However Coomaraswamy J changed course and effectively converged the Singapore and Hong Kong law on this ground in *ADG*¹¹²⁹ where he cited the *Grand Pacific 2* I-Ratio and both were then cited in *Triulzi*.¹¹³⁰

In summary the cases dealing with this ground have given rise to a large number of I-Ratios, mostly narrowly formulated. Until recently there was little evidence of any I-Ratio crossing a border but with *ADG*¹¹³¹ and *Triulzi*¹¹³² citing and relying upon the *Grand Pacific 2* I-Ratio there is a degree of uniformity evident with cross jurisdiction reliance on I-Ratios, demonstrating a limited achievement of the UML uniformity objective.

¹¹²⁴ (n 1004).

¹¹²⁵ (n 1004) [20].

¹¹²⁶ (n 1042).

¹¹²⁷ [2014] SGHC 148.

¹¹²⁸ In *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28, CLOUT 743 and *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] SGHC 163.

¹¹²⁹ (n 1053) [116].

¹¹³⁰ (n 1048) [134].

¹¹³¹ (n 1053).

¹¹³² (n 1048).

6.3.3 Article 34(2)(a)(iii) – Scope of Submission¹¹³³

There are no significant textual dissimilarities to consider under this ground.¹¹³⁴

This ground was first considered by the courts in enforcement cases in Hong Kong. In *Tiong Huat*¹¹³⁵ Kaplan J found that an arbitration agreement which provided for ‘all disputes as to quality or condition of the rubber or other disputes’ was sufficient to include claims for non-payment and the ground was not made out. In *Wah Sin*¹¹³⁶ Leonard J rejected an argument that the tribunal had incorrectly identified the correct contract upon which the dispute was based, as this was an attempt to open up the merits. In *Karaha Bodas* Burrell J at first instance rejected as being within the ambit of this ground a suggestion that the tribunal had applied the wrong law.¹¹³⁷ In the Court of Appeal the defendant put its case differently suggesting that the tribunal had re-written the contract and the tribunal’s construction of the contract was completely irrational and tantamount to making a new contract. The Court of Appeal¹¹³⁸ and Court of Final Appeal¹¹³⁹ rejected this submission on the facts.

In *Re An Arbitration Between Hainan Import and Export Machinery Corp and Donald McCarthy Pte Ltd*¹¹⁴⁰ Prakash J held that a threat of legal proceedings did not amount to a waiver of an arbitration agreement bringing the submission to arbitration within this ground. In *John Holland Pte Ltd v Toyo Engineering Corp*¹¹⁴¹ it was suggested that an error in the approach of interpreting a contract came within this ground. This was rejected albeit without reference to any authority.

¹¹³³ See generally in the context of the NYC M da Silveira and L Levy, ‘Transgression of the Arbitrators’ Authority: Article V(1)(c) of the New York Convention’ in Gaillard (n 1058) 639. N Port, S Bowers and B Noll, ‘Article V(1)(c)’ in Kronke (n 1058) 257.

¹¹³⁴ Para 4.4.4 above.

¹¹³⁵ (n 1065).

¹¹³⁶ (n 992).

¹¹³⁷ (n 1103) [47].

¹¹³⁸ (n 1104) Tang VP [99].

¹¹³⁹ (n 996) Ribeiro PJ [91].

¹¹⁴⁰ [1995] 3 SLR 354, [1996] 1 SLR 34.

¹¹⁴¹ [2001] 2 SLR 262.

In *Asuransi*¹¹⁴² the tribunal had dismissed a claim on the basis of issue estoppel, having been the subject of a submission to a previous arbitration thereby deciding that it did not have jurisdiction. The Court of Appeal found this to be erroneous in that the relevant issues had not in fact been within the scope of submission to the previous arbitration. However the court held that such an error formed part of the tribunal's determination of its own jurisdiction (under the UML Article 16) and could not be set-aside under this ground. This results in an important I-Ratio that a tribunal's negative ruling of jurisdiction under Article 16 is not capable of being set aside under Article 34. The Court of Appeal also laid down the test for this ground, which is the *Asuransi* I-Ratio 2: the court must ascertain (a) the matters which were within the scope of submission and (b) whether the award involved such matters or whether a new difference irrelevant to the issues before the tribunal.

In *Fairmount Development Pte Ltd v Soh Beng Tee & Co Pte Ltd*¹¹⁴³ the tribunal had decided in a construction case that time was at large and liquidated damages were therefore not applicable. Although time at large had been pleaded, the parties made no submissions on the topic. Prakash J held that the question before the tribunal was when should completion contractually occur and this would involve a range of issues including whether time was at large. The issue was therefore within the submission to arbitration.¹¹⁴⁴ In *Government of the Philippines*¹¹⁴⁵ the applicant argued unsuccessfully that severability was not an issue before the tribunal where the underlying contract had been declared void by the Philippines court.

In Hong Kong in *Brunswick*¹¹⁴⁶ it was submitted that this ground was engaged because the underlying contract specified Illinois' law and the tribunal decided that PRC law

¹¹⁴² (n 1010).

¹¹⁴³ [2007] 1 SLR 32.

¹¹⁴⁴ Prakash J did however set aside the award on the grounds of a breach of the rules of natural justice, a ground not available in Article 34. Her decision however was reversed on appeal (n 1128).

¹¹⁴⁵ (n 985), (n 1006).

¹¹⁴⁶ (n 1005).

applied. Lam J held that this was a simple decision on the interpretation of the contract by the tribunal and was not within this ground.¹¹⁴⁷

In Singapore in *Sobati General Trading LLC v PT Multistrada Arahsarana*¹¹⁴⁸ the tribunal found that an agreement had been terminated. It was argued that although the duration of the agreement was an issue before the tribunal this did not give the tribunal power to find that the agreement had terminated. The argument failed as each of the parties had cases based on the existence or non-existence of the agreement at the date of termination. In *Sui Southern*¹¹⁴⁹ the applicant argued that the award contained manifest and perverse errors of law in arriving at a finding which gave rise to physically impossible obligations on the applicant and as such was outside the scope of the submission to arbitration. Prakash J cited the *Asuransi I Ratio 2* and held that the issue was within the submission to arbitration stating:

If an issue is firmly within the scope of submission to arbitration, I fail to see how it can be taken outside the scope of submission to arbitration simply because the arbitral tribunal comes to a wrong, even manifestly wrong, conclusion on it.¹¹⁵⁰

In *Galsworthy Ltd v Glory Wealth Shipping Pte Ltd*¹¹⁵¹ Teck J rejected an application to resist enforcement on this ground where it was clear that the issue was within the submission and the applicant had even made submissions to the tribunal on the very issue it suggested was outside the scope of the submission to arbitration.

*PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation*¹¹⁵² concerned an arbitration over the decision of a dispute review board ('DAB'). The tribunal decided that it would not open up the decision and awarded merely its enforcement. The tribunal decided however that there could be a separate arbitration dealing with the underlying issues, although this was arguable seeing that the tribunal had made a final award making the DAB decision final and binding. Ang J considered the application to set

¹¹⁴⁷ (n 1005) [22].

¹¹⁴⁸ [2009] SGHC 245.

¹¹⁴⁹ (n 1008).

¹¹⁵⁰ (n 1008) [37].

¹¹⁵¹ [2011] 1 SLR 727.

¹¹⁵² [2010] SGHC 202.

aside the award on this ground, it being argued that the tribunal decided something that had not been referred to them. She referred to the Hong Kong enforcement case of *Tiong Huat*,¹¹⁵³ where there was an award that pertained to the consequences of the non-opening of a letter of credit but the arbitration agreement, it was found, only went to matters of quality etc of the goods concerned. The award in that case was therefore not enforced. In *CRW* the tribunal was asked to deal with an issue that did not come within the submission to arbitration, namely whether the respondent was entitled to immediate payment pursuant to the DAB decision. Ang J set it aside holding it was outside the scope of the submission to arbitration. The Court of Appeal¹¹⁵⁴ set out the principles applicable to applications under this ground. After citing the *Asuransi 2 I-Ratio* Rajah JA stated first that the ground is substantive not procedural so that it does not address jurisdictional issues, only what has or has not been the subject of the submission to arbitration. Secondly a failure by a tribunal to deal with every issue submitted to it will not ordinarily make the award liable to be set aside and this will depend on the effect of the failure in terms of prejudice. He held that in failing to consider the merits of the DAB decision before making the final award the tribunal had exceeded their jurisdiction.¹¹⁵⁵ The *CRW 2 I-Ratio* can be framed as: a failure to decide on issues in the scope of submission will come within this ground only if it led to actual prejudice.¹¹⁵⁶ This I-Ratio is a controversial one that may not be followed outside Singapore.¹¹⁵⁷

¹¹⁵³ (n 1065).

¹¹⁵⁴ (n 1009).

¹¹⁵⁵ (n 1009) [85].

¹¹⁵⁶ Remarkably there followed a fresh award and that was also sought to be set aside, this time unsuccessfully, in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2014] SGHC 146; both cases concern the nature of a Dispute Review Board decision under the FIDIC form of contract and this was discussed in C Seppala, ‘Singapore Contributes to a Better Understanding of the FIDIC Disputes Clause: The Second Persero Case’ (2015) ICLR 4; F Gillion, ‘Persero II: “Pay Now, Argue Later” in the Context of DAB Decisions – What Approach Best Advances the Purpose of the FIDIC’s Security of Payment Regime?’ (2015) ICLR 26.

¹¹⁵⁷ The court relied on a treatise by G Born for this I-Ratio. However Van den Berg does not consider the ground encompasses this: Van den Berg A, ‘The New York Convention of 1958: An Overview’ in Gaillard and Di Pietro (n 1058). His views have been referred to in the main text on the NHKAO: Choong & Weeramantry (n 1060) para 81.45. See also da Silveira (n 1133) 675; Port (n 1133) 277. However see for a supportive analysis J Ahmad, ‘The UNCITRAL Model Law and Awards *infra petita*’ (2014) 31 J. Int’l Arb. 413.

In *Kempinski Hotels SA v PT Prima International Development*¹¹⁵⁸ Prakash J set aside an award that had included a decision on matters that had been raised in a request for clarifications to a previous award of the same tribunal, but not pleaded. The applicant had claimed damages for wrongful termination of a management contract and had been awarded damages from the date of termination in two interim awards. However at that point the respondent had discovered that the applicant had entered into a new management contract that would affect their claim for damages and raised a request for clarification. The third award of the tribunal held that the claim for damages ceased on the date of the new management contract. The Court of Appeal¹¹⁵⁹ reversed the decision holding that the question of damages was within the scope of the submission to arbitration. On the failure to plead the new management contract the court stated that it was the applicant which had failed to disclose the new management contract and it had ample opportunity to address the issue, the failure to plead being immaterial.

In *Quarella SpA v Scelta Marble Australia Pty Ltd*¹¹⁶⁰ Prakash J had to consider an argument that the tribunal had decided the *lex contractus* incorrectly. The judge referred to the Court of Appeal's outline of the principles applicable to this ground in *CRW*¹¹⁶¹ (the *Asuransi I-Ratio 2*) and approved of the following extract from Chan Leng Sun's book on awards in Singapore¹¹⁶² in dismissing the application under this ground:

An issue that is within the scope of submission to arbitration does not go outside the scope simply because the arbitral tribunal comes to a wrong conclusion on it. Unless the award contained decisions beyond the scope of the arbitration agreement, an error in interpreting the contract does not permit setting aside under Article 34(2)(a)(iii) of the Model Law 1985. Neither would an argument that the tribunal applied the wrong governing law constitute a ground for setting aside an award.

¹¹⁵⁸ [2011] SGHC 171.

¹¹⁵⁹ *PT Prima International Development v Kempinski Hotels SA* [2012] SGCA 35 (CA).

¹¹⁶⁰ [2012] SGHC 166.

¹¹⁶¹ (n 1009).

¹¹⁶² Chan (n 1058) para 6.127.

This decision is similar to that in *Sui Southern*¹¹⁶³ but is probably another example of the no appeal on the merits I-Ratio. However it is dealing with a fundamental error of law that probably merits it being the *Quarella Spa* I-Ratio.

In Hong Kong in *Grant Thornton International Ltd v JBPB & Co*¹¹⁶⁴ enforcement was resisted because, it was submitted, one of the tribunal's decisions related to the legal effect of a settlement deed which related to the counterclaim only. The judge stated that the scope of submission included the counterclaims and in rejecting the application Au J laid down the *Grant Thornton* I-Ratio: 'decisions on matters beyond the scope of the submission' should be construed narrowly to only include those decisions which are clearly unrelated to or not reasonably required for the determination of the subject disputes, matters or issues that have been submitted to arbitration.¹¹⁶⁵ This I-Ratio was later cited by Chan J in the setting aside case of *S Co v B Co*.¹¹⁶⁶

The Singapore courts growing reluctance to entertain setting aside applications was evident in *TMM*.¹¹⁶⁷ Onn J seemed to be irritated by what he considered to be an appeal dressed up as a setting aside application. He was faced with an allegation that the tribunal had decided an issue that was not in the memorandum of issues. After citing the most recent Court of Appeal decision of *Kempinski*¹¹⁶⁸ and the *Asuransi* I-Ratio 2 he dismissed the application, stating: 'an issue which surfaces in the course of the arbitration and is known to all the parties would be considered to have been submitted to the tribunal even if it is not part of any memorandum of issues or pleadings.'¹¹⁶⁹ This is the *TMM* I-Ratio and is very similar to the *Grant Thornton* I-Ratio. It appears to be similar in other jurisdictions.¹¹⁷⁰

¹¹⁶³ (n 1008).

¹¹⁶⁴ [2013] HKEC 477.

¹¹⁶⁵ Ibid [44].

¹¹⁶⁶ HCCT 16/2013 unreported.

¹¹⁶⁷ (n 1012).

¹¹⁶⁸ (n 1159).

¹¹⁶⁹ (n 1012) [51].

¹¹⁷⁰ Digest Chapter VII para 82.

In *BLB*¹¹⁷¹ Ang J set aside an award under this ground where the tribunal had failed to address a counterclaim. The judge cited the *CRW* I-Ratio which allows for awards to be set aside where the tribunal fails to decide matters submitted to it (also cited in *TMM*) and held that the test of prejudice was satisfied. However the Court of Appeal overturned this decision on the facts as it considered the tribunal had addressed the counterclaim.¹¹⁷²

In Hong Kong in *Po Fat*¹¹⁷³ Chan J considered a setting aside application on this ground where the tribunal had decided that a contractor was liable for the design of works when it was alleged that was not pleaded. However it was clear that the issue had arisen during the hearing and the other party had an opportunity to deal with the issue. The judge adopted a test under this ground of whether the error was serious or egregious, citing the *Grand Pacific 2* I-Ratio and rejected the application.

In Singapore in *AKM*¹¹⁷⁴ Coomaraswamy cited the *CRW 2* I-Ratio. The tribunal had awarded damages for loss of opportunity when this had not been specifically pleaded and not even characterised as such in submissions. The claim had been one for loss of profit and the judge considered this to be different and an excess of jurisdiction. Prejudice had also been suffered as there had been no opportunity to address this method of calculating damages and the award was set-aside on this ground. The judge did not address the *Grand Pacific 2* I-Ratio and it is not clear whether this application would have satisfied that test. Moreover the *Brunswick 3* I-Ratio (see paragraph 6.3.4 below) is also inconsistent with the *CRW 2* I-Ratio.

In summary there is again little evidence of I-Ratios crossing borders with this ground although the formulation of the I-Ratios is similar in Hong Kong and Singapore. Nevertheless there is not a high degree of uniformity with this ground.

¹¹⁷¹ (n 1013).

¹¹⁷² (n 1013).

¹¹⁷³ (n 1042).

¹¹⁷⁴ (n 1127).

6.3.4 Article 34(2)(a)(iv) – Tribunal Composition or Arbitral Procedure¹¹⁷⁵

There are no significant textual dissimilarities to consider under this ground.¹¹⁷⁶

*Werner Bock*¹¹⁷⁷ was the first case to consider this ground and the Court of Appeal found that it was made out because the arbitrators were not strictly appointed in accordance with the arbitration agreement (the application was still unsuccessful as the court exercised its discretion against setting aside enforcement). An application was also unsuccessful in *Shenshen Nan Das*¹¹⁷⁸ where the contract specified an arbitral appointing body that had changed its name.

In *Re Hainan*¹¹⁷⁹ which was the first Singapore case considered on the NYC, Prakash J rejected an application to set aside enforcement on this ground where it was contended that the procedure for an arbitration in China was not as agreed. The applicant had made submissions based on the procedure that should have taken place as suggested by English authorities but did not present any evidence that the procedure was not in accordance with the law of China. Prakash J also rejected an application under this ground in *Luzon Hydro Corp (Phillipines) v Transfield Phillipines Inc (Phillipines)*¹¹⁸⁰ where the tribunal appointed an expert who did not give any written report and was not presented for examination, although carried out a great deal of support work for the tribunal. In *Quarella Spa*¹¹⁸¹ the argument was the tribunal applied the wrong *lex contractus*. An Egyptian decision was cited in support of this as well as academic writings but Prakash J distinguished these authorities on the facts. The judge held that what was really at issue was the applicant's disagreement with the tribunal's decision

¹¹⁷⁵ See generally in the context of the NYC S Jarvin, 'Irregularity in the Composition of the Arbitral Tribunal and the Procedure' in Gaillard (n 1058) 729; P Nacimiento, 'Article V(1)(d)' in Kronke (n 1058) 281.

¹¹⁷⁶ Para 4.4.5 above.

¹¹⁷⁷ (n 1023).

¹¹⁷⁸ (n 987).

¹¹⁷⁹ (n 1140).

¹¹⁸⁰ [2004] 4 SLR(R) 705.

¹¹⁸¹ (n 1160).

on a matter of law and that does not engage this ground, resulting in the *Quarell Spa* I-Ratio.

In the Hong Kong Court of Final Appeal case of *Karah Bodas*¹¹⁸² the claimant contended that the tribunal had given an award of damages without giving reasons, contrary to the rules applicable to the arbitration. Ribeiro PJ agreed that if these facts were made out, it would come within this ground. However he held that the tribunal had assessed damages on the basis of loss of chance and given adequate reasons for adopting this approach.¹¹⁸³ The *Karaha Bodas* I-Ratio is therefore that if the applicable arbitration rules require a reasoned award, a failure to give reasons for an award of damages would prima facie come within this ground.

In *Brunswick*¹¹⁸⁴ it was submitted that the tribunal's decision to allocate more time to one party for evidence departed from the parties' agreement. Lam J found that this was as a result of slavish application of an agreed chess clock procedure and thus was in accordance with the agreement of the parties. In addition it was argued that the tribunal had failed to address one of the defences raised by the Respondent. Lam J held that this did not come within the ground:

Failure to consider an issue is a matter that goes to the substantive decision rather than a failure to follow the arbitral procedure agreed by the parties. Thus, the fact that the Tribunal failed to consider the Respondent's case properly is at most an error of law which cannot be a basis for this court to set aside the award.¹¹⁸⁵

This finding results in the *Brunswick* I-Ratio 3 that a tribunal's failure to address all issues in an award is at most an error of law not within this ground. This is consistent with some other jurisdictions.¹¹⁸⁶ As mentioned above, this I-Ratio is also inconsistent with the *CRW 2* I-Ratio on the Scope of Submission ground.

¹¹⁸² (n 996).

¹¹⁸³ (n 996) [88]

¹¹⁸⁴ (n 1005).

¹¹⁸⁵ (n 1005) [56].

¹¹⁸⁶ See Digest Chapter VIII 29.

This ground was made out at first instance in *Grand Pacific*¹¹⁸⁷ before Saunders J because of changes in procedure by the tribunal but the Court of Appeal held that the tribunal had a good reason for doing so and overturned the decision.¹¹⁸⁸ The *Grand Pacific* 2 I-Ratio applicable to the unable to present case ground appears from the judgment to be equally applicable to this ground: a sufficiently serious error might be regarded as coming within this ground being one that undermined due process or that was serious or egregious (cited in *X Chartering*¹¹⁸⁹).

In *R v F*¹¹⁹⁰ Au J considered a setting aside application where it was argued that, contrary to the procedural rules requiring the tribunal to give reasons, none had been given related to a finding that the counterclaim had succeeded and awarding the full amount of the counterclaim. It transpired that the Claimant had neglected to contest the evidence of the Respondent in respect of the counterclaimed amounts and the arbitrator had in the award referred to the ‘amount claimed’ which in the judge’s view was sufficient to comprise the reasons in the context of that claim not being contested at all during the hearing.¹¹⁹¹ Interestingly the *Grand Pacific* 2 I-Ratio was not cited.

In *S Co*¹¹⁹² an argument that the tribunal had not complied with the applicable rules failed on the basis of estoppel. Chan J relied upon *Hebei*¹¹⁹³ and *Gao Hai Yan v Keeneye Holdings Ltd*¹¹⁹⁴ which were enforcement cases but the principle is clearly good for a setting aside case and provides the *S Co* I-Ratio that this ground is not available where the applicant has failed to raise objection with the tribunal about non-compliance with the applicable rules.

¹¹⁸⁷ (n 1001).

¹¹⁸⁸ (n 1002); see also para 6.3.2 above.

¹¹⁸⁹ (n 1004).

¹¹⁹⁰ (n 1004).

¹¹⁹¹ Confirmed on appeal: *Arima Photovoltaic & Optical Corp v Flextronics Computing Sales and Marketing (L) Ltd* CACV 194/2012 unreported (CA).

¹¹⁹² (n 1166).

¹¹⁹³ (n 1031).

¹¹⁹⁴ [2011] 3 HKC 157.

In Singapore in *Triulzi*¹¹⁹⁵ Ang J was required to decide a factual issue as to whether the parties had agreed a procedure whereby no expert evidence would be adduced. She found that there was no such agreement and the applicant did not cross this threshold.

This ground has again so far failed to produce any I-Ratios that have crossed any border and the decisions under this ground provide little evidence of uniformity.

6.3.5 Article 34(2)(b)(i) – Arbitrability¹¹⁹⁶

There have been only two cases, both in Singapore, that have considered this ground and no I-Ratio can be discerned from them and therefore no contribution to the uniformity test.

6.3.6 Article 34(2)(b)(ii) – Public Policy¹¹⁹⁷

Although there is model and comparative textual uniformity regarding Article 34 there is a potentially important textual dissimilarity between Singapore and Australia/Hong Kong the latter jurisdictions omitting the reference to the public policy of the enforcing jurisdiction. This will be relevant in this section only if an I-Ratio depended on the application of a law other than the enforcing jurisdiction.

The first case that involved an application to resist enforcement under this ground was *Werner Bock*¹¹⁹⁸ where enforcement was refused on the basis that the arbitrators had applied the wrong law. The Hong Kong Court of Appeal reversed this decision stating that there was insufficient evidence to arrive at this conclusion.¹¹⁹⁹ In *Zhejiang*¹²⁰⁰ it

¹¹⁹⁵ (n 1048).

¹¹⁹⁶ See generally in the context of the NYC P Bernardini, ‘The Problem of Arbitrability in General’ in Gaillard (n 1058) 503; D Otto, ‘Article V(2)’ in Kronke (n 1058) 345.

¹¹⁹⁷ See generally in the context of the NYC A Maurer, *The Public Policy Exception under the New York Convention* (2012 JurisNet); Hanotiau and Capresse (n 1058) 787; D Otto and E Omaia, ‘Article V(2)’ in Kronke (n 1058) 345; W Shen, *Rethinking the New York Convention* (Insentia 2013) Chapter 5 Public Policy and the New York Convention.

¹¹⁹⁸ (n 1084).

¹¹⁹⁹ (n 1023).

¹²⁰⁰ (n 1066).

was argued unsuccessfully that the courts of Hong Kong should not enforce an award which included amounts in respect of PRC taxes. In *JJ Agro*¹²⁰¹ Kaplan J accepted that if a witness had been kidnapped and forced to make a false affidavit retracting material evidence and giving false evidence this would be within this ground and decided to hear oral evidence to determine the question.¹²⁰² In *Paklito* Kaplan J applied Van den Berg's statement turning it into an I-Ratio; the ground: 'is to be construed narrowly and to be applied only where the enforcement would violate the forum State's most basic notions of morality and justice.'¹²⁰³

In *Wah Sin*¹²⁰⁴ Leonard J stated that it was 'fanciful' to suggest that it was contrary to public policy to enforce an award where the evidence showed that the arbitrators had inserted the wrong date of the trial. In Singapore in *Re Hainan*¹²⁰⁵ it was suggested that the tribunal had not considered certain arguments. Prakash J held that as there was no allegation of illegality or fraud this ground was not engaged. In *Medison Co Ltd v Victor (Far East) Ltd*¹²⁰⁶ it was argued that the agreement between the parties had been a sham but Burrell J stated that the evidence fell well short of what is required especially where these arguments had not been made in the arbitration. In *Haikoo City*¹²⁰⁷ Sears J, in rejecting the application, held that this ground 'means matters which would indeed violate the standard principles of justice.'¹²⁰⁸ The evidence was that the arbitrator was a senior official of a body (in the PRC) known as the CCIB and the issue in the arbitration was whether a certificate issued by that same body was authentic. The Court of Appeal upheld the judge's findings primarily on the basis of burden of proof.

¹²⁰¹ (n 988).

¹²⁰² In *Shanghai City Foundation Works Corp. v Sunlink Ltd* HCCT 83/2000 unreported, CLOUT 520 Burrell J was also asked to hear oral evidence as to whether there was an overriding agreement but refused to do so as there was no evidence at all of such an agreement. For this reason he also found the public policy ground not made out.

¹²⁰³ (n 1026) [77].

¹²⁰⁴ (n 992).

¹²⁰⁵ (n 1140).

¹²⁰⁶ [2000] 2 HKC 502, CLOUT 459 cited by the English Court of Appeal in *Anthony Lombard-Knight v Rainstorm Pictures Inc* [2014] EWCA Civ 356 [30].

¹²⁰⁷ (n 995).

¹²⁰⁸ (n 995) [6].

Liu JA seemed to base his test on the public policy of the PRC not the public policy of Hong Kong.¹²⁰⁹

In *Hebei*¹²¹⁰ this was the main ground considered by the appeal courts. It was suggested that the failure of the arbitrator to inform the defendant about an inspection by an expert, attending the inspection himself and receiving communications from the plaintiff's employees was a breach of natural justice and it would be contrary to the public policy of Hong Kong to enforce an award obtained in such circumstances.¹²¹¹ The court equated the arbitrator's conduct as showing apparent bias. The court set the test based upon the US case of *Parsons & Whittemore v Societe Generale de L'Industrie du Papier*¹²¹² and the *Paklito* I-Ratio. The Court of Appeal set aside enforcement.¹²¹³ The Court of Final Appeal, in its first consideration of the NYC, took a very different view of the facts although there was little issue with the Court of Appeal over the applicable law adopting the *Paklito* I-Ratio and making it the superior court *Hebei* I-Ratio.¹²¹⁴ This I-Ratio has been relied upon by many subsequent enforcement cases where the ground has been raised in all three jurisdictions.¹²¹⁵ It has also been

¹²⁰⁹ *Logy Enterprises Ltd v Haikou City Bonded Area Wansen Products Trading Company* CACV 65/1997 unreported (CA).

¹²¹⁰ (n 1096).

¹²¹¹ Van den Berg cites this as a 'classical example of an arbitrator failing to observe due process': Van den Berg, A, 'New York Convention of 1958: Refusals of Enforcement' (2007) 18(2) ICC International Court of Arbitration Bulletin 1, 20.

¹²¹² 508 F2d 969.

¹²¹³ (n 1096).

¹²¹⁴ (n 1031).

¹²¹⁵ *Shanghai City* (n 1202); *Shantou Zheng Ping Zu Yueli Shu Kuao Trading Co Ltd v Westco Polymers Ltd* HCCT 107/2000 unreported, CLOUT 529; *Shandong* (n 1072); *Karaha Bodas* (n 996); *Aloe Vera* (n 1017); *Xiamen* (n 991); *A v R* (n 1074); *AJT v AJU* [2010] SGHC 201; *Galsworthy* (n 1151); *Gao Hai Yan* (n 1194); *Altain Khuder* (n 1016); *Traxys Europe SA v Balaji Coke Industry Pvt Ltd* [2012] FCA 276, CLOUT 1223; *Granton Natural Resources Co. Ltd v Armco Metals International Ltd* [2012] HKEC 1686; *X Chartering* (n 1004); *Hong Kong Golden Source Ltd v New Elegant Investment Ltd* [2014] HKEC 1658; see also reliance on *Hebei* in A Sheppard, 'Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 Arb Int'l 217, 228.

adopted in the setting aside cases in Hong Kong of *Shanghai Fusheng*¹²¹⁶ and *S Co*¹²¹⁷ and in the Singapore Court of Appeal setting aside case of *AJU v AJT*.¹²¹⁸

In Singapore the first consideration of this ground came in two enforcement cases. In *Re Hainan*¹²¹⁹ Prakash J gave very brief consideration to the ground rejecting the application as there was no allegation of fraud or illegality and no exceptional circumstances. Given that the decision adopts some importance later in the public policy analysis it merits an I-Ratio status. In *John Holland*¹²²⁰ it was argued unsuccessfully that a fundamental irregularity in respect of the law came within this ground. In *Karaha Bodas*¹²²¹ the defendant contended first that they had merely followed Indonesian law in following the Government Decrees that resulted in the termination of energy agreements. Burrell J held that the contract had merely allocated the risk of this in favour of the plaintiff and there was nothing that could be considered to be contrary to public policy in Hong Kong. Similarly the plaintiff's failure to disclose they had political risk insurance was also not contrary to public policy. In the Court of Appeal¹²²² the defendant put forward a different case based on fraud of the plaintiff. It was argued that documents had come to light since the hearing at first instance which showed the fraud. Tang VP referred to the judgment of Kaplan J in *JJ Agro*¹²²³ and agreed that the correct test for whether the evidence of fraud was sufficient was the test in *The Saudi Eagle*,¹²²⁴ a decision of the English Court of Appeal which stated that the evidence must be such as to demonstrate that the allegation of fraud or bad faith has a reasonable prospect of success. The defendant argued that the documents showed that the plaintiff had made certain declarations of commercial viability of the geothermal facility that were fraudulent. However Tang VP said that not even a prima facie case of fraud had been made out. The plaintiff simply had a methodology of establishing

¹²¹⁶ (n 1004).

¹²¹⁷ (n 1166).

¹²¹⁸ [2011] SGCA 41 (CA).

¹²¹⁹ (n 1140).

¹²²⁰ (n 1141).

¹²²¹ (n 1103).

¹²²² (n 1104).

¹²²³ (n 988).

¹²²⁴ [1996] 2 Lloyd's Rep 221.

commercial viability that was open to views.¹²²⁵ Stone J adopted the *Hebei* I-Ratio before considering the evidence. He (as did the third judge Lam J) agreed that the correct threshold was that of the *Saudi Eagle* and then found that this threshold had not even been approached. The Court of Final Appeal agreed with the Court of Appeal.¹²²⁶ The *Karaha Bodas* I-Ratio is therefore that in cases of fraud the standard of proof requires a reasonable prospect of success to come within this ground.¹²²⁷

Shortly after in *Corvetina Technology Ltd v Clough Engineering Ltd*¹²²⁸ the New South Wales court allowed a setting aside application to proceed to hear evidence of illegality of the underlying contract, finding that it was a reason to set aside enforcement (but referring to English decisions only). The Singapore High Court considered this ground in *Aloe Vera*,¹²²⁹ it being argued that a finding by a US arbitrator that under US law the applicant was the ‘alter ego’ of a contracting party was a legal principle alien to Singapore law and should not be enforced. Prakash J rejected this ground for numerous reasons, including that the principle had similar concepts, such as agency, recognised in Singapore and that the facts ‘would not by any stretch of imagination offend against the most basic notions of justice that the Singapore court adheres to’ adopting the *Hebei* I-Ratio.

In *Asurans*¹²³⁰ at first instance it was held that an error of law by the tribunal disregarding the legally binding findings of a previous tribunal was nevertheless not within this ground. In the Court of Appeal Indian authority was cited by counsel but the court distinguished it and formulated the I-Ratio under Article 34 as follows in rejecting the challenge on this ground:

¹²²⁵ (n 1104) [83].

¹²²⁶ (n 996).

¹²²⁷ W Stone, ‘Public Policy in the Enforcement of New York Convention Awards: A Hong Kong Perspective’ (2011) Asian DR 71 contains a summary of the law in Hong Kong analysing *Hebei* and *Karaha Bodas*.

¹²²⁸ [2004] NSWSC 700.

¹²²⁹ (n 1017).

¹²³⁰ (n 1106).

Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would "*shock the conscience*" (see *Downer Connect* ([58] *supra*) at [136]), or is "*clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public*" (see *Deutsche Schachbau v Shell International Petroleum Co Ltd* [1987] 2 Lloyds' Rep 246 at 254, per Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (RAKTA)* 1974 USCA2 836; 508 F2d 969 (2nd Cir, 1974) at 974.¹²³¹

The *Asuransi 3 I-Ratio* has the same source as the *Hebei I-Ratio* but extends it with the reference to *Downer-Hill*¹²³² and *Deutsche Schachbau v Shell International Petroleum Co Ltd*.¹²³³ It has been adopted in a number of setting aside cases in Singapore¹²³⁴ and two enforcement cases, one of which was in Hong Kong.¹²³⁵

In *Government of the Philippines*¹²³⁶ the applicant had argued that the arbitration agreement had been procured by fraud. Prakash J found no evidence of fraud. Prakash J also rejected an application where it was argued that a tribunal's costs award was disproportionate, citing the *Asuransi 3 I-Ratio*.¹²³⁷

¹²³¹ (n 1010) [59].

¹²³² (n 1050).

¹²³³ [1987] 2 Lloyds' Rep 246.

¹²³⁴ *VV v VW* [2008] SGHC 11, *Dongwoo* (n 1011), *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2009] SGHC 231, *Sui Southern* (n 1008), *AJT* (n 1215), *AJU* (n 1218), *Rockeby biomed Ltd v Alpha Advisory Pte Ltd* [2011] SGHC 155.

¹²³⁵ *A v R* (n 1074) 389; *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2013] SGHC 248.

¹²³⁶ (n 985).

¹²³⁷ *VV* (n 1234).

In *Xiamen*¹²³⁸ Reyes J was faced with a submission that an award which ordered specific performance that was impossible to comply with came within this ground. After citing the *Hebei* I-Ratio he rejected the argument on the facts.¹²³⁹ Reyes J also considered an application to set aside an order for enforcement of a Danish award under this ground in *A v R*.¹²⁴⁰ He adopted the *Hebei* I-Ratio and then referred to an English case which had considered the approach under the English Arbitration Act 1996 which although not a UML jurisdiction has a similar ground for setting aside an award. The judge in that case said: 'it will normally be necessary to satisfy the court that some form of reprehensible or unconscionable conduct on his part has contributed in a substantial way to obtaining an award in his favour.'¹²⁴¹ Reyes J then referred to two Singapore cases and in particular the judgment of Keong CJ that formulated the *Asuransi 3* I-Ratio.

[W]here the upholding of an arbitral award would 'shock the conscience' ... or is 'clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public' ... or where it violates the forum's most basic notion of morality and justice.¹²⁴²

Reyes J therefore reformulated the *Hebei* I-Ratio to this: 'a substantial injustice arising out of an award which is so shocking to the Court's conscience as to render enforcement repugnant.' He was faced by an argument that the tribunal had awarded excessive damages as they were based on a liquidated damages amount that was a penalty. This argument may or may not have been correct but was neither raised before the tribunal or before the Danish court and Reyes J had no hesitation in finding that such an argument came nowhere near satisfying the test he had to apply. It is doubtful that Reyes J's attempt to reformulate the *Hebei* I-Ratio can be considered as an I-Ratio given the superior status of *Hebei*¹²⁴³ although interestingly both *Hebei* and *A v R*¹²⁴⁴ were cited in the recent setting aside case of *Shanghai Fusheng*.¹²⁴⁵

¹²³⁸ (n 991).

¹²³⁹ This was upheld in the Court of Appeal: [2009] 4 HKLRD 353.

¹²⁴⁰ (n 1074).

¹²⁴¹ Moore-Bick J in *Profilati Italia SrL v PaineWebber Inc* [2001] 1 Ll Rep 715 [17].

¹²⁴² (n 1010) [59].

¹²⁴³ (n 1031).

In *VV v VW*¹²⁴⁶ Prakash J considered whether a tribunal's decision on costs was in conflict with the public policy of Singapore by offending against the principle of proportionality. She adopted the *Asurans* 3 I-Ratio despite being referred to authorities from the Philippines and Zimbabwe that put the test slightly differently:

Where there is direct authority from our Court of Appeal as to the relevant tests, such authority must be followed and it would not be right for me to try and put a gloss on the principles expressed by the Court of Appeal by reference to the pronouncements of judges in other jurisdictions.¹²⁴⁷

She then found that it was not part of the public policy to ensure that costs in private disputes are assessed on the basis of any particular principle. In *Dongwoo*¹²⁴⁸ Onn J had to consider whether a deliberate disregard of the tribunal's disclosure order amounted to a breach of public policy. After citing the *Asurans* 3 I-Ratio Onn J considered the English case of *Profilati*¹²⁴⁹ (as had Reyes J in *A v R*) where Bingham J had indicated that non-disclosure could lead to an award contrary to public policy but considered this would be an extreme case. In addition it would be necessary to establish substantial injustice as a result of the non-disclosure and therefore a causative link between the award and non-disclosure. The judge found that the decision to withhold disclosure was based on an honest belief that there was a confidentiality issue and a deliberate non-disclosure in itself would not amount to a breach of public policy. The applicant did not satisfy the high standard of proof required for a setting aside on this ground. In *Swiss Singapore*¹²⁵⁰ it was suggested that a party had misled a tribunal to such an extent on the question of assessment of damages that it amounted to fraud. Whilst holding that an award obtained by fraud could come within this ground, on the facts Prakash J found no such fraud (having cited the *Asurans* 3 I-Ratio).

¹²⁴⁴ (n 1074).

¹²⁴⁵ (n 1004).

¹²⁴⁶ (n 1234).

¹²⁴⁷ (n 1234) [18].

¹²⁴⁸ (n 1011).

¹²⁴⁹ (n 1241).

¹²⁵⁰ (n 1234).

In *Sui Southern*¹²⁵¹ it was argued that manifest disregard or perverse findings of law amounted to breach of public policy. Prakash J cited the *Asuransi 3 I-Ratio* and held:

It is clear therefore, that in order for SSGC to have succeeded on the public policy argument, it had to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice. Nothing of the sort had been pleaded or proved by SSGC, and its ambiguous contention that the Award was perverse” or irrational” could not, of itself, amount to a breach of public policy.¹²⁵²

In the enforcement case of *Strandore*¹²⁵³ it was suggested that matters of irregularity in an agreement the subject of the arbitration could amount to breaches of public policy and Loh JC, citing the *Asuransi 3 I-Ratio*, had no difficulty in rejecting such contention particularly as the allegations should have been canvassed before the tribunal. This is an example of an enforcement court relying upon a setting aside I-Ratio.

In *AJT*¹²⁵⁴ a Thai tribunal had to deal with an agreement under which a party agreed to withdraw allegations which had been made to the Thai police of fraud and forgery and upon the Thai police confirming that there would be no prosecution the agreement would take effect. The tribunal found that there was nothing illegal about the agreement. This was sought to be set-aside because the agreement sought to stifle the prosecution of a non-compoundable offence, the contract was illegal and unenforceable in Thailand and bribery and corruption of a public authority were involved in the performance of the agreement. Onn J cited the *Asuransi 3 I-Ratio* and then the Prakash J gloss on the test in *Sui Southern*.¹²⁵⁵ The first matter to be established was that the tribunal was wrong in deciding the agreement was not illegal and then that enforcement would satisfy the *Asuransi 3 I-Ratio*. The judge carried out a re-hearing of the illegality

¹²⁵¹ (n 1008).

¹²⁵² (n 1008) [48].

¹²⁵³ (n 1017).

¹²⁵⁴ (n 1215); see P Megens and D Finch, ‘Setting Aside an Award on Public Policy Grounds: *AJT v AJU*’ (2011) 77 Arb. 155.

¹²⁵⁵ (n 1008).

test and found, contrary to the tribunal's decision, that the agreement was illegal because it sought to stifle a prosecution and set aside the award.

Before the case came before the Court of Appeal two relevant cases were decided. In *Galsworthy*¹²⁵⁶ Teck J made no reference to *Asurans*,¹²⁵⁷ instead citing the *Hebei* I-Ratio and the *Hainan* I-Ratio. This was a curious thing to do in the light of the well-known *Asurans* 3 I-Ratio and appeared to give a first instance decision of 1995 pre-eminence over a 2006 Court of Appeal decision. *Rockeby*¹²⁵⁸ concerned an alleged illegal financial advisory consultancy contract. It was suggested that as the agreement was illegal, an arbitral award for sums owed to the consultant under the agreement was contrary to public policy. Citing the *Asurans* 3 I-Ratio and *AJT*¹²⁵⁹ for the test of illegality, Prakash J agreed with the tribunal that the contract was not illegal as it came within an exemption in the legislation for financial advisory services. One of these cases would have an impact on the Court of Appeal in *AJT*.

In *AJT* the Court of Appeal¹²⁶⁰ reversed the first instance decision preferring the view that findings of fact or law may not be opened up, relying upon *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd.*¹²⁶¹ Findings of law relating to illegality/public policy of Singapore however could be opened up but in this case the tribunal's decisions were matters of fact and this did not engage the public policy ground. This is the *AJT* I-Ratio. In reaching this decision the Court of Appeal examined extensive authorities and adopted both the *Hebei* I-Ratio and *Asurans* 3 I-Ratio. The most interesting part of this decision is the apparent retreat from the more expansive *Asurans* 3 I-Ratio toward the narrower *Hebei* I-Ratio. Two of the three Court of Appeal judges were the same in both cases that were separated in time by almost 5 years. After citing *Asurans*¹²⁶² for the principle that public policy has an international focus the court held that case law on enforcement is relevant to the setting aside regime and therefore 'in this regard' cited

¹²⁵⁶ (n 1151).

¹²⁵⁷ (n 1010).

¹²⁵⁸ (n 1234).

¹²⁵⁹ (n 1215).

¹²⁶⁰ (n 1218).

¹²⁶¹ [2000] 1QB 288.

¹²⁶² (n 1010).

the *Re Hainan* I-Ratio (approved in *Aloe Vera*¹²⁶³ and *Galsworthy*¹²⁶⁴) for the notion that the objection must involve ‘exceptional circumstances’ and then the *Hebei* I-Ratio (also relied on in *Aloe Vera* and *Galsworthy*).¹²⁶⁵ The court then applied that test to the questions before them.¹²⁶⁶ This appears to be a resetting of the *Asuransi 3* I-Ratio without expressly doing so.

This ground has not come before the Singapore Court of Appeal subsequently but in the enforcement case of *Beijing Sinozonto*¹²⁶⁷ it was argued that the award had been procured by fraud or corruption by entering into an ‘improper arrangement with the tribunal’ which involved the payment of money to the tribunal. The court was asked to infer this from certain inconclusive e-mails and the fact that the tribunal exerted pressure on the applicant to settle the case. Ang J adopted the *Asuransi 3* I-Ratio and the inconsistent *Galsworthy* I-Ratio stating that ‘[w]hile the formulation in *Galsworthy* is worded slightly differently from that enunciated in [*Asuransi*], it is clear that the gist and import of these decisions are consistent.’¹²⁶⁸ She also adopted the *Altain Khuder* I-Ratio regarding standard of proof and held that ‘clear and convincing’ evidence of fraud was needed and it was simply not adduced in this case.¹²⁶⁹ In *Triulzi* Ang J cited only the *Asuransi 3* I-Ratio not mentioning *AJT*.¹²⁷⁰

In the Australian case of *Cargill*¹²⁷¹ it was suggested that a tribunal’s failure to deal in its award with an alternative argument came within this ground as it was a breach of the rules of natural justice. This was rejected on an analysis of the rules of natural justice authorities. In *Uganda*¹²⁷² it was argued unsuccessfully that an assessment of damages

¹²⁶³ (n 1017).

¹²⁶⁴ (n 1151).

¹²⁶⁵ It is interesting that the *Re Hainan* I-Ratio is reflective of the later proposal in the ILA Report (see Shepherd n 1215) and approved in the ICCA Guide (n 986) 107.

¹²⁶⁶ (n 1218) [37]-[38].

¹²⁶⁷ (n 1235).

¹²⁶⁸ (n 1235) [40].

¹²⁶⁹ (n 1235) [69].

¹²⁷⁰ (n 1048) [162].

¹²⁷¹ (n 1051).

¹²⁷² (n 1077).

had been excessive. In this Australian case *Parsons*¹²⁷³ was cited for the public policy test. In *Altain Khuder*¹²⁷⁴ the Victorian Court of Appeal found that the failure of the tribunal to give notice of intention to make an order against the defendant amounted to a breach of the rules of natural justice and therefore within this ground.¹²⁷⁵ This suggests the test for public policy under the IAA is clearly less difficult to establish than under the cited *Hebei I-Ratio*. The court also held that the standard of proof in public policy cases was a balance of probabilities and this is the *Altain Khuder* I-Ratio.

*Gao Hai Yan v Keeneye Holdings Ltd*¹²⁷⁶ involved an argument that there had been a private communication between the respondents and the tribunal initiated by the tribunal, during which it was suggested that the tribunal would decide the dispute in the Respondent's favour but that compensation to the tune of US\$250 million would have to be paid to 'other parties'. Saunders J referred to the *Hebei I-Ratio* and stated:

So in determining the question as to whether or not the circumstances of the Award are contrary to public policy the court must have regard to the basic notions of morality and justice in Hong Kong, but also take into account the fact that different procedures apply at the seat of arbitration.¹²⁷⁷

It was submitted to the court (but without any evidence) that the process undertaken by the tribunal was part of a mediation process which was a part of the procedures of the PRC arbitral commission involved. The judge held:

But the basic notions of morality and justice in Hong Kong would not permit ex parte communication between a member of a tribunal and party once an arbitration process has commenced. Even allowing for the fact that there may be different rules in the Mainland I cannot accept Mr Ng's submission that the facts as disclosed could not offend against the basic notions of morality and justice in Hong Kong. But that is so even having regard to Sir Anthony Mason's

¹²⁷³ (n 1212).

¹²⁷⁴ (n 1016).

¹²⁷⁵ (n 1016) [346].

¹²⁷⁶ [2010] HKCU 2374 unreported.

¹²⁷⁷ Ibid [11].

acceptance of the particular facts that occurred in the Hebei Import case. The argument that the facts in the present case are significantly more egregious than those in Hebei Import, must be open to the Respondents in the present case.

And therefore adjourned the hearing for full argument and evidence.¹²⁷⁸ At the full hearing before Reyes J¹²⁷⁹ the argument was refined to the award was tainted by bias or apparent bias. Reyes J said the test was as laid down in the House of Lords case of *Porter v Magill*¹²⁸⁰ namely whether the award is made in circumstances, which would cause a fair-minded observer to apprehend a real possibility of bias on the part of the tribunal.¹²⁸¹ The judge found that the parties had agreed for the tribunal to proceed with what is known as ‘med-arb’ where they first attempt mediation before proceeding with the arbitration. Even accepting that the communications between the tribunal and the respondents had been part of a mediation process the judge still felt that a fair-minded observer would apprehend a real risk of bias and set-aside enforcement of the award. The Court of Appeal overturned the decision.¹²⁸² In his judgment Tang VP referred to the *Hebei I-Ratio* as the leading authority and stated:

It does not mean, for example, if it is common for mediation to be conducted over dinner at a hotel in Xian, an award would not be enforced in Hong Kong, because, in Hong Kong, such conduct, might give rise to an appearance of apparent bias.

In the circumstance of this case, I am not satisfied that a sufficient case of apparent bias, contrary to the fundamental conceptions of moral and justice in Hong Kong, has been established such that it would be right for our court to refuse to enforce the Award.¹²⁸³

¹²⁷⁸ (n 1276) [16]-[17].

¹²⁷⁹ (n 1194).

¹²⁸⁰ [2002] AC 357.

¹²⁸¹ (n 1194) [3].

¹²⁸² [2011] HKEC 1626.

¹²⁸³ Ibid [105]; see also R Morgan and SY Man, ‘Enforcement of Foreign and Mainland Arbitral Awards in Hong Kong: Med-Arb, Public Policy and Waiver’ (2012) Asian DR 28.

In the Australian Federal Court in *Traxys*¹²⁸⁴ it was suggested that the award creditor had to prove the debtor had assets in Australia and without such proof it would be contrary to public policy to enforce the award. Although the court found that the debtor did have assets within Australia it went on to examine the ground and held that the *Hebei I-Ratio* applies in Australia resulting in what might be described as an ‘international public policy’.¹²⁸⁵ Applying this the court rejected the application. In *TCL*¹²⁸⁶ Murphy J was faced with an argument that there was no evidence for the tribunal’s findings and the applicant had not had an opportunity to be heard on certain issues. This was argued to be a breach of natural justice which under the IAA was a matter stated to be contrary to public policy (representing a textual dissimilarity from Hong Kong in particular).¹²⁸⁷ The judge cited *Hebei*,¹²⁸⁸ *Asuransi*,¹²⁸⁹ *Parsons*¹²⁹⁰ and *Deutsche Schachbau*¹²⁹¹ for the public policy test but without making any distinction between the four slightly different tests represented by these cases.¹²⁹² This confused approach was made worse when the judge found that any breach (even a minor one) of the rules of natural justice would be within the ground but then raised this seemingly low threshold test to the same level as the result of the cases he had cited for the public policy test, on the basis of the discretion test, namely that to set aside the award by the exercise of discretion ‘an offence to fundamental notions of fairness or justice is required.’¹²⁹³ The appeal was heard by the Full Court of the Federal Court.¹²⁹⁴ The court arrived at the same conclusion as Murphy J but via a different route. Instead of relying upon the discretion test, which was not even mentioned, the court’s interpretation of the IAA and in particular the reference to the rules of natural justice was such as to qualify the test by effective reference to the authorities on the public policy test. This approach had the result of narrowing the effects of the textual dissimilarity with Hong Kong

¹²⁸⁴ (n 1215).

¹²⁸⁵ (n 1215) [104].

¹²⁸⁶ (n 1056).

¹²⁸⁷ See para 4.4.6 above.

¹²⁸⁸ (n 1031).

¹²⁸⁹ (n 1010).

¹²⁹⁰ (n 1212).

¹²⁹¹ (n 1233).

¹²⁹² (n 1056) [39]-[49].

¹²⁹³ (n 1056) [177].

¹²⁹⁴ (n 1018).

referred to above. Like Murphy J the court did not seem able to decide what the public policy I-Ratio was. The court referred to the *travaux préparatoires*, as well as, inter alia, *Parsons*,¹²⁹⁵ *Hebei*,¹²⁹⁶ *Asuransi*,¹²⁹⁷ *Downer-Hill*¹²⁹⁸ and *Deutsche Schachbau*¹²⁹⁹ in arriving at a conclusion that:

A review of the international jurisprudence leads to the conclusion that the interpretation of public policy in Art v of the [NYC] and Arts 34 and 36 of the [UML] is as it was understood at the time of the completion of the preparatory work: it is limited to the fundamental principles of justice and morality of the state, recognising the international dimension of the context.¹³⁰⁰

This formulation is very close to the *Hebei* I-Ratio but merits its own I-Ratio because of the slightly different wording and the reference to a number of cases with slightly different formulations of the test.

In *Granton*¹³⁰¹ it was argued the tribunal had been bias. The application was rejected as the bias complained of was apparent not actual and this was not sufficient, citing the *Hebei* I-Ratio. In *X Chartering*¹³⁰² it was argued that the legal representatives of the applicant had acted for the other party in entirely separate proceedings so this was a conflict of interest that would come within this ground. After citing the *Hebie* I-Ratio Chan J rejected the application finding that there was no evidence of conflict of interest let alone transmission of confidential information. Chan J also cited the *Hebei* I-Ratio and the development of it by Reyes in *A v R*¹³⁰³ in the setting aside case of *Shanghai Fusheng*.¹³⁰⁴ This case concerned a joint venture dispute in China where one of the parties had obtained a court judgment against the other that it

¹²⁹⁵ (n 1212).

¹²⁹⁶ (n 1031).

¹²⁹⁷ (n 1010).

¹²⁹⁸ (n 1050).

¹²⁹⁹ (n 1233).

¹³⁰⁰ (n 1018) [76].

¹³⁰¹ (n 1215).

¹³⁰² (n 1004).

¹³⁰³ (n 1074).

¹³⁰⁴ (n 1004).

claimed decided the dispute that was being arbitrated. The tribunal however refused to take the judgment into account as the evidence in the case had been closed and they were considering their award. Chan J found that this did not come within the ground and particularly so as the dispute in the court case was considered by the tribunal to be of no relevance to the disputes in the arbitration. Chan J reiterated the same approach in *S Co*¹³⁰⁵ where an unsuccessful application to set aside was made on almost every ground in Article 34 on numerous alternative bases as an attack was made on almost every part of the award.

In the most recent Hong Kong case on this ground, the enforcement case of *Golden Source*¹³⁰⁶ it was established that a party which had legal but not beneficial ownership of certain shares had brought an arbitration and obtained an award in an attempt to deprive the beneficial owner (who was not a party to the arbitration) of ownership of the shares. It was argued that this was within the ground, in reliance on *JJ Agro*.¹³⁰⁷ However Chow J rejected the application as the behaviour complained of was unrelated to the issues in the arbitration, which had in any event been correctly decided.

The question of uniformity with this ground is the most complex. This is because of the Singapore and Australian courts' reluctance to embrace the *Hebei* I-Ratio as a complete ratio of how the ground should be approached. This was evident in *Asurans*¹³⁰⁸ which adopted a more expansive approach to the test than *Hebei*¹³⁰⁹ but 5 years later some cracks in the *Asurans* I-Ratio began to appear. First in *Galsworthy*¹³¹⁰ and then in *AJT*¹³¹¹ where a retreat was in full swing toward a slightly modified *Hebei* I-Ratio incorporating the *Re Hainan* I-Ratio but subsequently the retreat was ignored by Ang J in *Beijing Sinozonto*¹³¹² and

¹³⁰⁵ (n 1166).

¹³⁰⁶ (n 1215).

¹³⁰⁷ (n 988).

¹³⁰⁸ (n 1010).

¹³⁰⁹ (n 1031).

¹³¹⁰ (n 1151).

¹³¹¹ (n 1218).

¹³¹² (n 1235).

Triulzi.¹³¹³ However even in Hong Kong there appears to be a move toward the expansion of the *Hebei* I-Ratio evident in *A v R*¹³¹⁴ and *Shanghai Fusheng*.¹³¹⁵ This was also the position in Australia with *TCL*¹³¹⁶ which adopted an I-Ratio that is very similar to the *Hebei* I-Ratio. There is clearly a high degree of uniformity with the common adoption of the *Hebei* I-Ratio or very similar in the three jurisdictions although in Singapore the *Re Hainan* I-Ratio leaves considerable scope for matters not falling within the *Hebei* I-Ratio to be considered.

Other jurisdictions in Asia have not exclusively followed the *Hebei* I-Ratio. There have been enforcement problems with this ground in Malaysia, Indonesia and India, although the narrow approach of the *Hebei* I-Ratio has been adopted in South Korea and a similar approach in China.¹³¹⁷

6.4 Conclusions

6.4.1 Introduction

The Objective for this chapter was to test the second part of the applied uniformity formula; that dealing with the similarity of results. This has been done by identifying some key principles of law or ‘I-Ratios’ laid down by the courts of the three jurisdictions and considering the extent to which those I-Ratios have been relied upon by the courts of the other jurisdictions.¹³¹⁸

In Chapters 2 and 3 it was concluded that absolute applied uniformity of the UML was both unlikely and unnecessary to achieve the objectives of the UML. With the I-Ratio test however a level of absolute applied uniformity is possible if an I-Ratio is adopted by all jurisdictions. This does not constitute absolute uniformity on all

¹³¹³ (n 1048).

¹³¹⁴ (n 1074).

¹³¹⁵ (n 1004).

¹³¹⁶ (n 1018).

¹³¹⁷ Hwang and Yeo (n 1019).

¹³¹⁸ See Table 9; Tables, pages 107 to 112.

levels because although the courts of the three jurisdictions may agree on a principle of law applicable to the UML Article 34, this does not prevent the application of that principle being subject to local nuances such as sub-principles or of course applying the principle to the facts in different ways. However it is considered that the I-Ratio test is at a level of detail sufficient to test the similarity of results applied uniformly. To attempt a comparison of results at a greater level of detail would have been unproductive and unrepresentative. No two cases are factually the same and there may be only two or three within 300 that are factually similar.

Apart from the I-Ratio analysis there is an ancillary feature that emerges from the history of academic writings of the NYC and UML and from some of the cases. This is the basic philosophy of the UML of party autonomy, minimal court intervention, enforcing agreements to arbitrate and upholding the finality of awards.¹³¹⁹ Upholding this philosophy means a jurisdiction is ‘pro-arbitration’ or conversely not upholding it means a jurisdiction is ‘interventionist’. Minimal court intervention is an important part of the philosophy. It follows that the court should intervene only when strictly necessary to preserve the integrity of the arbitral structure and process. Therefore Article 34 should be construed narrowly with this principle or philosophy in mind. A degree of uniformity across jurisdictions might be achieved even if the courts are consistently interventionist. However this would amount to a redefining of the meaning of uniformity of the UML so as to entirely ignore the paramount philosophy of party autonomy and minimal curial intervention. If such a conclusion resulted from this study, it would mean that the courts of the three jurisdictions were uniformly, broadly and incorrectly interpreting the UML. Not only would this be a failure of the courts to properly interpret the UML it would disincentivise businessmen from specifying those jurisdictions as the curial law in their contracts.

This chapter’s conclusion will provide views on these features.

¹³¹⁹ See for example L Boo, ‘Modifications, Changes and Additions made By States Adopting the UNCITRAL Model Law on International Commercial Arbitration’ in UNCITRAL-SIAC Conference, *Celebrating Success: 20 Years UNCITRAL Model Law on International Commercial Arbitration* (SIAC 2006) 31.

6.4.2 The I-Ratio Test

6.4.2.1 No Appeal on Merits and Discretion

Remarkably there was not a single I-Ratio identified that was adopted by the courts of the other two jurisdictions without qualification, re-casting or amendment. The courts of each jurisdiction are now routinely willing to consider decisions from the others by engaging the JC I-Norm. This is clear from Table 2, particularly for Singapore although increasingly so with Australia.¹³²⁰ The interesting thing is that although cases are often cited in this way the I-Ratios deriving from them are not always clearly adopted. Identifying the rationale for this approach, of citing but not completely adopting, is not easy to discern unless the court has expressly stated why it has instead laid down a different I-Ratio or not followed the cited one.

The I-Ratio that Article 34 does not allow an appeal on the merits is interesting as Article 34 does not actually state this. It is therefore an example of the courts interpreting the UML in this way in accordance with the intentions of UNCITRAL as reflected in the *travaux préparatoires* and of course in accordance with the philosophy of party autonomy and minimal curial intervention. Each jurisdiction has arrived at precisely the same I-Ratio without need of reference to the courts of other jurisdictions, suggesting that the I-Ratio is an obvious and fundamental principle of Article 34. Even though there is no cross-pollinisation of the I-Ratio it can confidently be stated that there is a high degree of applied uniformity of this I-Ratio across two and probably the three jurisdictions, it having been pronounced in the Hong Kong Court of Appeal in *Grand Pacific*,¹³²¹ the Singapore Court of Appeal in *CRW*¹³²² and the Full Court of the Federal Court in *TCL* (at least as to errors of fact).¹³²³

¹³²⁰ Tables, pages 17 to 24.

¹³²¹ (n 1002).

¹³²² (n 1009).

¹³²³ (n 1018) [54]-[56].

The use of the word ‘may’ in Article 34 provides a linguistically clear discretion for the court to exercise even if a ground is made out.¹³²⁴ There have been various pronouncements of the appropriate test for the exercise of this discretion in Hong Kong which have been classified above as two main I-Ratios (*Paklito*¹³²⁵ and *Brunswick/Grand Pacific*¹³²⁶). Moreover there has been little consideration of the boundaries of discretion in Singapore. In this case given the extensive albeit inconclusive discussion in Hong Kong the Singapore courts could have drawn from these discussions. It did to some extent, referring to both *Paklito* (in *CRW*¹³²⁷) and *Grand Pacific* (in *Triulzi*¹³²⁸) but then arriving at a confused and inconsistent formulation of the applicable I-Ratio. There is therefore little uniformity on this aspect despite the cross-pollinisation of Hong Kong cases to Singapore.

6.4.2.2 The Grounds¹³²⁹

Any conclusions as to applied uniformity with the Incapacity, Invalid Arbitration Agreement ground are not possible. There have been no setting aside cases where this ground was relied upon and the limited NYC I-Ratios arising from the 22 cases where the ground was relied are narrow ones not subsequently cited. At this point therefore it can be said only that there is no degree of uniformity between the three jurisdictions.

The Unable to Present Case ground is one of the most often relied upon and has consequently produced a relatively large number of I-Ratios, other than in Australia (where there appears to be only one relevant case¹³³⁰). The most cited I-Ratio in Hong Kong is the *Grand Pacific 2* I-Ratio and one might have expected the broadly crafted I-Ratio to have been cited in other jurisdictions. However there was no

¹³²⁴ Not, it should be noted, in the official French translation: see See Nacimiento (n 1058) 208; Hanotiau and Caprasse (n 1058) 802-803.

¹³²⁵ (n 1026).

¹³²⁶ (n 1005) (n 1002).

¹³²⁷ (n 1009).

¹³²⁸ (n 1048).

¹³²⁹ See generally Table 7; Tables, pages 95 to 102.

¹³³⁰ *Uganda* (n 1077).

cross-pollinisation of any I-Ratio or even citation of cases from other jurisdictions related to this ground until the judgment of Coomaraswamy in *ADG*¹³³¹ and then Ang J in *Triulzi*.¹³³² It is therefore too early to suggest that there is a common I-Ratio in Hong Kong and Singapore on this ground and no evidence at all of one in Australia. However the recent citing of the *Grand Pacific 2* I-Ratio in Singapore suggests a level of applied uniformity between the two jurisdictions.

This ground does produce an interesting result where there is textual dissimilarity between the ground as contained in the laws of Australia and Hong Kong and as contained in the law of Singapore. This is because in the former jurisdictions Article 18 has been amended so that a party is entitled to a reasonable opportunity to present its case, rather than as Article 18 provides a ‘full’ opportunity. In *ADG* it was confirmed that they mean the same thing, that is a reasonable opportunity.¹³³³ There is therefore a form of hybrid textual/applied uniformity on this aspect in the three jurisdictions.

The Scope of Submission ground has also produced a large number of cases in Hong Kong and Singapore (but apparently none in Australia). The Singapore Court of Appeal’s *Asuransi 2* I-Ratio has set the benchmark for applications under this ground, having been subsequently cited in a number of Singapore cases. This basic I-Ratio was expanded upon in *Quarella Spa*¹³³⁴ and *TMM*¹³³⁵ but has not been cited in Hong Kong or Australia. However in Hong Kong the *Grant Thornton* I-Ratio is arguably a reformulation of the I-Ratios arising out of the three Singapore cases. To this extent it is arguable that there is a measure of applied uniformity with this ground but without the proper juristic methodology. It is therefore applied uniformity by chance not method and can hardly be held as a shining example of the UML achieving its objectives. In addition in another area there seems to be a possibility of contrary I-Ratios where in Singapore the *CRW 2* I-Ratio is in stark contrast with academic writings about awards *infra petita* with this not having been

¹³³¹ (n 1053).

¹³³² (n 1048).

¹³³³ (n 1053).

¹³³⁴ (n 1160).

¹³³⁵ (n 1012).

before the courts in Hong Kong under this ground.¹³³⁶ However the argument was raised under the Scope of Procedure ground in *Brunswick*¹³³⁷ when it was rejected (the *Brunswick* 3 I-Ratio).

The Scope of Procedure ground has given rise to a number of cases but has produced no I-Ratio that has crossed a border. This is surprising given that the *Grand Pacific* 3 I-Ratio appears to be uncontroversial but nevertheless has not been cited in cases in Singapore (or Australia) on this ground. Again there is no evidence of any degree of uniformity or achievement of the UML uniformity objective.

With grounds considered so far there has been only two I-Ratios which have been cited in another jurisdiction (the *Paklito* I-Ratio in *CRW*¹³³⁸ and the *Grand Pacific* 2 I-Ratio in *ADG*¹³³⁹ and *Triulzi*¹³⁴⁰). This significantly changes with the Public Policy ground where there has been most jurisprudence of all grounds relied upon. Moreover it is under this ground where it can be argued that the closest convergence has occurred between the three jurisdictions. Chronologically the I-Ratios started in Singapore with *Re Hainan*¹³⁴¹ where to come within the ground there must be fraud, illegality or exceptional circumstances. Next in *Hebei*¹³⁴² the Hong Kong Court of Final Appeal handed down judgment that the ground is to be construed narrowly and enforcement set aside only where it would violate the forum's State's most basic notions of morality and justice. Back in Singapore the Court of Appeal in *Asurans*¹³⁴³ incorporated the *Hebei* I-Ratio but broadened the ground to also encompass a situation where the upholding of the award would shock the conscience

¹³³⁶ Save for a recent decision which is confidential and cannot currently be reported in view of Section 17 of the NHKAO. In that case the judge refused to set aside an award on the ground that the award did not decide all claims put to him on the basis that as a matter of fact, as interpreted by the judge, the claim had been the subject of a decision (albeit very briefly). The author represented one of the parties in this case.

¹³³⁷ (n 1005).

¹³³⁸ (n 1009).

¹³³⁹ (n 1053).

¹³⁴⁰ (n 1048).

¹³⁴¹ (n 1140).

¹³⁴² (n 1031).

¹³⁴³ (n 1010).

or is clearly injurious to the public good or is wholly offensive to the ordinary reasonable and fully informed member of the public. It is not clear to what extent these tests broaden the *Hebei* I-Ratio and in *Galsworthy*¹³⁴⁴ the Singapore High Court (Teck J), which should have followed *Asuransi*, instead cited *Hebei*¹³⁴⁵ and *Re Hainan*.¹³⁴⁶ The Court of Appeal then did likewise in *AJT*.¹³⁴⁷ This results in two lines of I-Ratios in Singapore, one the *Re Hainan* and *Hebei* I-Ratios line and the other the *Asuransi* 3 I Ratio line. Both have been cited in a number of cases in Singapore but the *Asuransi* 3 I Ratio has not been cited in the other jurisdictions. On the other hand the *Hebei* I-Ratio has been cited in cases in Singapore¹³⁴⁸ and Australia, where it has also been formulated slightly differently.¹³⁴⁹ Whilst absolute applied uniformity is elusive, there is a fairly high degree of convergence between the three jurisdictions on this ground based upon the *Hebei* I-Ratio. However whether a uniform adoption of any of the tests would produce applied uniformity as regards the application of the test is another matter. As Kroll suggests (following an analysis of *Asuransi*): Case law shows that, without further specification, one can use such a broad definition to justify nearly any result.¹³⁵⁰

Other than the unable to present case ground and the public policy ground therefore there is as yet little evidence of applied uniformity of similarity of results based on the I-Ratios test.

¹³⁴⁴ (n 1151).

¹³⁴⁵ (n 1031).

¹³⁴⁶ (n 1140).

¹³⁴⁷ (n 1218).

¹³⁴⁸ *Aloe Vera* (n 1017), *Galsworthy* and *AJT*.

¹³⁴⁹ *Altain Khuder* (n 1016), *Traxys* (n 1215) and *TCL* (n 1018).

¹³⁵⁰ S Kroll, 'The Public Policy Defence in the Model Law Jurisprudence: The *ILA Report Revisited*' in Bachand F and Gelinas F (eds), *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (JurisNet 2013) 142.

6.4.3 Interventionism

A jurisdiction's courts are sometimes described as interventionist if they set aside an award or set aside enforcement of an award.¹³⁵¹ When a court sets aside an award or sets aside enforcement it is not necessarily because the court has been interventionist. The framework for this interventionism is in the NYC and UML. It is perhaps the interpretation of those instruments and their incorporation into the legislation which could be classified as interventionist in circumstances where they might be too willing or even eager to interfere with the arbitral award. Interference should not however be confused with supportive intervention:

A pro-arbitration policy is therefore one that recognises the interface between national courts and arbitral tribunal as one of co-existence and collaboration and which finds the right equilibrium between furthering the efficacy and legitimacy of arbitration on the one hand and respect of the parties' autonomy on the other. This is well illustrated by the ostensible reversal of the minimal intervention approach when the courts are called upon to play a supportive role.¹³⁵²

It is possible therefore for a jurisdiction's court to adopt an internationalist approach, to also adopt an I-Ratio (possibly from another jurisdiction) but then apply that I-Ratio to the facts in such a manner to be quite different to another jurisdiction's application. Because the facts of each case are different it is not always easy to identify an interventionist approach in these circumstances. It is probably correct however that no matter how uniform the juristic methodology or adoption of I-Ratios; an interventionist approach would render the objectives of the UML of harmonisation and uniformity unachievable.

It is not intended to analyse those decisions where an application succeeded. Instead the trend will be briefly examined. Table 7 demonstrates that between 1977 and

¹³⁵¹ For examples of where court's were interventionist in one jurisdiction and strongly pro-arbitration in another in respect of the same arbitral award see M Ahmed, 'The Influence of the Delocalisation and Seat Theories upon Judicial Attitudes Towards International Commercial Arbitration' (2011) 77 Arb. 406.

¹³⁵² A Phang, *Alternative Dispute Resolution and Regional Prosperity: A View from Singapore*, China ASEAN Justice Forum 2014.

1994, out of 13 cases analysed there were just two cases where enforcement was set aside, both of which were in Hong Kong.¹³⁵³ This hardly merits an interventionist label. Between 1995-2003 out of 29 cases analysed a ground was successfully established on 4 occasions (not including those successful initially but overturned on appeal), all in Hong Kong.¹³⁵⁴ This is around 14%. Again the numbers would not merit an interventionist label. Between 2004 and 2010 27 cases were analysed there were just 4 times when a ground was successfully established.¹³⁵⁵ This is around 15%. This is the first period where the Singapore and Australian cases are sufficient to consider those jurisdictions approach in a meaningful way.¹³⁵⁶ Both of these jurisdictions have been considered interventionist at certain points in their development of jurisprudence on the UML although not necessarily in the enforcement or setting aside context. Of the 4 successful applications in this period 2 were in Hong Kong, and one each in Singapore and Australia. Between 2011 and 2015 of 40 cases analysed a ground was successfully established 7 times. This is 17.5%. Of 17 cases in Hong Kong in this period none were successful. Of 14 in Singapore there were 4 successful ones (around 28%) and of 9 in Australia there were 2 successful ones (around 22%). Again this does not indicate an interventionist approach from a statistical point of view.

If the Article 34 cases alone are considered (see Table 6),¹³⁵⁷ out of 48 cases (including appeal decisions) across the three jurisdictions 8 were successful. This is around 17%. In Hong Kong out of 9 cases only one was successful and that was the first known one in 2009.¹³⁵⁸ This is around 11%. In Singapore out of 33 cases there were 7 successes, which is around 21%. In Australia there have only been 6 cases with no successes. These statistics quantitatively do not suggest an interventionist

¹³⁵³ Tables, page 95.

¹³⁵⁴ Tables, page 95.

¹³⁵⁵ Tables, page 95.

¹³⁵⁶ Judgments dealing with IAA matters have been notably increasing in recent years: A Monichino, L Nottage and D Hu, 'International Arbitration in Australia: Selected Case Notes and Trends' Sydney Law School Legal Studies Research Paper No. 12/53 August 2012 available at <<http://ssrn.com/abstract=2133763>> accessed 2 March 2015, 4.

¹³⁵⁷ Tables, pages 77 to 94.

¹³⁵⁸ *Brunswick* (n 1005).

approach with any of the jurisdictions although it seems the chance of setting aside application succeeding is better in Singapore than the other two jurisdictions although there could be a number of reasons for this apart from an interventionist approach.

Chapter 7: Conclusion

'[P]arties choosing international commercial arbitration have had the benefit of a comprehensive body of law that transcends national law and domestic courts, that has evolved into transnational jurisprudence, and that allows for the legal analysis of an international corpus of law.'¹³⁵⁹

The objective of the UML is the harmonisation and uniformity of arbitral procedures.¹³⁶⁰ The objective of this study was to test and assess whether UNCITRAL's objective is being successfully achieved, albeit this was by a necessarily limited analysis of three jurisdictions and one article only of the UML. The three jurisdictions are however the most mature and important UML jurisdictions in the Asia-Pacific region and Article 34 arguably the most important article in the UML. Given that the assessment would necessarily compare how three jurisdictions have implemented and applied the UML the study was a comparative analysis.

Before any testing or analysis could be undertaken consideration needed to be given as to what exactly the harmonisation and uniformity objective means, first generally in law and secondly in the context of the UML. In international trade law uniformity is usually judged by whether laws are functionally similar, the function being the lowering of the costs of international trade for businessmen. The method of achievement of the similarity is the textual uniformity of the transnational instrument or norm governing relationships and the applied uniformity of the norm.¹³⁶¹

A number of writers place significance on the difference between harmonisation and uniformity, the former often described as the 'collective descriptor' of the means of bringing about uniformity.¹³⁶² However in the context of the UML at least, it is not

¹³⁵⁹ S Jarvin, 'The Role of International Commercial Arbitration in the Modern World.' (2009) 75 Arb. 65, 68.

¹³⁶⁰ Para 3.1 above.

¹³⁶¹ Para 2.3 above.

¹³⁶² Para 2.3.5 above.

considered that any significance can be attached to the difference particularly when the meaning of uniformity is functional similarity. Similarity denoting something less than absolute uniformity so that whether one is discussing harmonisation or uniformity one is really discussing the degree of functional similarity achieved. Therefore there is little to be gained by addressing two questions; first whether the UML is achieving its harmonisation objective and secondly whether it is achieving its uniformity objective. The question addressed in this study is whether functional similarity is being achieved whether one is calling this harmonisation or uniformity.

Being a model law, not a convention or treaty, the UML will never achieve absolute textual uniformity and will never, except in a utopian World, achieve absolute applied uniformity. The test for uniformity is not therefore whether absolute uniformity has been achieved but whether an acceptable degree of uniformity has. What is acceptable will depend on the results of the test and it is difficult to dogmatically prescribe a benchmark of acceptability in advance of the assessment, especially for textual uniformity.¹³⁶³ What was identified from the comparison of textual uniformity were a number of textual dissimilarities between the jurisdictions' adoption of the UML (and in particular Article 34) and these were categorised qualitatively as to whether they were significant or not and this benchmark was ultimately used in the assessment of textual uniformity.¹³⁶⁴

The UML does include an express indicator of what might be required for the achievement of applied uniformity. This indicator is the presence of Article 2A which was introduced in the revisions to the UML in 2006. This provision is highly complex when it is broken down into its constituents and although not much has been written about the objectives of Article 2A, much has been written about the provision that was used as a precedent, namely Article 7 of the CISG. Much of that writing is critical of the drafting of Article 7 and similar criticisms can be made of Article 2A.¹³⁶⁵ However what comes across strongly from Article 2A is the requirement in the interpretation of the UML to pay regard to its international origin

¹³⁶³ Para 2.2.2 above.

¹³⁶⁴ Para 4.1.3 above.

¹³⁶⁵ Para 3.4 above.

and the need to promote uniformity. This has been referred to as the need to adopt an internationalist approach to the interpretation of the UML and this is the term used throughout this study.¹³⁶⁶ Of course Article 2A is a relatively new provision and most of the jurisdictions that have adopted the UML (including one of the three jurisdictions in this study) do not include it in their legislation. It was therefore necessary to consider whether a different approach to interpretation of the UML was required in the absence of Article 2A. Whilst there has been little written about this, what there is considers that the interpretation of transnational norms, whether or not the embodiment of a treaty, should be interpreted in the same or similar way as a treaty in an international way. Treaty interpretation is governed by the VLCT which contains detailed rules on interpretation which may or may not equate with the requirements of Article 2A but what is clear is that even before Article 2A was included into the UML the functional similarity forming the UNCITRAL objectives required the same approach to interpretation as required by Article 2A. This is an attractive proposition underscored by the autonomous theory of international arbitraiton.¹³⁶⁷ The proposition would be tested in this study in a chapter that looked at whether the internationalist approach to interpretation was adopted by the three jurisdictions.

The assessment of textual uniformity therefore addressed not only Article 34 itself but also whether the internationalist approach to interpretation of the UML or legislation adopting it, had been overtly incorporated into the legislation (or rejected by it). Hong Kong had its own version of Article 2A since 1990 and included the UML with Article 2A when it introduced a new arbitration law in 2011.¹³⁶⁸ Singapore however has not included Article 2A but does have interpretation provisions which allow reference to the *travaux preparatoires* of the UML. Australia included Article 2A as well as other interpretation provisions (pointing to a purposive approach) in revisions to the IAA in 2010. This dissimilarity between the textual directives for interpretation (as well as the temporal periods of adoption of the UML with and without Article 2A) provides a useful basis for comparison as

¹³⁶⁶ Para 3.4.1.2.1 above.

¹³⁶⁷ Para 3.5.5 above.

¹³⁶⁸ Para 4.2.1 above.

to how the courts in each jurisdiction have actually approached the interpretation of the UML.

In order to test the internationalist approach suggested as being necessary for achieving the UML objectives three standards of approach or norms were adopted. The test would consider whether the courts have approached interpretation of the UML by engaging these three norms, named as the UML I-Norm (a conscious decision to adopt an internationalist approach), the TP I-Norm (regard to the *travaux préparatoires* of the UML) and the JC I-Norm (regard to the global jurisconsultorium). The adoption of any of these I-Norms should normally indicate an internationalist approach.¹³⁶⁹

The cases analysed to assess the approach to interpretation numbered over 300 and were not limited to enforcement and setting aside cases. The results showed that Hong Kong generally adopted a sometimes strong internationalist approach until around 2003 but has clearly stagnated in the years since save for a relatively small number of important cases. Singapore and Australia on the other hand took a long time before they adopted an internationalist approach but since around 2010 (some years earlier for Singapore) have produced a large number of strongly internationalist judgments and appear to be consistently doing so (although the federal system in Australia means that there is inconsistency between States¹³⁷⁰).¹³⁷¹ The reasons for this are not entirely clear. For Singapore and Australia it is almost certainly the result of the push for international arbitration visibility resulting in pro-internationalist legislation interpreted mainly in a pro-internationalist way. With Hong Kong the reason for what is called stagnation is likely to be a failure on the part of practitioners to approach cases as is required. The author has recently had to

¹³⁶⁹ Para 3.7 above.

¹³⁷⁰ For example: 'In the absence of exclusive federal jurisdiction over international arbitration, inconsistency in various jurisdictions is in some respects inevitable.' P Megens and B Cubitt, 'Emerging Trends in Judicial Approach to International Arbitration in Australia: The Winds of Change' (2011) 77 Arb. 33, 42.

¹³⁷¹ Some long ago forecast that this might happen: 'In due time, perhaps, Singapore could contribute to the development of case-law on the Model Law.' L Boo and C Lim, 'Overview of the International Arbitration Act and subsidiary legislation in Singapore' (1995) 12 J.Int'l Arb. 75, 89.

bring foreign decisions to the attention of senior counsel in court applications before they are considered and this is likely to be at least a factor if not the main reason. It has been suggested that '[u]niform construction and application of international instruments require a certain education and attitude on the part of the practising lawyer.'¹³⁷² This however would need further study to confirm its accuracy.

It is clear that the presence of Article 2A has made little or no difference to the way the courts have approached interpretation. This can be confidently stated because there were only a few cases where the article was mentioned despite the widespread adoption of an internationalist approach in all three jurisdictions.¹³⁷³ It can also be confidently stated that the textual dissimilarities in the textual directives for interpretation have similarly had no or little impact. It seems that once a court adopts an internationalist approach it is possible for all three I-Norms to be engaged whatever the textual dissimilarities of the legislation.¹³⁷⁴ Therefore the forensic analysis of the meaning of the CISG Article 7 referred to in Chapter 3 and how this informs the meaning of Article 2A has proved to be little more than academic. Any detailed analysis has thus far evaded the courts even in the few cases where Article 2A is referred to.

The close link between the UML and the NYC has been established early in this study and this was particularly relevant where Article 34 is modeled on Article V of the NYC.¹³⁷⁵ The case analysis served to confirm this link with cases from enforcement decisions being relied upon for interpretation of Article 34 and vice versa.¹³⁷⁶

The second part of the applied uniformity assessment comprised the identification of ratio decidendi from NYC and UML cases that could be referred to in cases in other

¹³⁷² M Hendrikse and N Margetson, 'Uniform International Commercial Law: The Phenomena of Unification, Uniform Construction and Uniform Application' (2009) 1 *European Journal of Commercial Contract Law* 72, 89.

¹³⁷³ Para 5.3 above.

¹³⁷⁴ Para 5.5 above.

¹³⁷⁵ Para 3.6 above.

¹³⁷⁶ Para 5.4 above.

jurisdictions. These are therefore referred to as I-Ratios. Consideration was then given to the extent to which these I-Ratios were cited in other cases, particularly in the other jurisdictions studied. In this analysis the effect of those textual dissimilarities identified between Article 34 and the Article V equivalents in each jurisdiction, some of which are considered to be significant, was considered.¹³⁷⁷ In contra-distinction with the results of the internationalist approach the adoption of I-Ratios across borders was seen to be fairly limited with only a handful of that occurring. Even where it did occur it usually resulted in some reformulation of the I-Ratio concerned. The conclusion is that the courts in each jurisdiction are still developing their jurisprudence on each of the grounds and the convergence necessary for an acceptable level of uniformity for achievement of UNCITRAL's objectives is still some time away. Of course what is acceptable to one person is not to another so there is a large measure of subjectivity in this conclusion although it can be suggested that the I-Ratio analysis strongly corroborates such a proposition. There have been similar conclusions, in the context of different transnational instruments, it being suggested that a uniform instrument can be applied uniformly but construed differently.¹³⁷⁸

On reflection when this study was commenced in 2008, the body of relevant case law was very limited. There were no known setting aside cases in Hong Kong or Australia but around 11 in Singapore. Although there had been a large number of enforcement cases in Hong Kong and a few in Australia, if this study had concluded at that time its conclusions would certainly have been less valuable. Since 2008 there have been nine Hong Kong setting aside cases, 19 in Singapore and 4 in Australia. It is fair to conclude that the data from the Australian cases have not provided meaningful analysis as regards the test of applied uniformity of similarity of results. However Australian cases have certainly provided meaningful data for the analysis of juristic methodology in Chapter 5 given the important and detailed judgments in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*,¹³⁷⁹ *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*¹³⁸⁰ and *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd*.¹³⁸¹

¹³⁷⁷ Para 4.4 above.

¹³⁷⁸ Jarvin (n 1359) citing De Ly at 74.

¹³⁷⁹ [2011] VSCA 248.

¹³⁸⁰ [2014] FCAFC 83.

This study has made contributions to the study of harmonisation and uniformity of uniform laws and in particular the UML. It has arrived at fairly certain conclusions that the three jurisdictions are exhibiting a fairly high degree of uniformity of juristic methodology. That this has occurred with three different legislative frameworks (one of which does not even include Article 2A) is demonstrative of the phenomenon of the primacy of the uniform objective of the UML over parochial domestic considerations. Without expressly disavowing their domestic imperatives, the three jurisdictions' courts have embraced their States' policies of pro-international commercial arbitration and the UML objective of the global arbitration culture.

This study has also shown that whilst there are promising seeds of cross pollinisation (to use a Neil Kaplan expression) as regards similarity of results, the development of this part of applied uniformity is still in its relative infancy. However given the similarities between the judicial systems, the legislative frameworks and pro-arbitration policies of the three jurisdictions it can only be a matter of time before the I-Norms dwindle in importance as they become the new normal. Instead the importance of the body of I-Ratios will emerge as the product of the internationalist approach and adherence to the I-Norms. This can it is suggested be predicted for the three jurisdictions. Whether this is the case for others is difficult to predict and requires the extension of this study to more jurisdictions. The models developed in this study are clearly appropriate for testing harmonisation and uniformity of other UML jurisdictions. It might even be optimistically thought that the study will help some of those less developed UML jurisdictions to educate the practitioners and judiciaries on the correct approach to the interpretation of the UML and in particular the important Article 34.

Convergence of laws has been occurring for a long time¹³⁸² and the model normative convergence of the UML is clearly going to continue and develop at a fairly quick pace, if the developments with the three jurisdictions in recent years is reflective of the expected pace of convergence, at least in developed common law jurisdictions.

¹³⁸¹ [2013] FCA 918, [2013] FCAFC 109.

¹³⁸² Paragraph 2.3.1 above.

More still needs to be achieved in the cause of uniformity even in the three jurisdictions if they want to consolidate their membership of the international arbitration club or, in the case of Australia, join it. Merely being a UML jurisdiction is obviously not enough¹³⁸³ as the law must be interpreted and applied in a way that is attractive to the users of international arbitration. Australia has significant challenges primarily because of the numerous States having jurisdiction over arbitration and in particular international arbitration cases. Surely Monichino *et al*¹³⁸⁴ are right when they state that if the Federal Court had exclusive jurisdiction over such matters it would help uniformity. The arguments against appear parochial and unconvincing on first blush and if Australia really wishes to join the international arbitration club this needs to be done as the prospects for the designation of Australia as a curial law for international arbitration may intuitively be slim at present.

Apart from the inability to appeal certain decisions of the court in Hong Kong, although not enforcement or setting aside applications, there is one other possible constraint against uniformity in Hong Kong and this is the confidentiality of arbitration proceedings in the courts and in particular restrictions on reporting that apply in Hong Kong and Singapore but not in Australia.¹³⁸⁵ There have of course been numerous decisions published and reported and it is not clear the extent to which parties have agreed for such reporting or whether the decisions have been published in the normal way without consideration of this feature. In recent Hong Kong and some Singapore judgments, the court has used acronyms to protect confidentiality suggesting that consideration is given to this. In a recent setting aside case the author was involved in however, no consideration was given to this feature during the hearing and the judgment was marked 'restricted' so that its details cannot be published. Apart from the fact that this judgment cannot be used in this thesis, a part of the decision concerned a question that had hitherto not been decided by the courts. Restrictions on reporting like this are

¹³⁸³ For example the inability to join the club was one of the reasons why Scotland opted out of the UML: HL Yu, 'A Departure From the UNCITRAL Model Law – The Arbitration (Scotland) Act 2010 and Some Related Issues' (2010) 3 *Contemp.Asia Arb.J.* 283, 289-290.

¹³⁸⁴ A Monichino, L Nottage and D Hu, 'International Arbitration in Australia: Selected Case Notes and Trends' Sydney Law School Legal Studies Research Paper No. 12/53 August 2012 available at <<http://ssrn.com/abstract=2133763>> accessed 2 March 2015, 30.

¹³⁸⁵ Section 2E HKAO and Section 17 NHKAO; SIAA Section 23.

therefore not helpful for any analysis such as contained in this thesis or for promoting Hong Kong as an international arbitration venue. The absence of reported enforcement and setting aside cases in Hong Kong between late 2003 and late 2007 is also likely to be a result of this.¹³⁸⁶

This study also suggests that more could be done in the promotion of uniformity, particularly by UNCITRAL. There are a number of possibilities. First a modified Article 2A could be introduced. In Chapter 3 it is demonstrated that the article is unsatisfactory and Chapter 5 has demonstrated that it has not had significant impact. A modified article 2A would help even if it did no more than direct to an interpretation in accordance with the VCLT. The difficulty with a modified Article 2A is first of all the difficulty in getting agreement to the text (the same difficulty surrounds the attempts to revise the NYC with the Dublin and Miami drafts)¹³⁸⁷ and the confusion it would cause with then three different models applicable depending on when a jurisdiction adopted the UML. A less troublesome approach would be an UNCITRAL guide to interpretation similar to the ICCA Guide to the NYC¹³⁸⁸ and reflecting the need for the engagement of the I-Norms.

Secondly, Article 34 could be codified to reflect some of the more important principles or I-Ratios arising out of the jurisprudence. As mentioned above, a revision of the UML would be problematical to get agreed. Further the development of the UML jurisprudence is in its relative infancy and a codification might not reflect adequately the possible meanings of Article 34. A better approach would be a modified Digest which incorporates the I-Ratios methodology. This would readily identify what the I-Ratios are and where they have been cited or adopted. It would also serve as a reference for the success of the uniformity of the UML. For this to be successful CLOUT would also have to be improved both as to the number of jurisdictions contributing to the

¹³⁸⁶ See Table 3, Tables 25-50.

¹³⁸⁷ The text and other information concerning this is available at <<http://www.newyorkconvention.org/draft-convention>> accessed 15 May 2015; see also M Paulsson, 'New York 1958: 'Vivat, Floreat et Crescat the New York Convention' Kluwer Arbitration Blog available at <http://www.newyorkconvention.org/news/marke-r-p-paulsson-the-miami-draft-the-good-twin-of-the-nyc#_ftnref> accessed 15 May 2015.

¹³⁸⁸ ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, The Hague 2011 available at <www.arbitration.icca.org/media/1/1309129848200/iccas_guide_to_the_1958_ny_convention_with_footer_final_with_disclaimer.pdf> accessed 7 March 2015.

jurisprudence and the judgments themselves (and where necessary translations) being available rather than merely abstracts.

In the final analysis this study has shown how the UML has effected a degree of convergence of the arbitration laws of Hong Kong, Singapore and Australia. There is thus a degree of harmonisation and uniformity that has been achieved and Bockstiegel is surely correct when he states: ‘In conclusion, first of all, I would expect a growing harmonisation between national arbitration laws.’¹³⁸⁹ However Bachand and Gelinas’ statement that ‘[t]he digest recently published by UNCITRAL and discussed in this collection of essays has revealed a significant degree of convergence in judicial decisions that interpret and apply the provisions of the [UML]’¹³⁹⁰ is probably inaccurate as far as the three jurisdictions in this study are concerned in the context of enforcement and setting aside. In the same publication it is noted that these areas are where the divergent approaches have been adopted by State courts.¹³⁹¹

To conclude however with a phenomenon: the convergence which has been described in this thesis is happening without Article 2A having any real significance, with textual dissimilarities in the three jurisdictions (evident in particular in the respective express legislative interpretative requirements) also appearing to have very similar effects on how the courts construe the UML and in their adoption of the internationalist approach. The underlying reason for this in Australia and Singapore may be postulated to be the underlying policy to join or enhance membership of the international arbitration club but if this is correct it would seem to prove Honnolds idea of *lingua franca* and Mazzacano’s idea of modern uniformity (functional similarity) being a neo-realist concept where the underlying policies are the aspirational values and drivers of uniformity.¹³⁹² For the UML the first driver is commercial business certainty but there is a new driver, being the desirability of involvement in the business of international

¹³⁸⁹ K Bockstiegel, ‘Past, Present, and Future Perspectives of Arbitration’ (2009) 75 Arb. 181, 186.

¹³⁹⁰ F Bachand and F Gelinas, ‘Introduction’ in F Bachand and F Gelinas (eds), ‘*The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration*’ (JurisNet 2013), xvii.

¹³⁹¹ T Lemay and C Montineri, ‘Review of the Model Law’s Implementation after Twenty-Five Years’ in F Bachand and F Gelinas (eds), ‘*The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration*’ (JurisNet 2013), 12.

¹³⁹² Para 2.3.1.2 above.

commercial arbitration. This function drives convergence until a satisfactory measure of uniformity is achieved. The past criticism of Australian courts theoretically appears to rest on an unhelpful adherence to positivism but this criticism is now receding with many of the courts adopting the neo-realist approach where functional similarity is key. Singapore had been involved in a similar process some years previously and Hong Kong perhaps some 20 years ago. The neo-realist approach is now being expressly recognised as necessary:

The development of skill and consistency in and among the major legal centres of the region is critical to the creation of a self-conscious and coherent law area and justice system, based on shared values reflected in the Model Law and upon shared experience as judges and arbitrators.¹³⁹³

¹³⁹³ J Allsop, 'International Commercial Arbitration – the Courts and the Rule of Law in the Asia Pacific Region' (2015) 81 Arb.169.

TESTING THE HARMONISATION AND UNIFORMITY OF THE UNCITRAL
MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

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Table 1

Comparison between Text of

UML Article 34 and its equivalents in the NYC (Article V), UML Article 36

and each of the three jurisdictions treatment of Article 34 and their NYC equivalents

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(5))
(a)(i) Incapacity / Invalidity “a party to the arbitration agreement referred to in	Law applicable to Invalidity that where "award was made" [Art 34 "Law of this State"]	- Law applicable for incapacity that "applicable to them" [Art 34 silent] - Law applicable	(1) (meaning in this table, 'the same')	- Law applicable for incapacity that "applicable to him" [Art 34 silent] - Law applicable	(1)	- Law applicable for incapacity that "applicable to that party" [Art 34 silent] - Law applicable	(1)	- Law applicable for incapacity that "applicable to him" [Art 34 silent] - Law applicable for invalidity that where Award	(1)	- Law applicable for incapacity that "applicable to him or her" [Art 34 silent] - Law applicable for invalidity that where Award made [Art 34 "Law of this State"]

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(5))
article 7 was under some incapacity ; or the said agreement is not valid under the law to which the parties have subjected it or, failing any		to invalidity that where Award made [Art 34 "Law of this State"] - refers to "Parties" [Art 34 "party"]		for invalidity that where Award made [Art 34 "Law of this State"]		for invalidity that where Award made [Art 34 "Law of this State"]		made [Art 34 "Law of this State"]		

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(5))
indication thereon, under the law of this State”										

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(5))
(a)(ii) Improper Notice “the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)	(1)

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(5))
proceedings or was otherwise unable to present his case”										

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(5))
(a)(iii) Scope of Reference to Arbitration “the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration,	“that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced” [Art 34 “that part of the award which contains decisions on	-“difference” [Art 34 “dispute”] -“that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced” [Art 34 “that	(1)	-“difference” [Art 34 “dispute”] “award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to	(1)	-“difference” [Art 34 “dispute”] “award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration	(1)	-“difference” [Art 34 “dispute”] “award ... contains decisions on matters not submitted to arbitration the award may be enforced to the extent that it contains decisions on matters so submitted” [Art	(1)	-“difference” [Art 34 “dispute”] “award ... contains decisions on matters submitted to arbitration and those decisions can be separated from decisions on not so submitted, that part of the award which

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(5))
or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those	matters not submitted to arbitration may be set aside”]	part of the award which contains decisions on matters not submitted to arbitration may be set aside”]		arbitration which can be separated from those on matters not so submitted” [Art 34 “that part of the award which contains decisions on matters not submitted to arbitration may be set aside”]		which can be separated from those on matters not so submitted” [Art 34 “that part of the award which contains decisions on matters not submitted to arbitration may be set aside”]		34 “that part of the award which contains decisions on matters not submitted to arbitration may be set aside”]		contains decisions on matters so submitted may be enforced” [Art 34 “that part of the award which contains decisions on matters not submitted to arbitration may be set aside”]

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(5))
not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside”										

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S 89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(7))
(a)(iv) Composition of Arbitral Tribunal “the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement	-does not include “unless such agreement was in conflict with a provisions of this Law from which the parties cannot derogate” -“the law of the country where the arbitration	-“authority” replaces “tribunal” -does not include “unless such agreement was in conflict with a provisions of this Law from which the parties cannot derogate”	(1)	-“authority” replaces “tribunal” -does not include “unless such agreement was in conflict with a provisions of this Law from which the parties cannot derogate”	(1)	-“authority” replaces “tribunal” -does not include “unless such agreement was in conflict with a provisions of this Law from which the parties cannot derogate”	(1)	-“authority” replaces “tribunal” -does not include “unless such agreement was in conflict with a provisions of this Law from which the parties cannot derogate” -“the law of the	(1)	-“authority” replaces “tribunal” -does not include “unless such agreement was in conflict with a provisions of this Law from which the parties cannot derogate” -“the law of the

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S 89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(7))
of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance	took place” [Art 34 “this Law”]	-“the law of the country where the arbitration took place” [Art 34 “this Law”]		-“the law of the country where the arbitration took place” [Art 34 “this Law”]		-“the law of the country where the arbitration took place” [Art 34 “this Law”]		country where the arbitration took place” [Art 34 “this Law”]		country where the arbitration took place” [Art 34 “this Law”]

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S 89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(7))
with this Law”										

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(7))
(2)(b)(i) Non-arbitrability “the subject-matter of the dispute is not capable of settlement by arbitration under the law of this	(1)	-Law applicable that of country where enforcement sought	(1)	-“the award is in respect of a matter which is not capable of settlement by arbitration” -Silent as to applicable law [Art 34 law applicable where arbitration takes place]	(1)	(1) -	(1)	-“difference” [Art 34 “dispute”]	(1)	-“difference” [Art 34 “dispute”]

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(7))
State”										

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(7))
(2)(b)(ii) Public Policy “the award is in conflict with the public policy of this State”	(1)	“contrary to the public policy of that country” i.e. country where enforcement sought	(1)	-“it would be contrary to public policy to enforce the award” [Art 34 law applicable where arbitration takes place]	(1)	-“it would be contrary to public policy to enforce the award” [Art 34 law applicable where arbitration takes place]	-includes additional grounds which stem from this ground: “(a) the making of the award was induced or affected by fraud	-“enforcement of the award would be contrary to the public policy of Singapore” [Art 34 law applicable where arbitration takes place] -includes additional grounds which stem from this	-“to enforce the award would be contrary to public policy” [Art 34 law applicable where arbitration takes place] -includes matters stated to be within ground: “(a) the making	-“to enforce the award would be contrary to public policy” [Art 34 law applicable where arbitration takes place] -includes matters stated to be within ground: “(a) the making

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(7))
							or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award by	ground: “(a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights	within ground: “(a) the making of the award was induced or affected by fraud or corruption; or or (b) a breach of the rules of natural	of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award”

Article 34(2)	Article 36	NYC Article V	HKAO		HKNAO		SIAA		IAA	
			Article 34 (S34C)	NYC (S44(2))	Article 34 (S81(1))	NYC (S89(2))	Article 34 (S3(1))	NYC (S31(2))	Article 34 (S16(1))	NYC (S8(7))
							which the rights of any party have been prejudice d”	of any party have been prejudiced”	justice occurred in connection with the making of the award”	

Table 2

Summary of Case Analysis (I-Norm and Textual Uniformity - all cases)

		Internationalist Approach									Textual Uniformity Test			English Cases Citation		
		UML I-Norm			TP I-Norm			JC I-Norm								
		HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS
1977-1994	Cases analysed	36	0	3	36	0	3	36	0	3	36	0	3	36	0	3
	Cases Engaging I-Norm	5	0	0	8	0	0	13(4)	0	0	0	0	0	16	0	3
1995-2003	Cases analysed	88	13	11	88	13	11	88	13	11	88	13	11	88	13	11
	Cases Engaging I-Norm	1(7)	0	0	2(8)	2(1)	0	6(24)	2	2	0	0	0	26	9	5
2004-2010	Cases analysed	35	34	11	35	34	11	35	34	11	35	34	11	35	34	11

		Internationalist Approach									Textual Uniformity Test			English Cases Citation		
		UML I-Norm			TP I-Norm			JC I-Norm								
		HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS
	Cases Engaging I-Norm	(8)	0	1	2(8)	9(1)	3(1)	1(11)	14(10)	3(1)	1	2	2	17	29	10
2011-2015	Cases analysed	30	33	30	30	33	30	30	33	30	30	33	30	30	33	30
	Cases Engaging I-Norm	(12)	3	10(3)	2(16)	12(10)	6(6)	4(15)	22(6)	11(5)	0	3	4	21	25	21
Total	Cases analysed	189	80	55	189	80	55	189	80	55	189	80	55	189	80	55
	Cases Engaging I-Norm	6(27)	3	11(3)	14(32)	23(12)	9(7)	24(54)	38(16)	16(7)	1	5	6	80	63	40

Figures in parenthesis denotes an indirect engagement. Figures not in parenthesis denotes direct engagement. Figures are exclusive of each other.

Table 2A

Summary of Case Analysis (I-Norm and Textual Uniformity) - Enforcement and Setting Aside

		Internationalist Approach									Textual Uniformity Test			English Cases Citation		
		UML I-Norm			TP I-Norm			JC I-Norm								
		HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS
1977-1994	Cases analysed	13	0	0	13	0	0	13	0	0	13	0	0	13	0	0
	Cases Engaging I-Norm	1	0	0	1	0	0	6(1)	0	0	1	0	0	4	0	0
1995-2003	Cases analysed	27	5	3	27	5	3	27	5	3	27	5	3	27	5	3
	Cases Engaging I-Norm	1(4)	0	0	1(4)	1	0	4(9)	2	1	1	0	0	5	3	0
2004-2010	Cases analysed	7	20	2	7	20	2	7	20	2	7	20	2	7	20	2

		Internationalist Approach									Textual Uniformity Test			English Cases Citation		
		UML I-Norm			TP I-Norm			JC I-Norm								
		HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS
	Cases Engaging I-Norm	(5)	0	0	1(5)	5(1)	1	1(5)	7(7)	1	1	1	0	6	16	2
2011-2015	Cases analysed	20	19	16	20	19	16	20	19	16	20	19	16	20	19	16
	Cases Engaging I-Norm	(9)	2	5(3)	2(13)	6(9)	5(4)	3(13)	11(5)	9(4)	0	2	4	15	13	14
Total	Cases Analysed	67	44	21	67	44	21	67	44	21	67	44	21	67	44	21
	Cases Engaging I-Norm	2(18)	2	5(3)	5(22)	12(10)	6(4)	14(28)	20(12)	11(4)	3	3	4	30	32	16

Figures in parenthesis denotes an indirect engagement. Figures not in parenthesis denotes direct engagement. Figures are exclusive of each other.

Table 2B

Summary of Case Analysis (I-Norm and Textual Uniformity) - Enforcement

		Internationalist Approach									Textual Uniformity Test			English Cases Citation		
		UML I-Norm			TP I-Norm			JC I-Norm								
		HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS
1977-1994	Cases analysed	13	0	0	13	0	0	13	0	0	13	0	0	13	0	0
	Cases Engaging I-Norm	1	0	0	1	0	0	6(1)	0	0	1	0	0	4	0	0
1995-2003	Cases analysed	27	2	3	27	2	3	27	2	3	27	2	3	27	2	3
	Cases Engaging I-Norm	1(4)	0	0	1(4)	0	0	4(9)	1	1	0	0	0	5	1	0
2004-2010	Cases analysed	6	5	1	6	5	1	6	5	1	6	5	1	6	5	1

		Internationalist Approach									Textual Uniformity Test			English Cases Citation		
		UML I-Norm			TP I-Norm			JC I-Norm								
		HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS
	Cases Engaging I-Norm	(5)	0	0	(5)	0	0	1(4)	2(2)	0	0	1	0	5	5	1
2011-2015	Cases analysed	12	3	12	12	3	12	12	3	12	12	3	12	12	3	12
	Cases Engaging I-Norm	(7)	2	3(3)	(9)	2(1)	1(4)	(9)	2(1)	6(4)	0	0	3	8	3	10
Total	Cases Analysed	58	10	16	58	10	16	58	10	16	58	10	15	58	10	16
	Cases Engaging I-Norm	2(16)	2	3(3)	2(18)	2(1)	1(4)	11(23)	5(3)	7(4)	2	1	3	22	9	11

Figures in parenthesis denotes an indirect engagement. Figures not in parenthesis denotes direct engagement. Figures are exclusive of each other.

Table 2C

Summary of Case Analysis (I-Norm and Textual Uniformity) - Setting Aside

		Internationalist Approach									Textual Uniformity Test			English Cases Citation		
		UML I-Norm			TP I-Norm			JC I-Norm								
		HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS
1977-1994	Cases analysed	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	Cases Engaging I-Norm	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1995-2003	Cases analysed	0	3	0	0	3	0	0	3	0	0	3	0	0	3	0
	Cases Engaging I-Norm	0	0	0	0	1	0	0	1	0	0	0	0	0	2	0
2004-2010	Cases analysed	1	15	1	1	15	1	1	15	1	1	15	1	1	15	1

		Internationalist Approach									Textual Uniformity Test			English Cases Citation		
		UML I-Norm			TP I-Norm			JC I-Norm								
		HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS	HK	SING	AUS
	Cases Engaging I-Norm	0	0	0	1	6(1)	1	(1)	6(5)	1	1	0	0	1	11	1
2011-2015	Cases analysed	8	16	4	8	16	4	8	16	4	8	16	4	8	16	4
	Cases Engaging I-Norm	(2)	0	2	2(4)	4(8)	4	3(4)	9(4)	3	0	2	1	7	10	4
Total	Cases Analysed	9	34	5	9	34	5	9	34	5	9	34	5	9	34	5
	Cases Engaging I-Norm	(2)	0	2	3(4)	11(9)	5	3(5)	16(9)	4	1	2	1	8	23	5

Figures in parenthesis denotes an indirect engagement. Figures not in parenthesis denotes direct engagement. Figures are exclusive of each other.

Table 3

Hong Kong Case Analysis

Enforcement and Setting Aside (I-Norm and Textual Uniformity) ('Y' means the I-Norm is engaged, 'YI' it is engaged indirectly and 'N' it is not engaged)

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Werner A. Bock K.G. v The N's Co., Ltd.	31 October 1977	HC	Liu C	Enforcement	N	N	N	N	Y
Werner A. Bock K.G. v The N's Co., Ltd.	4 May 1978	CA	CJ Huggins and Pickering JA	Enforcement	N	N	N	N	Y
Tiong Huat Rubber Factory (SDN) BHD v Wah-Chang	28 November 1990	HC	Kaplan J	Enforcement	N	N	N	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
International (China) Co. Ltd. And Wah-Chang International (Hong Kong) Corp.									
Guangdong New Technology Import & Export Corp Jiangmen Branch v Chiu Shing	23 August 1991	HC	Barnes J	Enforcement	N	N	N	N	N
Shenshen Nan Das Industrial	2 March 1992	HC	Kaplan J	Enforcement	Y	N	Y	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
and Trade United Co. Ltd. V FM International Ltd.									
Zhejiang Province Garment Import and Export Co. v Siemssen & Co. (Hong Kong) Trading Ltd.	2 June 1992	HC	Kaplan J	Enforcement	N	Y	Y	N	N
JJ Agro Industires (P) Ltd. V Texuna	3 August 1992	HC	Kaplan J	Enforcement	N	N	Y	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
International Ltd									
Qinhuangdao Tongda Enterprise Development Company v Million Basic Company Ltd	5 January 1993	HC	Kaplan J	Enforcement	N	N	Y	N (and said no difference)	N
Paklito Investment Ltd v Klockner East Asia Ltd	15 January 1993	HC	Kaplan J	Enforcement	N	N	Y	N	N
China Xinxing	26 July 1993	HC	Kaplan J	Enforcement	N	N	N	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Corp v Mid-Point Development Ltd									
Anhui Provincial Chemicals Import and Export Corp v Hua Qing (Hong Kong) Development Ltd	19 October 1993	HC	Kaplan J	Enforcement	N	N	N	N	N
China Nanhai Oil Joint Service Corp Shenzhen Branch v Gee Tai Holdings	13 July 1994	HC	Kaplan J	Enforcement	N	N	Y	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Nanjing Cereals, Oils and Foodstuffs Import & Export Corp. v Luckmate Commodities Trading Ltd.	16 December 1994	HC	Kaplan J	Enforcement	N	N	YI	N	N
Wah Sin Electronics Industrial Company limited Fujian v Tan Lok t/a Wahton Company	14 March 1995	HC	Leonard J	Enforcement	N	N	N	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Jiangxi Provincial Metal and Minerals Import and Export Corporation v Sulanser Company Ltd	6 April 1995	HC	Leonard J	Enforcement	N	N	YI	N	Y
Apex Tech Investments Ltd v Chuang's Development (China) Ltd	15 March 1996	CA	Mortimer and Mayo JJA and Wong J	Enforcement	N	N	Y	N (said same) [7]	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Zhanjiang City Qiming Industrial Coproaration v Fumei Ltd	11 November 1996	HC	Keith J	Enforcement	N	N	YI	N	N
Haikou City Bonded Area Wansen Products Trading Company v Logy Enterprises Ltd	19 March 1997	HC	Sears J	Enforcement	N	N	YI	N	N
Hebei Import and Export Corporation v	15 May 1997	HC	Findlay J	Enforcement	N	N	N	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Polytek Engineering Company Limited									
Logy Enterprises Ltd v Haikou City Bonded Area Wansen Products Trading Company	6 June 1997	CA	Nazareth VP, Bokhary and Liu JJA	Enforcement	N	N	N	N	N
Shenzhen ACG Industrial Imp & Exp Corp v Authority Profit	4 July 1997	HC	Findlay J	Enforcement	N	N	N	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Ltd									
Hebei Import & Export Corp v Polytek Engineering Company Ltd	18 July 1997	HC	Findlay J	Enforcement	N	N	N	N	N
Hebei Peak Harvest Battery Company Ltd v Polytek Engineering Company Ltd	27 October 1997	HC	Findlay J	Enforcement	N	N	N	N	N
Ng Fung Hong	15 January	HC	Findlay J	Enforcement	N	N	N	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Ltd v ABC	1998								
Hebei Import and Export Corporation v Polytek Engineering Co Ltd	16 January 1998	CA	Chan CJHC, Nazareth VP, Keith J	Enforcement	N	N	Y	N	Y
Guangdong Overseas Shenzhen Co Ltd v Yao Shun Group International Ltd	16 February 1998	HC	Findlay J	Enforcement	N	N	N	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Hebei Peak Harvest Battery Co Ltd v Polytek Engineering Co Ltd	10 March 1998	CA	Nazareth VP, Liu and Leong JJA	Enforcement	N	N	YI	N	N
TK Bulkhandling GMBH v Meridian Success International Ltd	30 November 1998	HC	Findlay J	Enforcement	N	N	N	N	N
Hebei Import and Export Corp v Polytek Engineering Co Ltd	9 February 1999	CFA	Li CJ, Litton PJ, Ching PJ, Bokhary PJ and Mason NPJ	Enforcement	Y	Y	Y	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Medison Co Ltd v Victor (Far East) Ltd	8 April 2000	HC	Burrell J	Enforcement	N	N	N	N	Y
Sam Ming City Forestry Economic Co v Liu Yuk Lin	6 July 2000	HC	Burrell J	Enforcement	N	N	N	N	N
Wuzhou Port Foreign Trade Dev Corp v New Chemic Ltd	8 December 2000	HC	Burrell J	Enforcement	N	N	YI	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Shanghai City Foundation Works Corp v Sunlink Ltd	2 February 2001	HC	Burrell J	Enforcement	YI	YI	YI	N	N
Shenzhen City Tong Ying Foreign Trade Corporation Ltd v Alps Co Ltd	12 September 2001	HC	Chung J	Enforcement	N	N	N	N	N
Chongqing Machinery Import & Export Co Ltd v Yiu Hoi	11 October 2001	HC	Woolley	Enforcement	N	N	N	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Shantou Zheng Ping Xu v Wesco Polymers Ltd	14 December 2001	HC	Burrell J	Enforcement	YI	YI	YI	N	N
Societe Nationale D'Operations Petrolieres De La Cote D'Ivoire v Keen Lloyd Resources Ltd	20 December 2001	HC	Burrell J	Enforcement	N	N	Y	N	N
Shandong Textiles Import and Export Corporation v Da Hua Non-Ferrous Metals	6 March 2002	HC	Ma J	Enforcement	YI	YI	YI	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Company Ltd									
Karaha Bodas Company LLC v Persusahaan Pertambangan Minyak Dan Gas Bumi Negara	27 March 2003	HC	Burrell J	Enforcement	YI	YI	YI	N	Y
Shenzhen Kai Long Investment and Development Co Ltd v CEC Electrical Manufacturing (International)	30 October 2003	HC	Cheung J	Enforcement	N	N	N	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Co Ltd									
Karaha Bodas Co LLC v Persusahaan Pertambangan	9 October 2007	CA	Tang VP, Stone J and Lam J	Enforcement	YI	YI	YI	N	Y
Xiamen Xingjingdi Group Ltd v Eton Properties Ltd	24 June 2008	HC	Reyes J	Enforcement	YI	YI	YI	N	Y
Karaha Bodas Co LLC v Perusahaan	5 December 2008	CFA	Li CJ, Bokhari PJ, Chan PJ,	Enforcement	YI	YI	YI	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Pertambangan			Ribeiro PJ and Lord Woolf NPJ						
Brunswick Bowling and Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd	10 February 2009	HC	Lam J	Setting aside	N	Y	YI	Y (para36)	Y
A v R	30 April 2009	HC	Reyes J	Enforcement	YI	YI	Y	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Xiamen Xingjingdi Group Ltd v Eton Properties Ltd	22 May 2009	CA	Rogers VP, Le Pichon and Hartmann JJA	Enforcement	N	N	N	N	Y
Gao Hai Yan v Keeneye Holdings Ltd.	8 November 2010	CFI	Saunders J	Enforcement	YI	YI	YI	N	N
Gao Hai Yan v Keeneye Holdings Ltd.	12 April 2011	CFI	Reyes J	Enforcement	YI	YI	YI	N	Y
Pacific China Holdings Ltd (in	29 June	CFI	Saunders J	Setting Aside	YI	YI	YI	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Liquidation) v Grand Pacific Holdings Ltd	2011								
Shandong Hongri Acron Chemical Joint Stock Co Ltd v Petrochina International (Hong Kong) Corp Ltd	25 July 2011	CA	Cheung CJHC, Kwan JA and Lam J	Enforcement	YI	YI	YI	N	Y
Gao Haiyan v Keeneye Holdings Ltd.	2 December 2011	CA	Tang VP, Fok JA and Sakhrani J	Enforcement	YI	YI	YI	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
[Chinese name] v Wong Wai Tsang	28 February 2012	CFI	Shieh SC	Enforcement	N	N	N	N	N
Astro Nusantara International BV v PT Ayunda Prima Mitra	15 and 21 March 2012	CFI	Lok DJ	Enforcement	N	N	N	N	Y
Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (In Liquidation) (No 1)	9 May 2012	CA	Tang VP, Kwan and Fok JJA	Setting Aside	N	Y	Y	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
[Chinese name] v Eton Properties Ltd	14 June 2012	CFI	Stone DJ	Enforcement	YI	YI	YI	N	Y
Pang Wai Hak v Hua Yunjian	22 June 2012	CFI	Recorder Chow SC	Setting Aside	N	YI	YI	N	Y
R V F	3 August 2012	CFI	Au J	Setting Aside	N	N	Y	N	Y
Granton Natural Resources Co. Ltd v Armco Metals	7 December 2012	CFI	To J	Enforcement	YI	YI	YI	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
International Ltd									
Grant Thornton international Ltd v JBPB & Co	5 April 2013	CFI	Au J	Enforcement	N	YI	YI	N	N
Guo Shun Kai v Wing Shing Chemical Co Ltd	5 June 2013	CFI	Lam J	Enforcement	N	N	N	N	N
Po Fat Construction Co Ltd v The Incorporated Owners of Kin Sang Estate	6 November 2013	CFI	Chan J	Setting aside	N	YI	YI	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Arima Photovoltaic & Optical Corp v Flextronics Computing Sales and Marketing (L) Ltd	27 November 2013	CA	Lam VP, Barma JA and Mc Walters J	Setting Aside	N	N	N	N	Y
X Chartering v Y	3 March 2014	CFI	Chan J	Enforcement	N	YI	YI	N	N
Shanghai Fusheng Soya-Food Co, Ltd v Pulmuone	25 April 2104	CFI	Chan J	Setting Aside	N	YI	YI	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Holdings Co, Ltd									
S Co v B Co	24 July 2014	CFI	Chan J	Setting Aside/Art 16	YI	Y	Y	N	Y
Hong Kong Golden Source Ltd v. New Elegant Investment Ltd	15 Sep 2014	CFI	Chow J	Enforcement	YI	YI	YI	N	Y
Astro Nusantara International BV v PT First Media TBK (formerly known as PT	17 February 2015	CFI	Chow J	Enforcement	YI	YI	YI	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Broadband Multimedia TBK)									

Table 4
Singapore Case Analysis
Enforcement and Setting Aside

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Re An Arbitration Between Hainan Import and Export Machinery Corp and Donald & McCarthy Pte Ltd	29 September 1995	HC	Prakash J	Enforcement	N	N	N	N	Y
Tan Poh Leng Stanley v Tang Boon Jek	30 November	HC	Selvam J	Setting aside	N	N	N	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Jeffrey	2000								
John Holland Pte Ltd v Toyo Engineering Corp	14 March 2001	HC	Teck JC	Opting out of UML, Setting aside	N	N	Y	N	Y
Newspeed International Ltd v Citus Trading Pte Ltd	4 June 2001	HC	Li JC	Enforcement	N	N	Y	N	N
Tang Boon Jek Jeffrey v Tan	22 June 2001	CA	Yong CJ, Thean and	Setting aside	N	Y	N	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Poh Leng Stanley			Chao, JJA						
Luzon Hydro Corp (Phillipines) v Transfield Phillipines Inc (Philipines)	13 September 2004	HC	Prakash J	Setting Aside	N	N	N	N	N
PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA	20 Oct 2005	HC	Prakash J	Setting Aside	N	N	N	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Aloe Vera of America Inc v Asianic Food (S) Pte Ltd	10 May 2006	SHC	Prakash J	Enforcement	N	N	Y	Y	Y
Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak	18 August 2006	HC	Menon JC	Enforcement	N	N	N	N	Y
Fairmount Development Pte Ltd v Soh Beng Tee & Co	17 October 2006	HC	Prakash J	Setting Aside	N	N	N	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Pte Ltd									
Government of the Republic of the Phillipines V Phillipine International Air Terminals Co Inc	17 November 2006	HC	Prakash J	Setting Aside	N	N	N	N	N
PT Asuransi Indonesia (Persero) v Dexia Bank SA	1 December 2006	CA	Leong JA, Ean J, Keong CJ	Appeal against refusal to set aside	N	Y	Y	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Soh Beng Tee & Co Pte Ltd v Fairmount Development PTE Ltd	9 May 2007	CA	Leong JA, Keong CJ and Rajah JA	Setting Aside	N	N	YI	N	Y
VV v VW	24 January 2008	HC	Prakash J	Setting aside	N	YI	YI	N	Y
Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH	8 May 2008	HC	Ong J	Setting Aside	N	Y	YI	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd	7 May 2009	HC	Prakash J	Security for Costs in setting aside	N	N	N	N	Y
Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd	16 October 2009	High Court	Prakash J	Setting Aside	N	Y	YI	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Sobati General Trading LLC v PT Multistrada Arahsarana	28 October 2009	HC	Tay J	Setting Aside	N	N	YI	N	N
Sui Southern Gas Co. Ltd v Habibullah Coastal Power Co (Pte) Ltd	23 February 2010	HC	Prakash J	Setting aside	N	Y	Y	N	Y
Front Row Investment Holdings (Singapore) Pte	15 March 2010	HC	Ang J	Setting aside	N	N	Y	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Ltd v Daimler South East Asia Pte Ltd									
Denmark Skibstekniske Konsulenter A/S I Likvidation v Unltrapolis 3000 Theme Park	9 April 2010	HC	Ang J	Enforcement	N	N	Y	N	Y
Strandore Invest A/S v Soh kim Wat	14 May 2010	HC	Loh JC	Enforcement	N	N	YI	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
AJT v AJU	16 July 2010	HC	Onn J	Setting aside	N	Y	Y	N	Y
PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation	20 July 2010	HC	Ang J	Setting aside	N	N	Y	N	Y
Galsworthy Ltd v Glory Wealth Shipping Pte Ltd	14 October 2010	HC	Choo J	Enforcement	N	N	YI	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Rockeby biomed Ltd v Alpha Advisory Pte Ltd	22 June 2011	High Court	Prakash J	Setting Aside	N	YI	YI	N	N
CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK	13 July 2011	CA	Tin JA, Leong JA and Rajah JA	Appeal from a setting aside	N	YI	Y	N	Y
Kempinski Hotels SA v PT Prima International	19 July 2011	HC	Prakash J	Setting aside	N	N	YI	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Development									
AJU v AJT	22 August 2011	CA	Keong CJ, Leong JA and Rajah JA	Setting aside	N	YI	Y	N	Y
LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd	24 February 2012	Sing HC	Lai J	Setting Aside	N	Y	N	N	Y
PT Prima	3 May 2012	CA	Keong CJ,	Appeal against setting	N	N	N	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
International Development v Kempinski Hotels SA			Leong JA and Ean J	aside					
Quarella SpA v Scelta Marble Australia Pty Ltd	27 June 2012	HC	Prakash J	Setting aside	N	YI	Y	Y (compared Art 34(2)(a)(iii) with Art V(1)(c) and said the same)	N
LW Infrastructure	16 August	Sing	Keong CJ, Leong and	Setting Aside	N	Y	Y	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Pte Ltd v Lim Chin San Contractors Pte Ltd	2012	CA	Menon JA						
PT Pukaafu Indah v Newmont Indonesia Ltd	11 September 2012	HC	Kin J	Setting aside	N	YI	N	N	N
Astro Nusantara International BV v PT Ayunda Prima Mitra	22 October 2012	HC	Ang J	Enforcement	Y	Y	Y	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
TMM Division Maritime SA de CV v Pacific Richfield Marine Pte Ltd	23 September 2013	HC	Onn J	Setting Aside	N	YI	Y	N	Y
BLB v BLC	30 September 2013	HC	Ang J	Setting Aside	N	YI	Y	N	Y
PT First Media TBK (formerly known as PT Broadband	31 October 2013	CA	Menon CJ, Rajah JA and Prakash J	Enforcement/ jurisdiction	Y	Y	Y	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Multimedia TBK) v Astro Nusantara International BV									
Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd	14 November 2013	HC	Ang J	Enforcement	N	YI	YI	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
ADG v ADI	15 April 2014	SHC	Coomaraswamy J	Setting Aside	N	Y	Y	N	Y
PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)	16 July 2014	SHC	Coomaraswamy J	Setting Aside	N	N	YI	YN	N
BLC v BLB	30 July 2014		Tin JA, Leong JA and Prakash J	Setting Aside	N	N	Y	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
AKM v AKN	31 July 2014	HC	Coomaraswamy J	Setting Aside	N	YI	YI	N	N
Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd	30 October 2014	HC	Ang J	Setting Aside	N	Y	Y	N	Y

Table 5

Australia Case Analysis

Enforcement and Setting Aside (I-Norm and Textual Uniformity)

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Hallen v Angledal	10 June 1999	Supreme Court NSW	Rolfe J	Enforcement	N	N	Y	N	N
Commonwealth Development Corporation v Montague	27 June 2000	Court of Appeal SCQ	Thomas JA, Ambrose and Fryberg JJ	Enforcement	N	N	N	N	N
Toyo Engineering Corp v John	20 December 2000	Supreme Court of	Byrne J	Enforcement	N	N	N	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Holland Pty ltd		Victoria							
Corvetina Technology Ltd v Clough Engineering Ltd	29 July 2004	Supreme Court NSW	McDougall J	Enforcement	N	N	N	N	Y
Cargill International SA v Peabody Australia Mining Ltd	11 August 2010	NSW Supreme Court	Ward J	Setting aside	N	Y	Y	N	Y
Altain Khuder LLC v IMC Mining Inc	28 January 2011	Supreme Court Victoria	Croft J	Enforcement	Y	Y	Y	Y (para 50)	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Uganda Telecom Limited v Hi- Tech Telecom PTY Ltd	22 February 2011	Federal	Foster J	Enforcement	N	N	Y	N	Y
ESCO Corporation v Bradken Resources Pty Ltd	9 August 2011	Federal	Foster J	Enforcement	N	N	N	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
IMC Aviation Solutions Pty Ltd v Altain Khuder LLC	22 August 2011	Court of Appeal, Victoria	Warren CJ, Hansen JA and Kyrou AJA	Enforcement	Y	N	Y	Y (para 130)	Y
Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd	23 January 2012	Federal Court	Murphy J	UML/Constitution/enf orcement/setting aside	N	Y	N	N	Y
Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty	9 March 2012	SCWA Court of Appeal	Martin CJ, Buss and Murphy JJA	Enforcement	N	YI	YI	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Ltd									
Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)	23 March 2012	Federal	Foster J	Enforcement	Y	YI	Y	Y (para 63/105)	N
Dampskibsselsk abet Norden A/S v Beach Building & Civil Group Pty Ltd	29 June 2012	Federal	Foster J	Enforcement	YI	N	Y	N	Y
Castel Electronics Pty	2 November	Federal	Murphy J	Setting Aside	Y	Y	Y	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Ltd v TCL Air Conditioner (Zhongshan) Co Ltd	2012								
TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia	13 March 2013	High Court	French CJ, Hayne, Crennan, Kiefel, Bell and Gageler JJ	UML/Constitution/settling aside	N	Y	Y	N	Y
Eopply New Energy Technology Co Ltd v EP Solar	19 April 2013	Federal	Foster J	Enforcement	YI	N	YI	N	N

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Pty Ltd									
Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd	6 September 2013	Federal	Katzmann J	Enforcement	N	N	N	N	Y
Dampskibsselsk abet Norden A/S v Gladstone Civil Pty Ltd (Formerly Beach Building & Civil Group Pty Ltd)	18 September 2013	Federal Court – Ful Court	Mansfield, Rares and Buchanan JJ	Enforcement	N	YI	YI	N	Y

Case	Date	Court	Judge(s)	Topic	Internationalist Approach			Textual Uniformity Test	English Cases Citation
					UML I-Norm	TP I-Norm	JC I-Norm		
Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd	30 September 2013	Federal Court – Full Court	Allsop CJ, Besanko and Middleton JJ	Enforcement	YI	N	Y	N	Y
Amada (Singapore) Pte Ltd v Gujarat NRE Coke Ltd	17 June 2014	Federal Court	Foster J	Enforcement	N	YI	YI	N	Y
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd	16 July 2014	Federal Court – Full Court	Allsop CJ, Middleton J and Foster J	Setting Aside	Y	Y	Y	Y	Y

Table 6

Setting Aside Case Analysis (I-Norm and Textual Uniformity)

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
Tan Poh Leng Stanley v Tang Boon Jek Jeffrey	30 November 2000	Sing HC	Selvam J	Setting Aside	Y (overturned on Appeal)	N	N	N	N	Y	N
John Holland Pte Ltd v Toyo Engineering Corp	14 March 2001	Sing HC	Teck JC	Setting Aside	N	N	N	Y	N	Y	N
Tang Boon Jek Jeffrey v Tan Poh Leng	22 June 2001	Sing CA	Yong CJ, Thean and Chao, JJA	Setting Aside	N	N	Y	N	N	N	N

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
Stanley											
Luzon Hydro Corp (Phillipines) v Transfield Phillipines Inc (Philippines)	13 September 2004	Sing HC	Prakash J	Setting Aside	N	N	N	N	N	N	N
PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA	20 Oct 2005	Sing HC	Prakash J	Setting Aside	N	N	N	N	N	Y	N
Fairmount	17 October	Sing	Prakash J	Setting	Y	N	N	N	N	Y	N

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
Development Pte Ltd v Soh Beng Tee & Co Pte Ltd	2006	HC		Aside	(overturned on Appeal)						
Government of the Republic of the Philippines V Phillipine International Air Terminals Co Inc	17 November 2006	Sing HC	Prakash J	Setting Aside	N	N	N	N	N	N	N
PT Asuransi Indonesia (Persero) v	1 December 2006	Sing CA	Leong JA, Ean J, Keong CJ	Setting Aside	N	N	Y	Y	N	Y	Y

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
Dexia Bank SA											
Soh Beng Tee & Co Pte Ltd v Fairmount Development PTE Ltd	9 May 2007	Sing CA	Leong JA, Keong CJ and Rajah JA	Setting Aside	N	N	N	YI	N	Y	N
VV v VW	24 January 2008	Sing HC	Prakash J	Setting Aside	N	N	YI	YI	N	Y	N
Dongwoo Mann+Hummel Co Ltd v Mann+Hummel	8 May 2008	Sing HC	Ong J	Setting Aside	N	N	Y	YI	N	Y	Y

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
I GmbH											
Brunswick Bowling and Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd	10 February 2009	HK HC	Lam J	Setting Aside	Y	N	Y	YI	Y (para36)	Y	Y
Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India	16 October 2009	High Court	Prakash J	Setting Aside	N	N	Y	YI	N	Y	Y

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
Pvt Ltd											
Sobati General Trading LLC v PT Multistrada Arahsarana	28 October 2009	Sing HC	Tay J	Setting Aside	N	N	N	YI	N	N	N
Sui Southern Gas Co. Ltd v Habibullah Coastal Power Co (Pte) Ltd	23 February 2010	Sing HC	Prakash J	Setting Aside	N	N	Y	Y	N	Y	Y
Front Row Investment	15 March 2010	Sing HC	Ang J	Setting Aside	N	N	N	Y	N	N	N

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd											
AJT v AJU	16 July 2010	Sing HC	Onn J	Setting Aside	Y (overturned on Appeal)	N	Y	Y	N	Y	Y
PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation	20 July 2010	Sing HC	Ang J	Setting Aside	Y	N	N	Y	N	Y	Y

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
Cargill International SA v Peabody Australia Mining Ltd	11 August 2010	NSW Supreme Court	Ward J	Setting Aside	N	N	Y	Y	N	Y	N
Rockeby biomed Ltd v Alpha Advisory Pte ltd	22 June 2011	Sing HC	Prakash J	Setting Aside	N	N	YI	YI	N	N	N
Pacific China Holdings Ltd (in Liquidation) v	29 June 2011	HK CFI	Saunders J	Setting Aside	Y (overturned on Appeal)	YI	YI	YI	N	Y	Y

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
Grand Pacific Holdings Ltd											
CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK	13 July 2011	Sing CA	Tin JA, Leong JA and Rajah JA	Setting Aside	Y	N	YI	Y	N	Y	Y
Kempinski Hotels SA v PT Prima International Development	19 July 2011	Sing HC	Prakash J	Setting Aside	Y (overturned on Appeal)	N	N	YI	N	Y	N

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
AJU v AJT	22 August 2011	Sing CA	Keong CJ, Leong JA and Rajah JA	Setting Aside	N	N	YI	Y	N	Y	Y
Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd	23 January 2012	Federal Court	Murphy J	UML/ Constitution/ enforcement / setting aside	N	N	Y	N	N	Y	N
LW Infrastructure Pte Ltd v Lim Chin San Contractors	24 February 2012	Sing HC	Lai J	Setting Aside	Y (confirmed on appeal)	N	Y	N	N	Y	N

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
Pte Ltd											
PT Prima International Development v Kempinski Hotels SA	3 May 2012	Sing CA	Keong CJ, Leong JA and Ean J	Setting Aside	N	N	N	N	N	Y	N
Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (In Liquidation) (No 1)	9 May 2012	HK CA	Tang VP, Kwan and Fok JJA	Setting Aside	N	N	Y	Y	N	Y	Y

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
Pang Wai Hak v Hua Yunjian	22 June 2012	HK CFI	Recorder Chow SC	Setting Aside	N	N	YI	YI	N	Y	Y
Quarella SpA v Scelta Marble Australia Pty Ltd	27 June 2012	Sing HC	Prakash J	Setting Aside	N	N	YI	Y	Y (compared Art 34(2)(a)(iii) with Art V(1)(c) and said the same)	N	Y
R V F	3 August 2012	HK CFI	Au J	Setting Aside	N	N	N	Y	N	Y	N

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd	16 August 2012	Sing CA	Keong CJ, Leong and Menon JA	Setting Aside	Y	N	Y	Y	N	N	Y
PT Pukuafu Indah v Newmont Indonesia Ltd	11 September 2012	Sing HC	Kin J	Setting Aside	N	N	YI	N	N	N	N
Castel Electronics Pty Ltd v TCL Air Conditioner	2 November 2012	Federal	Murphy J	Setting Aside	N	Y	Y	Y	N	Y	Y

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
(Zhongshan) Co Ltd											
TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia	13 March 2013	High Court	French CJ, Hayne, Crennan, Kiefel, Bell and Gageler JJ	UML/Constitution/setting aside	N	N	Y	Y	N	Y	Y
TMM Division Maritime SA de CV v Pacific Richfield Marine Pte Ltd	23 September 2013	Sing HC	Onn J	Setting Aside	N	N	YI	Y	N	N	N

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
BLB v BLC	30 September 2013	Sing HC	Ang J	Setting Aside	Y	N	YI	Y	N	Y	N
Po Fat Construction Co Ltd v The Incorporated Owners of Kin Sang Estate	6 November 2013	HK CFI	Chan J	Setting Aside	N	N	YI	YI	N	N	N
Arima Photovoltaic & Optical Corp v Flextronics	27 November 2013	CA	Lam VP, Barma JA and Mc Walters J	Setting Aside	N	N	N	N	N	Y	N

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
Computing Sales and Marketing (L) Ltd											
Shanghai Fusheng Soya-Food Co, Ltd v Pulmuone Holdings Co, Ltd	25 April 2014	HK CFI	Chan J	Setting Aside	N	N	YI	YI	N	Y	Y
ADG v ADI	15 April 2014	SHC	Coomaraswamy J	Setting Aside	N	N	Y	Y	N	Y	N

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)	16 July 2014	SHC	Coomaraswamy J	Setting Aside	N	N	N	YI	N	N	N
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd	16 July 2014	FFC	Allsop CJ, Middleton J and Foster J	Setting Aside	N	Y	Y	Y	Y	Y	Y
S Co v B Co	24 July 2014	HK CFI	Chan J	Setting Aside	N	Y	Y	Y	N	Y	Y

Case	Date	Court	Judge(s)	Topic	Application Successful	Internationalist Approach			Textual Uniformity Test	English Cases Citation	NYC Connection
						UML I-Norm	TP I-Norm	JC I-Norm			
BLC v BLB	30 July 2014	Sing CA	Tin JA, Leong JA and Prakash J	Setting Aside	N	N	N	Y	N	Y	N
AKM v AKN	31 July 2014	Sing HC	Coomaraswamy J	Setting Aside	Y	N	YI	YI	N	N	N
Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd	30 October 2014	Sing HC	Ang J	Setting Aside	N	N	Y	Y	N	Y	Y

Table 7

Summary of Case Analysis

Enforcement and Setting Aside (Grounds Analysis- all jurisdictions)

		Grounds											
		Invalidity		Unable to Present Case		Scope of Sub- mission		Scope of Procedure		Arbitrability		Public Policy	
1977- 1994	Cases analysed	13		13		13		13		13		13	
	Result	0Y	7N	2Y (1OT)	3N	0Y	2N	1Y(OT)	4N	0Y	0N	2Y(1C)(1OT)	4N
1995- 2003	Cases analysed	29		29		29		29		29		29	
	Result	1Y(C)	8N(1OT)	4Y(1C)(1OT)	9N	0Y	5N	0Y	4N	0Y	0N	1Y(OT)	12N
2004- 2010	Cases analysed	27		27		27		27		27		27	
	Result	0Y	2N	2Y	4N	2Y(1OT)	9N	0Y	5N	0Y	1N	3Y(1C)(2OT)	16N

		Grounds											
		Invalidity		Unable to Present Case		Scope of Sub- mission		Scope of Procedure		Arbitrability		Public Policy	
2011-2015	Cases analysed	40		40		40		40		40		40	
	Result	3Y(1OT)	5N(1OT)	2Y	10N(1OT)	4Y(2OT)	13N	1Y(OT)	11N	0Y	0N	2Y(1OT)	19N(1OT)
Total	Cases Analysed	102		102		102		102		102		102	
	Result	4Y(1OT)(1C)	21N(2OT)	10Y(2OT)(1C)	25N(1OT)	6Y(3OT)	27N	2Y(2OT)	21N	0Y	1N	8Y(5OT)(2C)	47N

(OT) means decision was overturned in appellate court.

(C) means decision was conditional on evidential hearing.

Table 7A

Summary of Case Analysis- Hong Kong

Enforcement and Setting Aside (Grounds Analysis)

		Grounds											
		Invalidity		Unable to Present Case		Scope of Sub- mission		Scope of Procedure		Arbitrability		Public Policy	
1977-1994	Cases analysed	13		13		13		13		13		13	
	Result	0Y	7N	2Y (1OT)	3N	0Y	2N	1Y(OT)	4N	0Y	0N	2Y(1C)(1OT)	4N
1995-2003	Cases analysed	22		22		22		22		22		22	
	Result	1Y(C)	5N(1OT)	4Y(1C)(1OT)	7N	0Y	4N	0Y	4N	0Y	0N	1Y(OT)	11N
2004-2010	Cases analysed	7		7		7		7		7		7	

		Grounds											
		Invalidity		Unable to Present Case		Scope of Sub- mission		Scope of Procedure		Arbitrability		Public Policy	
	Result	0Y	0N	1Y	0N	0Y	3N	0Y	2N	0Y	0N	1Y(OT)	5N
2011-2015	Cases analysed	17		17		17		17		17		17	
	Result	0Y	1N	1Y(OT)	5N	0Y	6N	1Y(OT)	5N	0Y	0N	1Y(OT)	8N
Total	Cases Analysed	59		59		59		59		59		59	
	Result	1Y(C)	13N(10T)	8Y(3OT)(1C)	15N	0Y	15N	2Y(2OT)	15N	0Y	0N	5Y(4OT)(1C)	28N

(OT) means decision was overturned in appellate court.

(C) means decision was conditional on evidential hearing.

Table 7B

Summary of Case Analysis- Singapore
Enforcement and Setting Aside (Grounds Analysis)

		Grounds											
		Invalidity		Unable to Present Case		Scope of Sub-mission		Scope of Procedure		Arbitrability		Public Policy	
1977-1994	Cases analysed	0		0		0		0		0		0	
	Result												
1995-2003	Cases analysed	5		5		5		5		5		5	
	Result	0Y	1N	0Y	2N	0Y	1N	0Y	0N	0Y	0N	0Y	1N
2004-2010	Cases analysed	18		18		18		18		18		18	
	Result	0Y	2N	1Y	4N	2Y(1OT)	6N	0Y	3N	0Y	1N	1Y(OT)	10N

		Grounds											
		Invalidity		Unable to Present Case		Scope of Sub-mission		Scope of Procedure		Arbitrability		Public Policy	
2011-2015	Cases analysed	14		14		14		14		14		14	
	Result	1Y	1N	1Y	1N	4Y(2OT)	5N	0Y	3N	0Y	0N	0Y	4N
Total	Cases Analysed	37		37		37		37		37		37	
	Result	1Y	4N	2Y	7N	6Y(3OT)	12N	0Y	6N	0Y	1N	1Y(OT)	15N

(OT) means decision was overturned in appellate court.

(C) means decision was conditional on evidential hearing.

Table 7C

Summary of Case Analysis- Australia
Enforcement and Setting Aside (Grounds Analysis)

		Grounds											
		Invalidity		Unable to Present Case		Scope of Sub-mission		Scope of Procedure		Arbitrability		Public Policy	
1977-1994	Cases analysed	0		0		0		0		0		0	
	Result												
1995-2003	Cases analysed	2		2		2		2		2		2	
	Result	0Y	2N	0Y	0N	0Y	0N	0Y	0N	0Y	0N	0Y	0N
2004-2010	Cases analysed	2		2		2		2		2		2	
	Result	0Y	0N	0Y	0N	0Y	0N	0Y	0N	0Y	0N	1Y(C)	1N

		Grounds											
		Invalidity		Unable to Present Case		Scope of Submission		Scope of Procedure		Arbitrability		Public Policy	
2011-2015	Cases analysed	9		9		9		9		9		9	
	Result	2Y(1OT)	3N(1OT)	0Y	4N(1OT)	0Y	2N	0Y	3N	0Y	0N	1Y	7N(1OT)
Total	Cases Analysed	13		13		13		13		13		13	
	Result	2Y(1OT)	5N(1OT)	0Y	4N(1OT)	0Y	2N	0Y	3N	0Y	0N	2Y(1C)	8N(1OT)

(OT) means decision was overturned in appellate court.

(C) means decision was conditional on evidential hearing.

Table 8

Citation of I-Ratios

I-Ratio	Cited		
	Hong Kong	Singapore	Australia
<u>GENERAL</u>			
<i>Grand Pacific</i> 1 (HK)	3(5) ¹	(4) ²	0
<i>Government of Philippines</i> (S)	0	4	0
<i>Paklito</i> 1 (HK)	6	1	0
<i>Nanhai</i> (HK)	2	0	0
<i>Brunswick / Grand Pacific</i> (HK)	2	1	0
<i>CRW</i> 1 (S)	0	1	0
<i>Triulzi</i> (S)	0	0	0

¹ Similar test cited in this number of cases.

² Similar test cited in this number of cases.

I-Ratio	Cited		
	Hong Kong	Singapore	Australia
<u>INVALIDITY</u>			
<i>Altain Khuder 1 (A)</i>	0	0	1
<i>Astro (S)</i>	0	0	0
<u>UNABLE TO PRESENT CASE</u>			
<i>Paklito 2 (HK)</i>	2	0	0
<i>Shandong (HK)</i>	0	0	0
<i>Brunswick 1(HK)</i>	1	0	0
<i>Brunswick 2 (HK)</i>	0	0	0
<i>Grand Pacific 2 (HK)</i>	3	2	0
<i>Pang Wai (HK)</i>	0	0	0
<i>AKM (S)</i>	0	0	0

I-Ratio	Cited		
	Hong Kong	Singapore	Australia
<i>ADG (S)</i>	0	0	0
<u>SCOPE OF SUBMISSION</u>			
<i>Asuransi 1 (S)</i>	0	0	0
<i>Asuransi 2 (S)</i>	0	4	0
<i>CRW 2 (S)</i>	0	4	0
<i>Quarella Spa</i>	0	0	0
<i>Grant Thornton (HK)</i>	1	0	0
<i>TMM (S)</i>	0	0	0
<u>SCOPE OF PROCEDURE</u>			
<i>Brunswick 3</i>	0	0	0

I-Ratio	Cited		
	Hong Kong	Singapore	Australia
<i>Grand Pacific 3</i>	0	0	0
<i>Karaha Bodas</i>	0	0	0
<i>S Co</i>	0	0	0
<u>PUBLIC POLICY</u>			
<i>Hebei (HK)</i>	12	3	2
<i>Re Hainan (S)</i>	0	3	0
<i>Karaha Bodas (HK)</i>	0	0	0
<i>Asuransi 3 (S)</i>	1	9	1
<i>AJT (S)</i>	0	0	0
<i>Altain Khuder 2 (A)</i>	0	1	0
<i>TCL (A)</i>	0	0	0

Table 9

List of I-Ratios

No Appeal on Merits

<i>Grand Pacific</i> 1 I-Ratio	there is no appeal on the merits for an Article 34 Application
	cited in <i>Pang Wai, X Chartering, Shanghai Fusheng</i> same test as in <i>Shenshen, Qinhuangdao, Wah Sin, Haikou, Wuzhou, Dongwoo, CRW, TMM, BLB</i>
<i>Government of the Philippines/ ADG</i> I-Ratio –	there is no appeal on the merits for an Article 34 Application

Discretion

<i>Paklito</i> 1 I-Ratio	only if it is beyond doubt that the decision could be the same
	cited in <i>Apex Tech (CA), Zhanjiang, Haikou City, Hebei, Grand Pacific, X Chartering, CRW</i>
<i>Nanhai</i> I-Ratio -	where the applicant failed to raise objections to the tribunal an estoppel may apply in the exercise of discretion
	cited in <i>Jiangxi</i>

<i>Brunswick / Grand Pacific</i> I-Ratio -	a court may refuse to set aside an award notwithstanding a violation if the applicant for setting side enforcement proves the outcome could have been different
	cited in <i>Pang Wai, Po Fat, Triulzi</i>
<i>CRW</i> 1 I-Ratio	a court may refuse to set aside an award notwithstanding a violation if no prejudice has been sustained by the applicant
	Cited in <i>Triulzi</i>
<i>Triulzi</i> I-Ratio	Prejudice is merely a relevant factor in deciding whether the breach in question is serious and thus whether to exercise its discretionary power

Invalidity Ground

<i>Altain Khuder</i> 1 I-Ratio -	the award creditor has to prove on a prima facie basis that the award debtor is a party to the arbitration agreement and the court can decide this <i>de novo</i> where the tribunal had not made a ruling on the question
	Cited in <i>Armada</i>
<i>Astro</i> I-Ratio -	the existence of an arbitration agreement comes within this ground

Unable to Present Case

<i>Paklito</i> 2 I-Ratio	there is a minimum requirement of fairness and due process under this ground
	cited in <i>Shandong, Brunswick</i>
<i>Shandong</i> I-Ratio -	a party must show that it has been prejudiced to a significant degree in not being allowed to present its case such that the proceedings have been conducted unfairly
<i>Brunswick</i> 1 I-Ratio	a tribunal should not give evidence to itself and must give the parties an opportunity of addressing it on all material facts
	cited in <i>Pang Wai</i>
<i>Brunswick</i> 2 I-Ratio	a tribunal is not bound by the parties case on quantum
<i>Grand Pacific</i> 2 I-Ratio	a sufficiently serious error might be regarded as coming within this ground being one that undermined due process or that was serious or egregious
	cited in <i>Po Fat, X Chartering, Pang Wai, ADG, Triulzi</i>
<i>Pang Wai</i> I-Ratio -	a tribunal should not carry out its own investigation on primary facts or decide a case on a wholly new point of law or fact, without giving the parties a fair opportunity to address this
<i>AKM</i> I-Ratio -	a decision must be unexpected to such a degree that it can be said that the parties were truly deprived of an opportunity to argue it

ADG I-Ratio	‘full opportunity’ in Article 18 is no wider than a ‘reasonable opportunity’ to present a case
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Scope of Submission

<i>Asuransi 1</i> I-Ratio	a tribunal's negative ruling of jurisdiction cannot be set aside under this ground
<i>Asuransi 2</i> I-Ratio	the court must ascertain (a) the matters which were within the scope of submission and (b) whether the award involved such matters or whether a new difference irrelevant to the issues before the tribunal
	cited in <i>Sui Southern, CRW, Quarella SpA, TMM</i>
<i>CRW 2</i> I-Ratio	a failure to decide on issues in the scope of submission will come within this ground if it led to actual prejudice
	cited in <i>TMM, BLB, AKM, CRW</i> (second case)
<i>Quarella SpA</i> I-Ratio -	an error in interpreting a contract, including applying the wrong <i>lex contractus</i> , is not within this ground
<i>Grant Thornton</i> I-Ratio -	this ground should be construed narrowly to only include those decisions which are clearly unrelated to or not reasonably required for the determination of the subject disputes, matters or issues that have been submitted to arbitration
	cited in <i>S Co</i>
<i>TMM</i> I-Ratio -	an issue which surfaces in the course of the arbitration and is known to all the parties would be considered to have been

	submitted to the tribunal even if not part of the memorandum of issues or pleadings
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Scope of Procedure

<i>Brunswick 3</i> I-Ratio	a tribunal's failure to address all issues in an award is at most an error of law not within this ground
<i>Grand Pacific 2</i> I-Ratio -	a sufficiently serious error might be regarded as coming within this ground being one that undermined due process or that was serious or egregious
<i>Karaha Bodas 1</i> I-Ratio -	if the applicable arbitration rules require a reasoned award, a failure to give reasons for an award of damages would prima facie come within this ground
<i>S Co</i> I-Ratio -	this ground is not available where the applicant has failed to raise objection with the tribunal about non-compliance with the applicable rules

Public policy

<i>Re Hainan</i> I-Ratio -	to come within this ground there must be fraud, illegality or exceptional circumstances'
	cited in <i>Aloe Vera</i> , <i>Galsworthy</i> , <i>AJT</i>
<i>Hebei (Paklito)</i> I-Ratio -	the ground is to be construed narrowly and to be applied only where the enforcement would violate the forum State's most basic notions of morality and justice

	cited in <i>Shanghai City, Shantou Zheng, Shandong, Karaha Bodas, Aloe Vera, Xiamen, A v R, Galsworthy, Gao Hai Yan, Altain Khuder, AJU, Traxys, Granton, X Chartering, Hong Kong Golden Sources, Shanghai Fusheng, S Co, TCL</i>
<i>Karaha Bodas 2 I-Ratio -</i>	in cases of fraud the standard of proof requires a reasonable prospect of success to come within this ground
<i>Asuransi 3 I-Ratio -</i>	the ground encompasses a narrow scope and operates only where the upholding of the award would shock the conscience or is clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public or where it violates the forum's most basic notion of morality and justice
	cited in <i>VV, Dongwoo, A v R, Swiss Singapore, Sui Southern, Strandore, AJT, Rockeby, Beijing Sinozonto, Triulziu, TCL</i>
<i>AJT I-Ratio</i>	Findings of law relating to illegality/public policy of Singapore are reviewable
<i>Altain Khuder 2 I-Ratio</i>	The standard of proof in public policy cases is a balance of probabilities
	Cited in <i>Beijing Sinozonto</i>
<i>TCL I-Ratio</i>	The ground is limited to the fundamental principles of justice and morality of the state, recognising the international dimension of the context

Table 10

Enforcement and Setting Aside (Grounds Analysis) ('OT' means in this table overturned on appeal)

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Werner A. Bock KG v The N's Co Ltd	31 October 1977	HC	Enforcement	N	Y (OT)		Y (OT)		Y (OT)	
Werner A. Bock KG v The N's Co Ltd	4 May 1978	CA	Enforcement	N	N		N		N	Discretion should be exercised except where complaints of substance made out

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Tiong Huat Rubber Factory (SDN) BHD v Wah-Chang International (China) Co Ltd And Wah-Chang International (Hong Kong) Corp.	28 November 1990	HC	Enforcement	N		N				
Guangdong New Technology Import & Export Corp Jiangmen Branch v	23 August 1991	HC	Enforcement	N		N	N			

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Chiu Shing										
Shenshen Nan Das Industrial and Trade United Co Ltd v FM International Ltd.	2 March 1992	HC	Enforcement				N			No opening up of the merits – relying on van den Berg
Zhejiang Province Garment Import and Export Co v Siemssen & Co (Hong Kong)	2 June 1992	HC	Enforcement	N					N	

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Trading Ltd										
JJ Agro Industires (P) Ltd v Texuna International Ltd	3 August 1992	HC	Enforcement						Y (conditional)	Kidnapping a witness and forcing him to give false evidence can come within ground of violating most basic notions of morality and justice (US case of <i>Luminaires</i>)

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Qinhuangdao Tongda Enterprise Development Company v Million basic Company Ltd	5 January 1993	HC	Enforcement		N				N	No opening up of merits
Paklito Investment Ltd v Klockner East Asia Ltd	15 January 1993	HC	Enforcement		Y				N	There is a minimum requirement of fairness and due process under this ground.

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										<p>Discretion – a party can choose between setting aside or enforcement</p> <p>Discretion – public policy ground -relying on van den Berg only if it is beyond any doubt that the decision could have been the same would a serious violation be overridden</p>

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										Following <i>Parsons</i> public policy is to be construed narrowly and test is whether violates basic notions of morality and justice
Anhui Provincial Chemicals Import and Export Corp v Hua Qing (Hong	19 October 1993	HC	Enforcement	N						

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Kong) Development Ltd										
China Nanhai Oil Joint Service Corp Shenzhen Branch v Gee Tai Holdings	13 July 1994	HC	Enforcement				N			Discretion – estopped where did not complain about tribunal’s formation
Nanjing Cereals, Oils and Foodstuffs Import & Export Corp v Luckmate	16 December 1994	HC	Enforcement		N					

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Commodities Trading Ltd										
Wah Sin Electronics Industrial Company limited Fujian v Tan Lok t/a Wahton Company	14 March 1995	HC	Enforcement		N	N			N	No opening up of merits (followed <i>Qinhuangdao</i>)
Jiangxi Provincial Metal and Minerals Import and Export	6 April 1995	HC	Enforcement		N		N			On basis of estoppel ratio in <i>Nanhai</i>

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Corporation v Sulanser Company Ltd										
Re An Arbitration Between Hainan Import and Export Machinery Corp and Donald & McCarthy Pte Ltd	29 September 1995	SHC	Enforcement			N			N	To come within this ground there must be fraud, illegality or exceptional circumstances.
Apex Tech Investments Ltd v	15 March 1996	CA	Enforcement		Y					Discretion – if clear decision

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Chuang's Development (China) Ltd										could not have been different (following <i>Paklito</i>)
Zhanjiang City Qiming Industrial Coproaration v Fumei Ltd	11 November 1996	HC	Enforcement		Y (conditional)					Discretion – if clear decision would not have been different (following <i>Paklito</i>)
Haikou City	19 March	HC	Enforcement						N	Discretion –

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Bonded Area Wansen Products Trading Company v Logy Enterprises Ltd	1997									residual discretion relying on <i>Nanhai (Paklito)</i> No opening up the merits relying on <i>Shenzhen Nan Das</i>
Hebei Import and Export Corporation v Polytek Engineering Company Limited	15 May 1997	HC	Enforcement		N					

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Logy Enterprises Ltd v Haikou City Bonded Area Wansen Products Trading Company	6 June 1997	CA	Enforcement				N		N	
Shenzhen ACG Industrial Imp & Exp Corp v Authority Profit Ltd	4 July 1997	HC	Enforcement		N					

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Hebei Peak Harvest Battery Company Ltd v Polytek Engineering Company Ltd	27 October 1997	HC	Enforcement	N (OT)						
Hebei Import and Export Corporation v Polytek Engineering Co Ltd	16 January 1998	CA	Enforcement		Y (OT)				Y (OT)	Followed <i>Paklito</i> on the test for public policy No residual discretion for public policy ground

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Guangdong Overseas Shenzhen Co Ltd v Yao Shun Group International Ltd	16 February 1998	HC	Enforcement		Y					
Hebei Peak Harvest Battery Co Ltd v Polytek Engineering Co Ltd	10 March 1998	CA	Enforcement	Y (conditional)						If a party corporation had ceased to exist at the time of the arbitration agreement it would come

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										within this ground
Hebei Import and Export Corp v Polytek Engineering Co Ltd	9 February 1999	CFA	Enforcement		N				N	Residual discretion can still apply for public policy in appropriate circumstances (and did so in this case), citing <i>Nanhai (Paklito)</i> Test for public policy based on <i>Parsons</i> , basic

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										<p>notions of morality and justice.</p> <p>Apparent bias (distinguished from actual bias) not within this ground.</p> <p>No appeal on merits.</p>
Hallen v Angledal	10 June 1999	SC NSW	Enforcement	N						

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Medison Co Ltd v Victor (Far East) Ltd	8 April 2000	HC	Enforcement						N	
Commonwealth Development Corporation v Montague	27 June 2000	CA SCQ	Enforcement	N						
Sam Ming City Forestry Economic	6 July 2000	HC	Enforcement	N					N	

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Co v Liu Yuk Lin										
Tan Poh Leng Stanley v Tang Boon Jek Jeffrey	30 November 2000	SHC	Setting Aside							
Wuzhou Port Foreign Trade Dev Corp v New Chemic Ltd	8 December 2000	HC	Enforcement		N		N			No opening up of merits (followed <i>Qinhuangdao</i>)
Shanghai City	2 February	HC	Enforcement						N	Relied on <i>Hebei</i>

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Foundation Works Corp v Sunlink Ltd	2001									test. For public policy.
John Holland Pte Ltd v Toyo Engineering Corp	14 March 2001	SHC	Setting Aside		N	N			N	
Newspeed International Ltd v Citus Trading Pte Ltd	4 June 2001	SHC	Enforcement		N					

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Shenzhen City Tong Ying Foreign Trade Corporation Ltd v Alps Co Ltd	12 September 2001	HC	Enforcement	N						
Chongqing Machinery Import & Export Co Ltd v Yiu Hoi	11 October 2001	HC	Enforcement	N			N		N	
Shantou Zheng Ping Xu v Wesco Polymers Ltd	14 December 2001	HC	Enforcement	N		N			N	Relied on <i>Hebei</i> test for public policy.

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Shandong Textiles Import and Export Corporation v Da Hua Non-Ferrous Metals Company Ltd	6 March 2002	HC	Enforcement	N	N				N	a party must show that it has been prejudiced to a significant degree in not being allowed to present its case such that the proceedings or an important part of them, have been conducted unfairly relied upon <i>Qinhuangdao</i> and

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										<i>Pakilito</i> for public policy
Karaha Bodas Company LLC v Persusahaan Pertambangan Minyak Dan Gas Bumi Negara	27 March 2003	HC	Enforcement			N			N	Relied on <i>Hebei</i> test for public policy
Corvetina Technology Ltd v Clough	29 July 2004	SC NSW	Enforcement						Y (conditional)	

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Engineering Ltd										
Luzon Hydro Corp. (Phillipines) v Transfield Phillipines Inc (Philippines)	13 September 2004	SHC	Setting Aside				N			
PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA	20 Oct 2005	SHC	Setting Aside		N	Y (in part) (OT)			N	

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Aloe Vera of America Inc v Asianic Food (S) Pte Ltd	10 May 2006	SHC	Enforcement	N		N		N	N	Cited <i>Hebei</i> for public policy test.
Fairmount Development Pte Ltd v Soh Beng Tee & Co Pte Ltd	17 October 2006	SHC	Setting Aside			N				
Government of the Republic of the Philippines V	17 November 2006	SHC	Setting Aside		N	N			N	No appeal on the merits

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Phillipine International Air Terminals Co Inc										
PT Asuransi Indonesia (Persero) v Dexia Bank SA	1 December 2006	SCA	Setting Aside		N	N			N	Relied upon <i>Downer Connect</i> and <i>Parsons</i> for test for public policy. Errors of law or fact do not engage public policy. For scope of submission the

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										court must ascertain (a) the matters which were within the scope of submission and(b) whether the award involved such matters or whether a new difference irrelevant to the issues before the tribunal.

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Soh Beng Tee & Co Pte Ltd v Fairmount Development PTE Ltd	9 May 2007	SCA	Setting Aside							
Karaha Bodas Co LLC v Persusahaan Pertambangan	9 October 2007	CA	Enforcement			N			N	Cited <i>Hebei</i> for public policy test. In cases of fraud the standard of proof requires a reasonable prospect of success to come

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										within this ground.
VV v VW	24 January 2008	SHC	Setting Aside						N	Cited test for public policy in <i>Asuransi</i> .
Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH	8 May 2008	SHC	Setting Aside		N				N	No appeal on the merits Cited <i>Asuransi</i> for test for public policy.

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Xiamen Xingjingdi Group Ltd v Eton Properties Ltd	24 June 2008	HC	Enforcement						N	Cited <i>Hebei</i> test for public policy.
Karaha Bodas Co LLC v Perusahaan Pertambangan	5 December 2008	CFA	Enforcement			N	N		N	An award obtained by fraud comes within public policy ground. In cases of fraud the minimum standard of proof

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										<p>is a reasonable prospect of success.</p> <p>If the applicable arbitration rules require a reasoned award, a failure to give reasons for an award of damages would prima facie come within this ground</p>
Brunswick Bowling	10 February	HC	Setting Aside		Y (part)	N	N			A tribunal should

Case	Date	Court	Topic	Grounds						Uniformity Test
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and Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd	2009									<p>not give evidence to itself and must give the parties an opportunity of addressing it on all material facts.</p> <p>A tribunal is not bound by the parties position on quantum.</p> <p>A tribunal's failure to address all issues in the award is at most an error of law not amenable</p>

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										under this ground. Cited <i>Paklito</i> test for discretion
A v R	30 April 2009	HC	Enforcement						N	Cited <i>Hebei</i> test for public policy and then <i>Asuransi, Soh Beng Tee</i> and <i>Xiamen</i> . Developed test so that there must be substantial injustice arising

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										out of an award which is so shocking to the court's conscience as to render enforcement repugnant.
Xiamen Xingjingdi Group Ltd v Eton Properties Ltd	22 May 2009	CA	Enforcement						N	Enforcement proceedings not an opportunity to re-litigate tribunals award,

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										citing <i>Hebei</i> .
Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd	16 October 2009	SHC	Setting Aside						N	Fraud can be within public policy. Cited <i>Asuransi</i> for test for public policy.
Sobati General Trading LLC v PT Multistrada Arahsarana	28 October 2009	SHC	Setting Aside			N				

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd	23 February 2010	SHC	Setting Aside			N			N	<p>Cited test for public policy in <i>Asuransi</i>.</p> <p>Cited test for scope in <i>Asuransi</i>.</p> <p>No appeal on merits.</p>
Front Row Investment Holdings (Singapore) Pte Ltd	15 March 2010	SHC	Setting Aside							

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
v Daimler South East Asia Pte Ltd										
Denmark Skibstekniske Konsulenter A/S I Likvidation v Untrapolis 3000 Theme Park	9 April 2010	SHC	Enforcement	N			N			No appeal on the merits. Cited <i>Paklito</i> on estoppel.
Strandore Invest A/S v Soh kim Wat	14 May 2010	SHC	Enforcement						N	Cited test for public policy in <i>Asuransi</i> .

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
AJT v AJU	16 July 2010	SHC	Setting Aside						Y (OT)	<p>Cited test for public policy in <i>Asuransi</i>.</p> <p>For illegal contract it is necessary to show the contract was illegal and then that enforcement would shock the conscience etc (as per <i>Asuransi</i> test)</p>

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation	20 July 2010	SHC	Setting Aside			Y	N			Cited <i>Tiong Huat</i> facts as similar.
Cargill International SA v Peabody Australia Mining Ltd	11 August 2010	SCNS W	Setting Aside						N	
Galsworthy Ltd v Glory Wealth Shipping Pte Ltd	14 October 2010	SHC	Enforcement			N	N		N	Cited <i>Hebei</i> for public policy test.

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Gao Hai Yan v Keeneye Holdings Ltd	8 November 2010	CFI	Enforcement						Y (conditional)	Cited <i>Hebei</i> test for public policy.
Altain Khuder LLC v IMC Mining Inc	28 January 2011	SCV	Enforcement	N (OT)	N (OT)	N	N		N (OT)	Cited <i>Aloe Vera</i> as being relevantly similar. The burden is on the award debtor to prove any grounds including it was not a party

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										to the arbitration agreement: citing <i>Aloe Vera</i> and <i>Hebei</i> . Cited <i>Hebei</i> for public policy test. No appeal on merits: citing <i>Xiamen</i> (which in turn cited <i>Hebei</i> .)
Uganda Telecom Limited v Hi-Tech Telecom PTY Ltd	22 February 2011	FD	Enforcement	N	N	N	N		N	Cited <i>Parsons</i> for public policy test.

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Gao Hai Yan v Keeneye Holdings Ltd	12 April 2011	CFI	Enforcement						Y (OT)	Cited <i>Hebei</i> for ratio that refusal to set aside by supervisory court does not raise an estoppel re an application to resist enforcement on public policy grounds.

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Rockeby biomed Ltd v Alpha Advisory Pte Ltd	22 June 2011	SHC	Setting Aside						N	Cited <i>Asuransi</i> for public policy test. <i>Cited AJT</i> for test for establishing illegality.
Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd	29 June 2011	HC	Setting Aside		Y(OT)		Y(OT)			No appeal on merits citing <i>Apex</i> , <i>Qinhuangdao</i> and <i>Karaha Bodas</i> . Discretion - Is the court able to say

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										that it can exclude the possibility that if the violation established had not occurred, the outcome of the award would not be different? <i>Citing Paklito</i>
CRW Joint Operation v PT Perusahaan Gas Negara (Persero)	13 July 2011	CA	Setting Aside			Y				Cited <i>Asuransi</i> for scope of submission test:

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
TBK										<p>Failure to decide issues within the scope of submission will come within scope of submission ground if it lead to actual prejudice.</p> <p>Cited <i>Sui Southern</i> for errors of law or fact not enough to set aside.</p> <p>Discretion –</p>

Case	Date	Court	Topic	Grounds						Uniformity Test
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										slightly departed from <i>Paklito</i> – the discretion ought to be exercised only if no prejudice has been sustained by the aggrieved party.
Kempinski Hotels SA v PT Prima International Development	19 July 2011	HC	Setting Aside			Y (OT)				

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
AJU v AJT	22 August 2011	SCA	Setting Aside						N	Case law on enforcement regime re public policy is relevant to setting aside applications under the same ground. Cited Asuransi but seemed to restrict ratio to: to come within the public policy exception there must be

Case	Date	Court	Topic	Grounds						Uniformity Test
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										<p>exceptional circumstances (citing <i>Hainan</i>, <i>Aloe Vera</i> and <i>Galsworthy</i>) or a violation of the most basic notions of morality and justice (citing <i>Hebei</i>).</p> <p>A supervisory court cannot reopen a tribunal's finding of fact and/or law</p>

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										that a contract is valid and enforceable unless it found a contract to be illegal but enforceable under Singapore law.
IMC Aviation Solutions Pty Ltd v Altain Khuder LLC	22 August 2011	CASC V	Enforcement	Y					Y	the award creditor has to prove on a prima facie basis that the award debtor is a party to the arbitration

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										agreement and the court can decide this de novo where the tribunal had not made a ruling on the question The standard of proof for public policy is a balance of probabilities.
Gao Haiyan v	2 December	CA	Enforcement						N	Cited <i>Hebei</i> test

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Keeneye Holdings Ltd	2011									as leading authority.
Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)	23 March 2012	FC	Enforcement						N	Cited <i>Hebei</i> for public policy test.
PT Prima international Development v Kempinski Hotels SA	3 May 2012	SCA	Setting Aside			N				

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (In Liquidation) (No 1)	9 May 2012	CA	Setting Aside		N		N			No appeal on the merits. Only a sufficiently serious error might be regarded as coming within this ground being one that undermined due process or that was serious or egregious. Citing the Canadian case

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										of <i>Corporacion Transnacional</i> . Discretion – burden on applicant to prove it had been prejudiced and that the result would have been different.
Pang Wai Hak v Hua Yunjian	22 June 2012	HC	Setting Aside		N (Y but discretion					No appeal on the merits. Citing <i>Brunswick</i> and

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
					exercised on a separate plea)					<i>Grand Pacific.</i> The denial of due process must be serious or egregious. Citing <i>Grand Pacific.</i> It is within this ground if the tribunal carried out its own investigation on primary facts or decided a case on wholly new point of law or fact, without giving the

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										parties a fair opportunity to respond. Discretion cited <i>Grand Pacific</i> test.
Quarella SpA v Scelta Marble Australia Pty Ltd	27 June 2012	SHC	Setting Aside			N	N			An error in interpreting a contract, including applying the wrong <i>lex contractus</i> , is not

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										within these grounds
Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd	29 June 2012	FC	Enforcement	Y(OT)						
R v F	3 August 2012	HC	Setting Aside			N	N		N	No appeal on the merits.

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd	2 November 2012	F	Setting Aside						N	Cited <i>Hebei, Asuransi, Parsons</i> and <i>Deutsch Schafitbau</i> for test for public policy.
Granton Natural Resources Co Ltd v Armco Metals International Ltd	7 December 2012	HC	Enforcement						N	Cited <i>Hebei</i> test for public policy. Apparent bias not within ground. Citing <i>Hebei</i> .

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Grant Thornton International Ltd v JBPB & Co	5 April 2013	HC	Enforcement			N				The ground should be construed narrowly to only include those decisions which are clearly unrelated to or not reasonably required for the determination of the subject disputes, matters or issues that have

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										been submitted to arbitration
Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd	6 September 2013	Federal	Enforcement		N				N	
Dampskibsselskabet Norden A/S v Gladstone Civil Pty Ltd (Formerly Beach Building & Civil Group Pty	18 September 2013	FCFC	Enforcement	N						

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Ltd)										
TMM Division Maritime SA de CV v Pacific Richfield Marine Pte Ltd	23 September 2013	SHC	Setting Aside			N				No appeal on the merits. Cited <i>Asuransi</i> . For scope of submission test. An issue which surfaces in the course of the arbitration and is known to all the parties is within the submission

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										even if not part of any memorandum of issues of pleadings.
BLB v BLC	30 September 2013	SHC	Setting Aside			Y (OT)				<p>Errors of law or fact not within Article 34. Citing <i>Sui Southern</i>.</p> <p>This ground covers where the tribunal exceeds its authority or fails to exercise</p>

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										its authority by failing to decide matters submitted to it (<i>infra petitia</i>). Citing <i>CRW</i> .
Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd	30 September 2013	FCFC	Enforcement		N				N	
PT First Media TBK (formerly	31 October 2013	SCA	Enforcement	Y						Existence of an arbitration

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
known as PT Broadband Multimedia TBK) v Astro Nusantara International BV										agreement is subsumed under the invalidity ground.
Po Fat Construction Co Ltd v The Incorporated Owners of Kin Sang Estate	6 November 2013	HC	Setting Aside		N	N				An error under the unable to present case ground must be serious or egregious. Citing <i>Grand Pacific</i> . Discretion – cited

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										<i>Brunswick and Grand Pacific</i> for test. Cited <i>Grant Thornton</i> test for scope of submission ground.
Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium	14 November 2013	SHC	Enforcement						N	Cited <i>Asuransi</i> and the slight reformulation in <i>Galsworthy</i> for the test for public

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
(Singapore) Pte Ltd										policy.
Arima Photovoltaic & Optical Corp v Flextronics Computing Sales and Marketing (L) Ltd (appeal from BLB v BLC)	27 November 2013	CA	Setting Aside			N	N		N	
X Chartering v Y	3 March 2014	HC	Enforcement		N		N		N	No appeal on the merits citing <i>Grand Pacific</i> .

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										<p>Cited <i>Grand Pacific</i> test for unable to present case ground.</p> <p>Cited <i>Hebei (Paklito)</i> test on public policy and discretion.</p>
Shanghai Fusheng Soya-Food Co, Ltd v Pulmuone Holdings Co Ltd	25 April 2014	HC	Setting Aside						N	<p>Cited <i>Hebei</i> for test for public policy. Also cited <i>A v R</i> development of</p>

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										test. No appeal on merits, citing <i>Grand Pacific</i> .
Armada (Singapore) Pte Ltd v Gujarat NRE Coke Ltd	17 June 2014	FC	Enforcement				N		N	Cited <i>Altain Khuder</i> 1 I-Ratio as basis for court deciding jurisdiction
PT Perusahaan Gas Negara (Persero)	16 July 2014	SHC	Setting Aside			N	N			

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
TBK v CRW Joint Operation (Indonesia)										
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd	16 July 2014	FFC	Setting Aside						N	<p>Cited <i>Parsons, Hebei, Asuransi, Downer-Hill</i> and <i>Deutsche Schachtbau</i></p> <p>The ground is limited to the fundamental principles of</p>

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										justice and morality of the state, recognising the international dimension of the context
S Co v B Co	24 July 2014	HC	Setting Aside		N	N	N		N	Cited <i>Grant Thornton</i> for scope of submission test. Cited <i>Hebei</i> and <i>Gao Hai Yan</i> for: this ground is not

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										available where the applicant has failed to raise objection with the tribunal about non-compliance with the applicable rules.
BLC v BLB	30 July 2014	SCA	Setting Aside			N				No appeal on merits.
AKM v AKN	31 July 2014	SHC	Setting Aside		Y	Y				Cited natural justice test in <i>Soh</i>

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										<i>Beng Tee and LW Infrastructure</i> for unable to present case test. Cited <i>CRW</i> test for scope of submission ground.
Hong Kong Golden Source Ltd v New Elegant Investment Ltd	15 Sep 2014	HC	Enforcement						N	Cited <i>Hebei</i> for public policy test.

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd	30 October 2014	SHC	Setting Aside		N		N		N	<p>Cited <i>Brunswick/Grand Pacific</i> I-Ratio indirectly by citing <i>Grand Pacific CA obita dictum</i>, and <i>CRW</i> I-Ratio</p> <p>prejudice is merely a relevant factor that the supervising court considers in deciding whether</p>

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
										the breach in question is serious and, thus, whether to exercise its discretionary power cited <i>Grand Pacific</i> 2 I-Ratio cited <i>Asuransi</i> 3 I-Ratio
Astro Nusantara International BV v	17 February 2015	HC	Enforcement	N		N				Cited <i>Nanhai</i> I-Ratio and <i>Hebei</i> .

Case	Date	Court	Topic	Grounds						Uniformity Test
				Invalidity	Unable to Present Case	Scope of Submission	Scope of Procedure	Arbitrability	Public Policy	I-Ratio
PT First Media TBK (formerly known as PT Broadband Multimedia TBK)										Decision based on breach of duty of good faith.

Table 11

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