

Attracting International Arbitrations Through Adoption of Predictable and Transparent National Legislation Advantages of the UNCITRAL Model Law for an Aspiring Arbitration Seat

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¹ The views expressed in this article are strictly those of the authors and should not be attributed in any way to White and Case LLP.

1 Introduction

The selection of a seat of arbitration is an important, although sometimes neglected, decision for parties to an international (commercial) contract, as this decision may have a significant impact on the resolution of the parties' possible future disputes.

The seat of arbitration determines, among others, the national arbitration law that applies to the conduct of the arbitration or to any action for setting aside an arbitral award. It oftentimes also determines the law that applies to (or at least impacts) the validity of the arbitration agreement and it may influence the process and rights relating to enforcement proceedings.² Further, even if it is not necessary, hearings are generally held at the seat of arbitration.

Nowadays, states are competing over commercial disputes as they seek to attract those disputes to be decided within their respective jurisdictions. There are several reasons behind this phenomenon sometimes described as the "Battle of the Seats".³ Jurisdictions worldwide recognize that international arbitration is not only a means to attract business but also a means to build prestige.⁴ Hosting international arbitrations is a way to build a state's reputation as a modern, neutral and reliable jurisdiction, respectful of the rule of law. In addition, attracting international arbitration benefits the local legal community, namely the lawyers, arbitrators, and arbitral institutions, by increasing the demand of their services. The increase of arbitration proceedings seated in a certain state also naturally increases the amount of arbitration related case law and legal writing in that state, thus contributing to the development of the legal culture. And as the hearings are often conducted at the seat of arbitration, international arbitration creates business opportunities for the hospitality industry. Thus, arbitration is seen as an export product for many countries.

Furthermore, the increased popularity of arbitration⁵ can bring significant savings for the local court system, as directing commercial disputes to arbitration

2 For further discussion regarding the scope of application of the law of the seat, *see, e.g.* Born, Gary B., *International Arbitration: Law and Practice* (Second Edition), 2015, p. 111–128 and Born, Gary B., *International Commercial Arbitration* (Second Edition), 2014, p. 1535–1598.

3 *See, e.g.* Dias Simões, Fernando, *Is Legal Reform Enough to Succeed in the 'Battle of the Seats'*, Kluwer Arbitration Blog, 30 September 2014, "kluwerarbitrationblog.com/2014/09/30/is-legal-reform-enough-to-succeed-in-the-battle-of-the-seats/" (accessed 21 December 2016); or Olson, Elizabeth, *Cities Compete to Be the Arena for Global Legal Disputes*, The New York Times, 11 September 2014, "dealbook.nytimes.com/2014/09/11/cities-compete-to-be-the-arena-for-global-legal-disputes/?php=true&_type=blogs&_r=1" (accessed 21 December 2016). *See also*, Seraglini, Christophe, Nyer, Damien, Templeman, John, and de Ferrari, Lucas, *The Battle of the Seats: Paris, London or New York?*, 6 December 2011, "www.whitecase.com/publications/article/battle-seats-paris-london-or-new-york" (accessed 21 December 2016).

4 Dias Simões, Fernando, *Commercial Arbitration between China and the Portuguese-Speaking World*, Kluwer Law International 2014 ("*Dias Simões 2014*"), p. 64.

5 As noted by Mr. Christopher R. Seppälä, the number of cross-border commercial contracts containing arbitration clauses and international treaties favoring arbitration has increased and, thus, the number of cases submitted to international arbitration has drastically grown,

may save ordinary courts' time and resources. This is particularly relevant as in many countries international commercial disputes are not ideally suited for ordinary courts due to their possible scale and complexity and the courts' possible unfamiliarity with the issues that oftentimes arise – starting from questions of conflicts of laws that may lead to the application of a foreign law.

Several attempts have been made in the course of the years to measure the economic benefits of arbitration for a seat. For instance, the authors of a study published in 2012 estimated that the total impact that arbitration would bring to the economy of the City of Toronto in 2013 would range around CAD 273 million (*i.e.* approximately EUR 185 million).⁶ Even if critics have questioned the estimated figures that different studies have attributed to the economic gain arbitration is said to generate, there is little doubt that attracting international arbitration benefits countries in multiple ways.

This article will analyze the role that a country's national arbitration law plays in the selection of a seat and what factors weigh in favor of one national arbitration law over another. The article will particularly focus on the advantages that an aspiring arbitration seat can gain from adopting the United Nations Commission on International Trade Law's (*UNCITRAL*) Model Law on International Commercial Arbitration (the "*UNCITRAL Model Law*"), adopted by *UNCITRAL* and approved and recommended by the General Assembly of the United Nations in 1985 and amended to take its current form in 2006.⁷

Finland will be used as a practical example as, despite Finland's strong reputation as a neutral state with a functioning legal system and despite its advantageous geographical location between east and west and close to the Baltic countries, Finland does not attract many international arbitration

especially since 1970. Seppälä, Christopher R., *Why Finland Should Adopt the UNCITRAL Model Law on International Commercial Arbitration*, *Liikejuridiikka* 3/2016, p. 190–191.

6 Charles River Associates, *Arbitration in Toronto: An Economic Study*, 2012, p. 3–4. For the entire study, see "www.crai.com/sites/default/files/publications/Arbitration-in-Toronto-An-Economic-Study.pdf" (accessed 21 December 2016). On average, the survey respondents estimated the parties' total expenditures related to an arbitration to be approximately CAD 600,000, which resulted in an estimated total direct expenditure of CAD 256.3 million in 2012. The total impact of arbitration in 2013 was estimated based on the survey respondents' reporting large growth in arbitration activity and their expecting the growth to continue in 2013. According to the survey, these expenditures include direct legal fees, arbitrator expenses, arbitral institution expenses, expert witness expenses, external document management expenses, reporting services, translation services, and other miscellaneous expenses, such as meals, travel, and accommodations. However, as noted in the survey, the total impact of international arbitration activity cannot be measured based on the direct expenses only as the arbitration activity attracts also other visitors and builds the general reputation of the city.

7 Resolution of the General Assembly of the United Nations 40/72, *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*, 1985; Resolution of the General Assembly of the United Nations 61/33, *Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958*, 2006.

proceedings. This article will discuss the possible reasons behind that phenomenon and address ways to remedy to it.

2 Which Seats Are Preferred and Why?

According to a survey conducted by Queen Mary University of London in 2015,⁸ the most preferred and most widely used arbitration seats are (in the same order for both indicators) London, Paris, Hong Kong, Singapore, Geneva, New York and Stockholm.⁹ In comparison, in a similar survey conducted in 2010, the respondents stated London, Geneva, Paris, Tokyo, Singapore and New York as their most preferred seats.¹⁰

From an aspiring seat's perspective, the interesting question is what the most preferred and most used seats have in common. Some of the above listed seats, such as Paris and London, are traditional arbitration hubs that have a long history of hosting international arbitral proceedings. In addition, some of the world's most well-known arbitration institutions are located in these cities. But alongside these traditional hubs, "new arbitration centers" have emerged in recent years, particularly in Asia.

Interestingly, the percentage of respondents that identified a (relatively) new and upcoming arbitration seat, such as Hong Kong or Singapore, as their preferred seats exceeded the percentage of respondents that identified those seats as their most commonly used seats. This suggests that the new seats may attract users in even greater numbers in the future.¹¹

The respondents in the 2015 International Arbitration Survey were asked why the most used seats were selected the most often. They identified the 'reputation and recognition of the seat' as the overriding reason (65 percent), followed by the 'law governing the substance of the dispute' (42 percent), and the 'particularities of the contract/type of dispute (likely to arise)' (33 percent).¹² These results support the conclusion that the parties want to arbitrate in a place the legal system of which they trust – *i.e.* at a seat with a good reputation, in

8 Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (the "2015 International Arbitration Survey"). The 2015 International Arbitration Study is an empirical study the objective of which was to collate the views of a comprehensive range of stakeholders on improvements and innovations, both past and potential, in international arbitration. The survey was conducted over a six month period and comprised two phases: an online questionnaire completed by 763 respondents (quantitative phase) and, subsequently, 105 personal interviews (qualitative phase). For the entire study, please see "www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf" (accessed 21 December 2016).

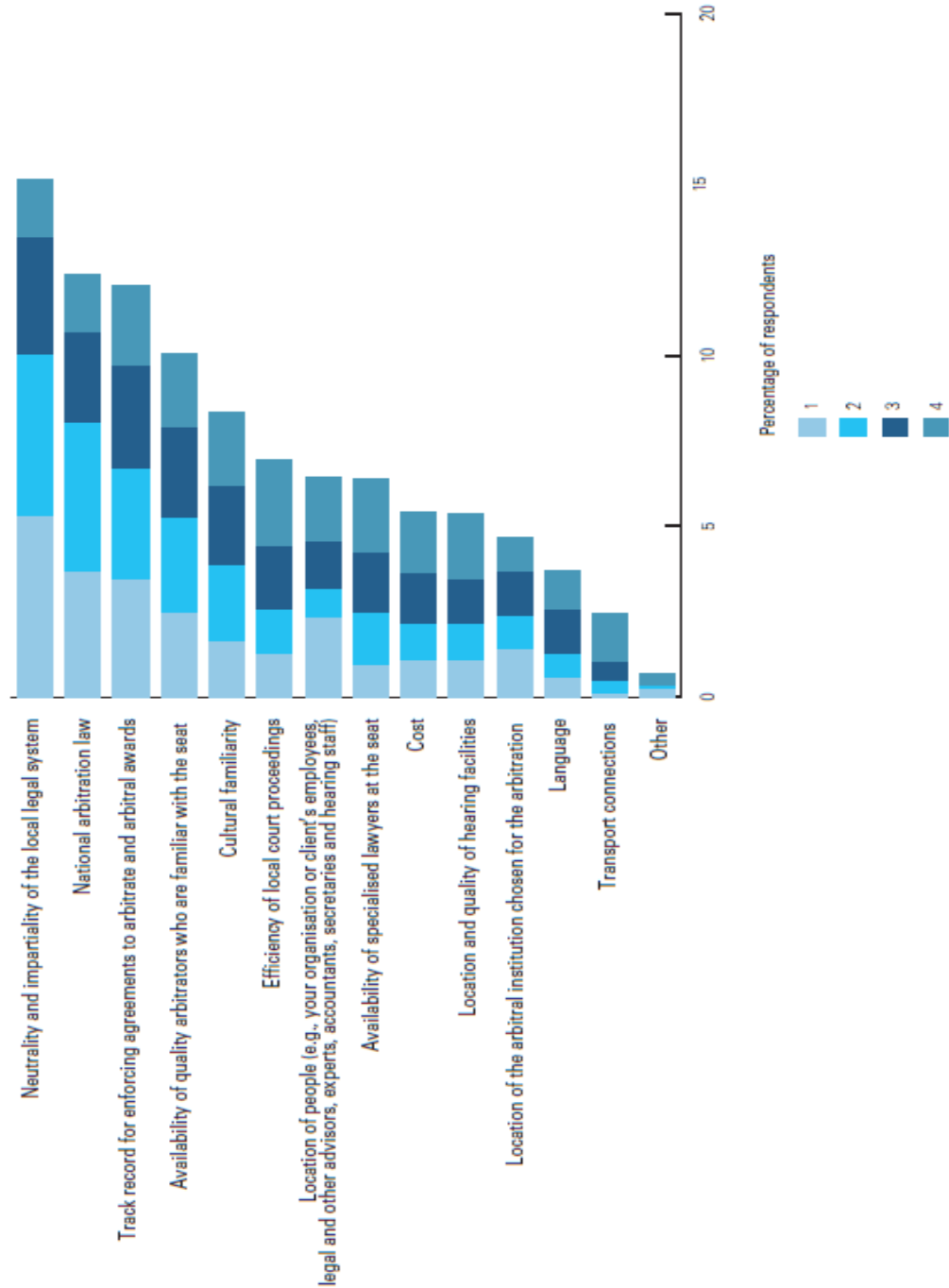
9 2015 International Arbitration Survey, p. 12.

10 Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration* (the "2010 International Arbitration Survey"), "www.arbitration.qmul.ac.uk/docs/123290.pdf", (accessed 21 December 2016), p. 19.

11 2015 International Arbitration Survey, p. 12.

12 2015 International Arbitration Survey, p. 13.

which the parties can be certain that their arbitration agreement will be enforced¹³ the proceedings will receive support from the local court system where needed, and the award will be recognized pursuant to local laws.



Source: 2015 International Arbitration Survey, p. 14.

13 In practice, this should lead the parties to a state that has ratified the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “*New York Convention*”) and that has case law enforcing Article II of that Convention.

In the 2015 International Arbitration Survey, the respondents were also asked which seats have improved the most and in what ways. The reasons why some seats were considered to have improved centered mainly on elements of convenience, such as quality of hearing facilities and only one out of the five most important reasons for improvement of certain seats related directly to the formal legal infrastructure (*i.e.*, improvements to the national arbitration law).¹⁴

When this data is compared with the reasons the respondents stated as grounds for selecting a certain seat or preferring a certain seat over another (discussed above), it appears that the factors of convenience become important once a seat's formal legal infrastructure has reached a certain threshold of quality:¹⁵ the seats are selected and preferred on the basis of their reputation, neutrality, local arbitration laws, and their track record in enforcing agreements and awards.

Hong Kong rising among the top five most preferred seats of arbitration after its reformed arbitration law expanding the UNCITRAL Model Law's application to all arbitrations seated in Hong Kong¹⁶ entered into force in June 2011 would seem to confirm this conclusion: this development suggests that a rising seat gains most from a legislative reform when seeking to attract arbitrations.¹⁷

It is only once this foundation has been laid that the seats benefit from building better hearing facilities and improving their hospitality services. London, Paris and New York appear to fit this model: these seats have been well-established for decades and have now been building upon that foundation.¹⁸

As a conclusion, new, aspiring seats should primarily focus on developing their formal legal infrastructure as that structure, if it creates a predictable legal framework, is essential for a jurisdiction to attract international arbitrations. Improvements to the national arbitration law are especially important for seats with an internationally less known legal regime. In addition, improvements to the legal framework are a relatively rapid and cheap technique for countries to draw international commercial opportunities.¹⁹

14 2015 International Arbitration Survey, p. 15–16.

15 2015 International Arbitration Survey, p. 16–17.

16 Except if the 'opt-in' provisions under Schedule 2 to the Arbitration Ordinance, Cap. 609 are to be applied.

17 In the 2010 International Arbitration Survey, Hong Kong did not figure on the list of preferred seats, whereas based on the results of the 2015 International Arbitration Survey, Hong Kong has established its position as a reputable and well-functioning seat.

18 *See also*, 2015 International Arbitration Survey, p. 16–17.

19 O'Hara, Erin and Ribstein, Larry E., *The Law Market*, Oxford University Press 2009, p. 98.

3 Achieving Predictability through Adoption of the UNCITRAL Model Law

3.1 What is the UNCITRAL Model Law?

The UNCITRAL Model Law is considered as “the single most important legislative instrument in the field of international commercial arbitration”.²⁰ Its ultimate goal is to “facilitate international commercial arbitration and to ensure its proper functioning and recognition”.²¹ It “is designed to assist states in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration”.²²

The Model Law covers all stages of an arbitral process, including the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the extent of court intervention, the recognition and enforcement of the arbitral award. Furthermore, the Model Law is compatible with the New York Convention.²³ The Model Law can be adopted by a country in its entirety or a country can choose to depart from certain of its provisions.

According to the report of the UN Secretary-General, the freedom of the parties was considered as one of the most important principles when creating UNCITRAL Model Law.²⁴ Indeed, the UNCITRAL Model Law is “recognized worldwide as a legal point of reference that grants parties maximum autonomy while limiting the intervention of local courts to extreme cases”.²⁵ This freedom may, however, be limited by local mandatory provisions, designed to prevent or to remedy certain major defects in the procedure, any instance of denial of justice or violation of due process.²⁶ In addition, the UNCITRAL Model Law provides the parties with supplementary rules that are designed to avoid uncertainty about, or controversy over, the smooth functioning of the arbitration proceedings.²⁷

UNCITRAL maintains a list of states and jurisdictions that have adopted the UNCITRAL Model Law (the so-called “*Model Law countries*”). There are no fixed criteria for a country to be considered as a Model Law country but

20 Born 2014, p. 133.

21 UNCITRAL, *Report of the Secretary-General: possible features of a model law on international commercial arbitration*, U.N. Doc. A/CN.9/207, 1981, p. 77.

22 UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, “www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html” (accessed 21 December 2016).

23 For example, as noted in the explanatory note by the UNCITRAL Secretariat, the grounds on which recognition or enforcement may be refused under the UNCITRAL Model Law are identical to those listed in article V of the New York Convention. See, UNCITRAL, *Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006*, p. 37.

24 UNCITRAL 1981, p. 78.

25 Dias Simões 2014, p. 56.

26 UNCITRAL 1981, p. 78.

27 UNCITRAL 1981, p. 77.

generally speaking the national legislation of the jurisdiction should include the key elements of the UNCITRAL Model Law and not go against its spirit and purpose.²⁸ Today, the UNCITRAL Model Law has been adopted in 73 states in a total of 103 jurisdictions.²⁹ In addition, the UNCITRAL Model Law has set the standard for many other jurisdictions, such as Sweden and Finland, which are not considered as Model Law countries but have sought to align their legislations with the premises of the Model Law. Of the seven most preferred seats listed in the previous section, Hong Kong and Singapore are listed as Model Law countries.

3.2 *Why Should an Aspiring Arbitration Seat Adopt the UNCITRAL Model Law?*

For traditional seats, providing a predictable legal framework to the users of international arbitration is hardly a challenge: these seats have the required reputation and recognition, and their long operating history has often resulted in extensive case law and legal literature, making familiarizing oneself with the legal system easy. Achieving a reputation as a predictable and trustworthy seat with functioning formal legal infrastructure is, however, a lot more difficult for aspiring new arbitration seats that have not yet had their breakthrough in the highly competitive international arbitration market. There is often very little of or even no case law available to the parties in order to forecast, for example, whether their agreement will be enforced or the proceedings receive the support from the local court system where needed. Further, familiarizing oneself with an unknown legal regime is time- and, thus, money-consuming and even after extensive investigation, there is always a risk of unwanted surprises resulting from local idiosyncrasies – particularly if the legal system is not well established or well known to its users.

One remedy to this problem is to adopt a clear and predictable legislation which is familiar to the users of international arbitration, a prime example being the UNCITRAL Model Law. This is because the seat's statutory environment must be easily accessible, clear, and in compliance with the international practice to attract international arbitration proceedings. Indeed, the predictability discussed several times in this article results from the stability, transparency and foreseeability in the application of the national law and the UNCITRAL Model Law serves this purpose as it provides a “safe and approved” model and tested structure that parties, or at the least their advisers, are usually familiar with.³⁰ Potential users may rely on a minimum legislative standard in the adopting state,

28 Sorieul, Renaud, *UNCITRAL Seminar: The Role of UNCITRAL in International Arbitration*, held on 16 July 2012.

29 UNCITRAL, *Status - UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, “www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html” (accessed 21 December 2016).

30 Born 2014, p. 138.

in contrast to the danger of unwanted legal surprises in an unknown jurisdiction.³¹

Further, the UNCITRAL Model Law provides a pro-arbitration legal framework while offering countries a low-cost standard to upgrade their arbitration laws. Thus, adopting the UNCITRAL Model Law saves an enacting state from “the strenuous and time-consuming task of drafting its own law”.³² In the same vein, the UNCITRAL Model Law remedies to a great extent to one of the major issues for countries that do not have a long tradition of hosting international arbitration proceedings, namely the lack of case law and doctrine. The UNCITRAL Model Law has been the subject of a substantial amount of case law and commentary that make its application predictable.

A good example of the UNCITRAL Model Law’s power to enhance a seat’s reputation can be found in Hong Kong. Hong Kong was the first Asian jurisdiction to adopt the 2006 version of the UNCITRAL Model Law in 2010 (with entry into force in 2011). Before that date, Hong Kong’s national arbitration law had a split regime under which the UNCITRAL Model Law applied only to international cases.³³ Under the current arbitration law, the Model Law applies to all arbitrations that are seated in Hong Kong, which is hoped to enhance foreign parties’ and practitioners’ confidence to choose Hong Kong as the seat of arbitration.³⁴ In addition, the unitary regime should “avoid the often complicated issue of which regime governs a particular dispute”.³⁵ Pursuant to the Consultation Paper prepared by the Department of Justice, an important consideration behind the reform was that “Hong Kong should also be clearly seen as a Model Law jurisdiction as the Model Law is familiar to practitioners from civil law as well as common law jurisdictions, thereby attracting more business parties to choose Hong Kong as the place to conduct arbitral proceedings”.³⁶ Overall, the revision of the national arbitration law was internationally greeted with open arms and Hong Kong figures today among the most preferred seats (see above). Hong Kong’s willingness to be among the first jurisdictions to adopt the revised version of the UNCITRAL Model Law can also be seen as an important message to the international arbitration community of Hong Kong’s supportive attitude towards international arbitration.

Adopting the UNCITRAL Model Law does not, however, automatically make a country attractive for arbitration. Despite having adopted the UNCITRAL Model Law, some countries, such as Australia and Ireland, have

31 Binder, Peter, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd Edition, Sweet & Maxwell 2009, p. 13.

32 *Ibid.*

33 The UNCITRAL Model Law has applied to international arbitration in Hong Kong since 4 April 1990.

34 Arbitration Ordinance, Cap. 609, Section 5; Fan, Kun, *The New Arbitration Ordinance in Hong Kong*, *Journal of International Arbitration*, Volume 29 Issue 6, 2012, p. 717.

35 Fan 2012, p. 717; see also, *Report of Committee on Hong Kong Arbitration Law*, 30 April 2003, p. 19.

36 Department of Justice, *Consultation Paper, Reform of Arbitration in Hong Kong and Draft Arbitration Bill*, December 2007, p. 4.

not (yet) been able to become leading arbitration seats.³⁷ This is because, as shown in the 2015 International Arbitration Survey, there are multiple other factors that affect the parties' choice of seat, such as cultural familiarity and location and quality of hearing facilities.³⁸ But the conclusion remains that parties want to avoid the risk of unwanted legal surprises resulting from local idiosyncrasies and in this regard UNCITRAL Model Law provides an excellent option.

4 Why has Every Country not Adopted the UNCITRAL Model Law and Should an Aspiring Seat Follow that Lead?

As adopting UNCITRAL Model Law provides several advantages, it is noteworthy that the world's leading arbitration centers, including France, England, Switzerland, the United States and Sweden, have not adopted the UNCITRAL Model Law. Adopting the UNCITRAL Model Law has been considered and debated in each of these jurisdictions but, in the end, the legislators have decided in favor of alternative solutions.³⁹ Several reasons explain these arbitration centers success despite their maintaining arbitration laws with local particularities.

First, these countries have a long tradition in international arbitration and they had established their position as reputable and well-functioning seats even before the UNCITRAL Model Law started to be adopted increasingly throughout the world. A significant amount of case law on national and international proceedings has been created during their history. Therefore, the requirements of predictability and transparency are fulfilled, despite "local idiosyncrasies" that are looked at with suspicion in the legislation of less well-known seats.

Second, some of these jurisdictions provide an even more liberal legislation than the UNCITRAL Model Law does. The criticism that some practitioners in these countries have formulated against the UNCITRAL Model Law is that the law is an overly-detailed and conservative basis for national arbitration legislation.⁴⁰ Indeed, for instance the French legislation is more liberal towards international arbitration than the UNCITRAL Model Law and, thus, adopting the Model Law would have decreased its pre-existing "arbitration friendliness". Therefore, in 2011, France reformed its old legislation by, *inter alia*, codifying the international arbitration case law that French courts had been applying since

37 See, e.g. Tomkinson, Deborah and Barhoum, Margaux, *Arbitration World International Series: Australian Centre for International Commercial Arbitration Chapter*, Thomson Reuters 2015, p. 28. According to the report, ACICA's caseload shows an increasing number of foreign parties choosing Australian seats. However, there *seems* to be no evidence that adopting the UNCITRAL Model Law could be identified as the single most influential factor for this increase.

38 2015 International Arbitration Survey, p. 14.

39 Born 2014, p. 138–139.

40 Born 2014, p. 138–139.

the previous reforms of 1980 and 1981.⁴¹ Thus, the French example does not constitute a valid point of comparison for new, aspiring arbitration seats as France is, and was at the time of the legislative reform, an old arbitration seat with a long tradition of being very arbitration friendly.

As noted by Mr. Seppälä, being recognized as a Model Law country by UNCITRAL is important for an aspiring seat.⁴² Thus, adopting the UNCITRAL Model Law without significant changes is often a more advisable option than aiming at drafting an even more liberal and arbitration-friendly legislation. This is because for an aspiring seat of arbitration, international arbitral institutions' and foreign users' perception of the seat's national arbitration law is of utmost importance.⁴³ And those institutions and users will not be willing to spend an extensive amount of time familiarizing themselves with a new seat's national arbitration law.

5 Case Study on Finland

5.1 Why Arbitrate in Finland?

Finland is a prime example of an aspiring arbitration seat. It has a developed legal culture and it is considered as a neutral, safe and accessible country. In World Justice Project's Rule of Law Index 2016, which intends to measure how the rule of law is experienced in practical, everyday situations by ordinary people around the world, Finland ranked third – right behind Denmark and Norway and above Sweden.⁴⁴ Finland's high education level and Finns' generally high knowledge of languages – most Finns speak at least Finnish, Swedish and English – contribute to the availability of qualified arbitrators and counsel for arbitral proceedings. In addition, Finland has ratified the New York Convention without any declarations or reservations as early as in 1962.⁴⁵

The Arbitration Institute of the Finland Chamber of Commerce (the “FAI”), established in 1911, is one of the world's oldest arbitration institutes. The FAI has been active in promoting arbitration in Finland: the Arbitration Rules of the Finland Chamber of Commerce (the “FAI Arbitration Rules”) and the Rules for Expedited Arbitration of the Finland Chamber of Commerce were both revised in 2013 to be fully consistent with the best international norms and practices and their revision was preceded by a wide consultation of international arbitration practitioners. Finland has an active arbitration community and the popularity of arbitration-related events seems to grow annually.

41 Carducci, Guido, *The Arbitration Reform in France: Domestic and International Arbitration Law*, Arbitration International, Vol. 28, No. 1, 2012, p. 125.

42 See, Seppälä 2016, p. 209.

43 See, Seppälä 2016, p. 198.

44 World Justice Project, *Rule of Law Index*, 2016, “<http://worldjusticeproject.org/rule-law-around-world>” (accessed 21 December 2016).

45 New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, *Contracting States*, “www.newyorkconvention.org/countries” (accessed 21 December 2016).

Nevertheless, Finland still attracts significantly fewer international arbitration proceedings than, for example, Sweden or Denmark. As the Secretary General of the ICC International Court of Arbitration, Mr. Andrea Carlevaris, noted in his closing speech at the Helsinki International Arbitration Day in May 2016, the ICC International Court of Arbitration has not selected Helsinki once as the seat for an arbitration in the last ten years.⁴⁶ According to him, an important reason for this was the Finnish national arbitration law being outdated and unpredictable.

5.2 *Finnish Arbitration Act*

Arbitration in Finland is governed by the Finnish Arbitration Act (967/1992, as amended), which entered into force in 1992. The Act applies to all arbitral proceedings seated in Finland and applies to both national and international proceedings. The Act is influenced by the original text of the UNCITRAL Model Law from 1985 but it is not based on the UNCITRAL Model Law. The substantive differences between the UNCITRAL Model Law and the Finnish Arbitration Act relate to their respective scopes of application, their form requirements that apply to the arbitration agreements, challenge of arbitrators, arbitrators' decision on jurisdiction and interim measures.

Only minor changes have been made to the Finnish Arbitration Act since its enactment. Major amendments to the Act are currently not contemplated, although discussion about revising the Act is ongoing. This is facilitated by Sweden currently amending its Arbitration Act, as Finland often follows the trends in other Nordic countries. Therefore, it is possible that the Finnish Arbitration Act will be revised in the foreseeable future, especially as the Finnish Arbitration Act is based on the Swedish Arbitration Act to some extent.

Such a revision would be welcome as there are several parts of the current Finnish Arbitration Act that should be revised – as the former Finnish Supreme Court Justice, Mr. Gustaf Möller has recently acknowledged.⁴⁷ For instance, as the Finnish Arbitration Act is relatively old, certain provisions are clearly outdated and are not consistent with international practice, such as its references to the Finnish Code of Judicial Procedure.⁴⁸ In addition, the Finnish Arbitration Act refers to some parts of the Finnish Code of Judicial Procedure that have been revised since the enactment of the Arbitration Act.⁴⁹ Yet, as Mr. Möller notes,

46 The ICC has selected Sweden as the place of arbitration 12 times and Denmark as the place of arbitration 10 times over the same period. Seppälä 2016, p. 198. As noted by Mr. Seppälä, Finnish parties are, however, increasingly involved in ICC arbitration. Seppälä 2016, p. 199.

47 See, Möller, Gustaf, *Behovet av en översyn av Finlands lag om skiljeförfarande*, JFT 5-6/2015, p. 408-419. In his article, Mr. Möller does not support adopting the UNCITRAL Model Law in Finland. However, he clearly concludes that various provisions of the Finnish Arbitration Act should be amended to correspond to the UNCITRAL Model Law.

48 See, e.g. Finnish Arbitration Act (967/1992; as amended), Sections 10 and 49.

49 For example, pursuant to Section 49 of the Finnish Arbitration Act, unless otherwise agreed by the parties, compensation of the other party's costs shall be ordered in accordance with the provisions of the Code of Judicial Procedure dealing with compensation for legal costs.

many of these provisions are not suitable for arbitration and, therefore, the provisions of the Finnish Arbitration Act are somewhat troublesome in this regard.⁵⁰ Even though Section 49 of the Arbitration Act includes a reservation that the Code of Judicial Procedure should be applied only “as appropriate”, the outdated provisions cause unnecessary confusion.

The Finnish Arbitration Act also gives rise to unpredictability, as there is very little case law and legal literature on the Finnish Arbitration Act. For example, pursuant to the FAI Arbitration Rules, arbitrators are allowed to grant interim measures. Yet, the Finnish Arbitration Act does not include any provisions on interim measures granted by an arbitral tribunal. As, at least to these authors’ knowledge, there is no case law regarding interim measures granted by an arbitral tribunal in Finland, it remains unclear whether such measures could be enforced in Finnish courts.

5.3 *Should Finland Follow the Swedish Lead?*

Even if the FAI has been in operation for a few years longer than the Arbitration Institute of Stockholm Chamber of Commerce (the “SCC”) (the FAI was established in 1911, whereas the SCC followed in 1917), Finland has been less successful than Sweden in attracting international arbitration proceedings.⁵¹ In 2015, SCC administered 181 new cases, whereas FAI received only 52 requests. Parties from 37 different countries chose to resolve their disputes with the SCC in 2015. For FAI the same number was 14 and a clear majority of the parties were Finnish.⁵²

In 2014, Sweden launched the revision work of its Arbitration Act, with the aim of increasing Sweden’s attractiveness as a venue for dispute resolution, especially for foreign parties and other foreign actors.⁵³ A committee was given the task of assessing how well the Swedish Arbitration Act has worked in

However, numerous exceptions to the general rule that “costs follow the event” have been included in the Code of Judicial Procedure since the Finnish Arbitration Act was enacted. See, Section 49 of the Finnish Arbitration Act: “*Unless otherwise agreed by the parties, the arbitrators may, in their award or in any other decision concerning the termination of the arbitration proceedings, order a party to compensate, in whole or in part, the other party for his or her costs in the arbitration proceedings, in accordance, as appropriate, with the provisions of the Code of Judicial Procedure on the compensation for legal costs.*”

50 Möller 2015, p. 415.

51 Arbitration Institute of the Stockholm Chamber of Commerce, *SCC Statistics*, <http://www.sccinstitute.com/statistics/>, (accessed 21 December 2016); and The Finland Arbitration Institute, *Statistics*, “arbitration.fi/the-arbitration-institute/statistics/”, (accessed 21 December 2016). Although the location of the institute does not determine the seat of arbitration, a link between these two factors oftentimes exists. As described by Mr. Fernando Dias Simões, “[i]n the global ‘battle of the seats’, success is measured by how effective arbitral institutions are in transforming their jurisdiction into a hub for arbitration, where parties are willing to go in case any dispute arises”. Dias Simões 2014, p. 73.

52 For FAI cases, 104 out of 122 parties were Finnish, whereas for SCC 123 out of 291 were Swedish.

53 Statens offentliga utredningar, *Översyn av lagen om skiljeförfarande – SOU 2015:37*, Stockholm 2015, p. 11.

practice and how it measures up internationally. The new legislation was originally supposed to enter into force in July 2016. However, the revision process is still ongoing. One question that was considered already in 1998, in the preparatory works of the current Swedish Arbitration Act (SFS 1999:116) which entered into force in 1999, was the extent to which it should build on the UNCITRAL Model Law. The deliberations led to the conclusion that the Swedish Arbitration Act should not be directly based on the UNCITRAL Model Law.⁵⁴ However, it was considered important to take into account the provisions of the UNCITRAL Model Law in every aspect.⁵⁵

Several provisions of the Swedish Arbitration Act are proposed to be amended to correspond to the 2006 version of the UNCITRAL Model Law, as well as international best practices.⁵⁶

As the Finnish Arbitration Act has been influenced by its Swedish equivalent, the Swedish revision work highlights the need for similar actions in Finland. It is also noteworthy that the current Swedish Arbitration Act dates only back to 1999, whereas the Finnish Act was enacted in 1992 – yet, no revision procedure has been started in Finland. Considering the substantial differences in the Swedish and Finnish arbitration tradition and current market, reliance on the Swedish example to avoid adopting the UNCITRAL Model Law in Finland is, however, unwarranted.

It is clear that the Finnish Arbitration Act in its current form does not reflect the international best practices and, in order to promote arbitration in Finland, the legislation should be replaced. An easy and efficient way would be to adopt the UNCITRAL Model Law without significant changes⁵⁷ – in particular as Finland already has all, or at least most, of the other attributes required from a desired seat of arbitration.

54 Regerings proposition 1998/99:35 Ny lag om skiljeförfarande, Stockholm 1998, p. 43.

55 *Ibid.*

56 For example, the current Swedish Arbitration Act distinguishes between the grounds for invalidity and grounds for setting aside an arbitral award. As noted in the committee report on revision of the Swedish Arbitration Act, such distinction is not found in any other jurisdiction than Sweden and Finland. Statens offentliga utredningar, *Översyn av lagen om skiljeförfarande – SOU 2015:37*, Stockholm 2015, p. 17 and 124. Under the provision on invalidity of arbitral awards, an arbitral award could be declared invalid on certain public policy grounds without any time limits (Section 33 of the current Swedish Arbitration Act). Under the proposed new Swedish Arbitration Act, the public policy rule would be a ground for setting aside an arbitral award and the application should be done within the general time limits for an application to set aside an arbitral award. The provision on invalidity of arbitral awards would be repealed. It is noteworthy that, after revision of the Swedish Arbitration Act, Finland will be the only jurisdiction that distinguishes between the grounds for invalidity and setting aside an arbitral award and providing no time limit for declaring an arbitral award invalid on certain public policy grounds.

57 As described by Mr. Seppälä, adoption of the UNCITRAL Model Law without significant change is necessary in order to optimize the positive perception in the international community. *See*, Seppälä 2016, p. 209.

6 Conclusion

An attractive, modern, transparent, accessible and predictable international arbitration law is the *sine qua non* condition for a country to build a reputation as a reliable seat of arbitration. It is only after this basic element is in place that other elements become relevant and important, such as institutional rules or hospitality services. Thus, although adoption of a new national arbitration law is not alone sufficient to attract more international arbitration proceedings, it is undeniable that national legislation has a big impact on the attractiveness of a seat and an unclear or outdated national law will be a barrier for an aspiring arbitration seat in the highly competitive “Battle of the Seats”.

Adopting the UNCITRAL Model Law provides multiple benefits to an aspiring seat. As a tested structure, mirroring the international best practices of arbitration, it is an attractive option for seats that wish to promote their jurisdiction as a reliable and well-functioning platform for arbitral proceedings. Therefore, in these authors’ view, unless exceptional circumstances so require, an upcoming arbitration seat should not aim for any other legislative structure when reforming its arbitration law. In fact, many well-established arbitration seats could also gain from losing some of their local idiosyncrasies and aligning their legislation with the UNCITRAL Model Law.

