THOMAS NOECKER*
MATTHIAS K. HENTZEN**

The New Legislation on Arbitration in Canada

The Canadian approach to international arbitration has changed substantially in the past two years. New legislation on the subject matter has been passed on both the federal and the provincial level.[1] The first of these Acts, the Foreign Arbitral Awards Act of British Columbia, was passed in December 1985.[2] The Act's importance for business transactions between the United States and Canada mandate a survey on this development. Furthermore, the amendments to the UNCITRAL Model Law on International Commercial Arbitration[3] (Model Law) are reviewed with respect to a general acceptance of the Model Law as a uniform frame in the field.

I. Introduction

Until recently, great uncertainty marked the extent to which foreign arbitral awards could be enforced in Canada. Double exequatur, meaning a review by the courts in the country of the arbitration as well as in the country of enforcement, was the rule. No distinction was drawn between domestic and international awards because Canada had not ratified the

*J.D., 1985, University of Muenster School of Law. Assistant, Institute of International Business Law, University of Muenster, Muenster, West Germany.

**J.D., 1985, University of Muenster School of Law; LL.M., 1986, Georgetown University Law Center. Assistant, Institute of International Business Law, University of Muenster, Muenster, West Germany.

1. Canada is composed of thirteen jurisdictions: federal, ten provinces, and two territories. For simplicity, the territories are mentioned with the provinces, see *infra* notes 9 & 10.

2. Assented to December 1985; B.C. Stat. ch. 74 (1985).

3. The United Nations Commission on the International Trade Law adopted the Model Law on June 21, 1985; U.N. Doc. A/40/17 (1985).

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958[4] (New York Convention) and was thus not bound to a more generous treatment of international arbitration.

What might appear as hostility to international arbitration had its origin in the conflict between federal and provincial jurisdiction in Canada. As the legislative body, the federal parliament merely has the power to implement a treaty, if it is vested with the competence to enact laws on such matter.[5] Similar to the U.S. Constitution, the Canadian Constitution leaves the federal government with only the power to legislate on enumerated subject matters. While navigation and shipping partly rest with the federal government,[6] civil procedure, property, and civil rights, meaning private law, are left to the provinces exclusively.[7]

Federal-provincial cooperation was thus needed to achieve a comprehensive coverage of international arbitration. In summer 1985, an agreement was reached.[8] The federal state and the common-law provinces subsequently enacted the New York Convention.[9] The Model Law, which is the main focus of the reform, has been passed in ten provinces so far.[10]

4. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

5. Attorney Gen. for Can. v. Attorney Gen. for Ont. (Labour Convention Case), [1937] A.C. 326 (P.C.)(Can.).

6. CAN. CONST. art. 91(10).

7. *Id.* art. 92(13), (14).

8. Previous attempts have not succeeded mainly because of Quebec's opposition.

9. *See* United Nations Foreign Arbitral Awards Convention Act, Can. Stat. ch. 21 (1986); Foreign Arbitral Awards Act, B.C. Stat. ch. 74 (1985); Foreign Arbitral Awards Act, Ont. Stat. ch. 25 (1986); The Enforcement of Foreign Arbitral Awards Act, Sask. Stat. ch. E-9.11 (1986); Foreign Arbitral Awards Act, Yukon Stat. ch. 4 (1986); In the other common-law provinces the New York Convention was enacted by the International Commercial Arbitration Act (*see infra* note 10). In the province of Quebec, the Convention has not been enacted as such, but the general principles have been incorporated in the Loi modifiant le Code civil et le Code de procédure civile en matière d'arbitrage (*see infra* note 10).

10. The Federal enactment is the Commercial Arbitration Act, Can. Stat. ch. 22 (1986); The provinces that have enacted the Model Law include: Alberta, International Commercial Arbitration Act, Alta. Stat. ch. I-6.6 (1986); British Columbia, International Commercial Arbitration Act, B.C. Stat. ch. 14 (1986); Manitoba, International Commercial Arbitration Act, Continuing Consolidation of the Statutes of Manitoba, ch. 151; New Brunswick, International Commercial Arbitration Act, N.B. Acts ch. I-12.2 (1986); Newfoundland, The International Commercial Arbitration Act, Nfld. Stat. ch. 45 (1986); Northwest Territories, International Commercial Arbitration Act, N.W.T. Ord. ch. 6 (1986); Nova Scotia, International Commercial Arbitration Act, N.S. Stat. ch. 12 (1986); Prince Edward Island, International Commercial Arbitration Act, P.E.I. Stat. ch. 14 (1986); Quebec, Loi modifiant le Code civil et le Code de procédure civile en matière d'arbitrage, Qué. Stat. ch. 73(1986); Yukon, International Commercial Arbitration Act—Bill 42 (3d session of the 26th Legislative Assembly). In Ontario and Saskatchewan, the Model Law has not been enacted yet.

II. General Features of the New Legislation

Since the New York Convention and the Model Law have already been written about,[11] this article confines itself to exploring the differences between the new laws and the Model Law.

A. Federal

Unlike the Model Law, article 5(2) of the Federal Commercial Arbitration Act[12] (the Act) limits the applicability of the law to arbitration on maritime or admiralty matters and such cases, when at least one of the parties to the arbitration is a department or a Crown Corporation.[13] On the other hand, the Act does not contain a distinction between domestic and international arbitration.[14] The Act therefore applies to any arbitration meeting the above subject matter qualification.

B. Provinces

As before the reform, a distinction has to be drawn between Quebec and the common-law provinces. The legislatures in most of the common-law provinces have used a special technique to enact the Model Law. The procedure involves introducing norms, which precede the Model Law.[15] In Quebec, on the other hand, the "Code civil" and the "Code de procedure civile" have been amended. Aside from problems in implementing the norms of the Model Law, substantive changes have been made.

---

11. For a discussion of the New York Convention, see G. Gaja, International Commercial Arbitration, New York Convention, (1984); A. Van Den Berg, The New York Arbitration Convention 1958 (1981); Bereolos, *Canadian-American Perspectives on the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards*, 3 Can. Am. L.J. 219 (1986); McLaughlin & Genevro, *Enforcement of Arbitral Awards under the New York Convention—Practice in U.S. Courts*, 3 Int'l Tax & Bus. Law. 249 (1986).

For a discussion of the UNCITRAL Model Law, see UNCITRAL's Project for a Model Law on International Commercial Arbitration (P. Sanders ed. 1984); Herrmann, *The UNCITRAL Model Law on International Commercial Arbitration—Its Salient Features and Prospects*, in International Commercial Arbitration 351 (N. Antaki & A. Prujiner eds. 1986); Hoellering, *The UNCITRAL Model Law on International Commercial Arbitration*, 20 Int'l Law. 327 (1986); Kerr, *Arbitration and the Courts: The UNCITRAL Model Law*, 34 Int'l & Comp. L.Q. 1 (1985).

12. Can. Stat. ch. 22 (1986).

13. "Crown Corporation" means a Crown Corporation as defined in § 95 of the Financial Administration Act.

14. For reasons of simplicity, the third category of "interprovincial arbitration" is not discussed in this article.

15. Only British Columbia has deviated from this procedure by enacting a comprehensive statute.

1. *Common-law Provinces*

None of the common-law provinces have passed the Model Law without amendments. In British Columbia a special rule governs the replacement of an arbitrator. In case the parties have not provided for such a situation in their agreement, the oral hearing has to be repeated if that arbitrator was the sole or the presiding arbitrator. Otherwise, the arbitral tribunal may determine how to proceed.[16] This rule supplements the Model Law in a sensible way. It generally allows for continuation of the arbitration even for cases in which the parties cannot agree upon it. On the other hand it sets a definite limit to such proceedings. Unfortunately, the laws in the other provinces provide that the proceedings must be repeated whenever the arbitrator is replaced.[17]

For purposes of clarification, the new legislation in all provinces also deals with multiparty arbitration.[18] A court having jurisdiction over the matter may only consolidate different arbitral proceedings if the parties have previously consented to it. New York courts were the first to decide cases involving consolidation of arbitral proceedings.[19] The procedure was subsequently adopted by other state and federal courts in the United States,[20] and extended to international maritime cases.[21] In a recent decision the United States Supreme Court did not oppose the possibility of consolidation absent the parties' consent, in that it refused to grant a writ of certiorari on this issue.[22] Subsequent decisions of other U.S. courts,[23] however, have not always followed that case. The Canadian solution in the common-law provinces avoids such uncertainty. In addition, court intervention is minimized and the enforcement of arbitral awards in countries that do not recognize consolidation[24] is not jeopardized.[25]

16. International Commercial Arbitration Act, B.C. Stat. ch. 14, art. 15(3) (1986).

17. *See* table of corresponding rules, in Appendix *infra*.

18. *See* "consolidation of proceedings" in table of corresponding rules in Appendix *infra*.

19. *See* Adam Consol. Indus. v. Miller Bros. Hat Co., 180 N.Y.S.2d 507 (1958); Symphony Fabrics Corp. v. Bernson Silk Mills, Inc., 240 N.Y.S.2d 23 (1963); Vigo S.S. Corp. v. Marship Corp., 309 N.Y.S.2d 165 (1970).

20. Grover-Dimond Assoc. v. Am. Arbitration Ass'n, 211 N.W.2d 787 (Minn. 1973).

21. Compania de Española de Petreolos S.A. v. Nereus Shipping, 527 F.2d 966 (2d Cir. 1975); Czarnikow-Riondo Co. v. Reyes Compania Naviera, 512 F.Supp. 1308 (S.D.N.Y. 1981).

22. *In re* Burmah Oil Tankers Ltd., 454 U.S. 966, *denying cert. to* 661 F.2d 910 (2d Cir. 1981) (no published opinion). The Supreme Court refused to grant a writ of certiorari on the issue of consolidation.

23. Weyerhaeuser Co. v. Western Seas Shipping, 743 F.2d 635 (9th Cir. 1984); Sociedad Anonima v. CIA de Petroleos de Chile, 634 F. Supp. 805 (S.D.N.Y. 1986); Ore & Chem. Corp. v. Stinnes Interoil, Inc., 606 F. Supp. 1510 (S.D.N.Y. 1985).

24. Consolidation is only known in Hong Kong (*see* § 6B of the Arbitration Ordinance) and in the Netherlands (*see* art. 1046 of the Code of Civil Procedure).

25. For a discussion of the problems going along with consolidation, see Branson & Wallace, *Court-Ordered Consolidated Arbitrations in the United States: Recent Authority*

Concerning the rules applicable to the substance of the dispute, the new legislation[26] provides a solution that corresponds with today's arbitral practice. If the parties have not reached an agreement as to which law applies, the arbitrators are not bound to follow the appropriate national provisions on conflict of laws. Instead, they are free to determine for themselves the rules they consider best to resolve the conflict. This offers a wide variety of approaches: the arbitral tribunal can choose to apply national legal systems as a whole, a combination of provisions out of different national legal systems, general commercial principles, known under the notion of *lex mercatoria*, or any other combination thereof.

2. *Quebec*

In Quebec only the basic structure of the Model Law has been adopted. The differences between the regulation enacted in Quebec and the Model Law are enumerated below.

First, the new regulation does not cover international arbitration alone. It deals with all arbitral proceedings taking place in the province of Quebec.[27]

A second and more serious difference between the Model Law and the regulation adopted by Quebec concerns its mandatory provisions. Such provisions have been incorporated in the Model Law to prevent: (1) certain major defects in the procedure, (2) the denial of justice, (3) violations of due process of law, or (4) necessary mechanisms for the functioning of the arbitral process. By their very nature, mandatory provisions can be enforced in national courts.

Article 940 of the Code of Civil Procedure[28] enumerates respective norms. As compared to the respective provisions of the Model Law, this catalog is incomplete. For example, it does not include the norms on the right to a hearing or the right to be notified about procedural acts of the other party or the arbitral tribunal.[29] Furthermore and most importantly, the mandatory provisions only determine that a decision of the judge is

---

Assures Parties the Choice, 5 J. INT'L ARB. 91 n.1 (1988); Hascher, *Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration?*, 1 J. INT'L ARB. 127 (1984).

With respect to art. V, para. 1(d) of the New York Convention, problems of incompatibility can arise from consolidated arbitrations.

26. *See* table of corresponding rules in Appendix *infra*.

27. *Cf.* Act of Nov. 11, 1986, ch. 73, art. 940.6, 1986 Qué. Stat. 793 (amending Quebec Code of Civil Procedure, QUE. REV. STAT. ch. C-25 art. 940 (1977)).

28. Article 940 states: "The provisions of this Title apply to an arbitration where the parties have not made stipulations to the contrary. However, articles 940.2, 941.3, 943.2, 945.8 and 946 to 947.4, as well as article 940.5 where the object of the service is a judicial proceeding, are peremptory." Act of Nov. 11, 1986, ch. 73 art. 940, 1986 Qué. Stat. 792.

29. *Cf., e.g.*, Act of Nov. 11, 1986, ch. 73, arts. 944.1, 944.2, 944.3, 944.4, 1986 Qué. Stat. 795, that are not mentioned in art. 940.

final and without appeal.[30] Thereby, the parties are free to agree in advance that no judge should have jurisdiction on any question of the arbitral proceedings. Thus, one of the basic principles of the Model Law can be circumvented. The legislature did not intend this deviation from the Model Law[31] and is currently considering the necessity of an amendment to article 940.

Due to Quebec's incorporation of the norms on arbitration in the Civil Code and the Code of Civil Procedure, their dispositive rules are applicable absent a stipulation of the parties to the contrary. Hence, the arbitral tribunal has less freedom to decide certain questions such as the procedure of summons and hearing of witnesses.[32] Under the Model Law these lie within the discretion of the arbitrators.

III. Conclusion

Until the recent amendments, the common law provinces followed the English law on arbitration as it was before the Arbitration Act of 1979. Courts could intervene in the arbitral proceedings under the motion of the "stated" or the "special case." Furthermore, any award was subject to judicial control and could be set aside for various reasons. Keeping that in mind, the current reform makes a "U turn" in the general approach to arbitration. Substantial autonomy of the parties has replaced vast governmental control.[33]

For Quebec, the change was not revolutionary. Nevertheless, the fact that the permissive rules of the Model Law have been extended to domestic arbitration should not be neglected.

Canada is the first country to adopt the Model Law. The few amendments illustrate that the Model Law gives a promising basis for the harmonization of national arbitration laws. In particular, it is flexible enough to be incorporated into different legal systems.[34] The extensive comments on it offer resort when problems arise. May the Canadian move be a catalyst for other countries to follow![35]

---

30. *Cf., e.g.*, Act of Nov. 11, 1986, ch. 73, 1986 Qué. Stat. 793 art. 941.3 which states that "the decision of the judge under articles 941.1 and 941.2 is final and without appeal."

31. The Quebec Secretary of Justice H. Marx explained that article 940 was intended to comprise the mandatory provisions scattered over the Model Law. *See* JOURNAL DES DEBATS, ASSEMBLEE NATIONALE, 33e législature, le session, No. 17, at CI-555 (Sept. 16, 1986).

32. *Cf.* Act of Nov. 11, 1986, ch. 73, arts. 944.6, 944.9, 1986 Qué. Stat. 796. Similarly, the language of the arbitral proceedings and possibly even the place of arbitration might be mentioned here.

33. For a comprehensive coverage of the law until 1985, see R. MCLAREN & E. PALMER, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION (1982).

34. The legal system of Quebec can be traced back to French law (civil law). The legal system of the common-law provinces is based on English law.

35. The adoption of the Model Law is now being considered in Great Britain. *See* Hacking, *Where We Are Now: Trends and Developments Since the Arbitration Act (1979)*, 2 J. INT'L

Appendix

Corresponding Rules under the International Commercial Arbitration Acts[36] of the common-law provinces

	Alta.	B.C.	Man.	N.B.	Nfld.	N.W.T.	N.S.	Ont.	P.E.I.	Sask.	Yukon
Short Title					1	1	1				
Definition	1	2	1	1	2	2	2		1		1
Foreign Arbitral Awards:											
Convention applies in the Province	2(1)	2*	2(1)	2(1)	3(1)	3(1)	3(1)	2*	2(1)	4**	2*
Convention applies to commercial legal relationships	2(2)	3*	2(2)	2(2)	3(2)	3(2)	3(2)	1(1)*	2(2)	5**	3*
Application to the Supreme Court[37]	3	4*	3	3	4	4	4	4*	3	6**	4*
Act prevails		6*								3**	6*
International Commercial Arbitration:											
Model Law applies in the Province	4(1)	1(2)	4(1)	4(1)	5(1)	5(1)	5(1)		4(1)		2(1)
Convention applies to international commercial arbitration	4(2)	1(1)	4(2)	4(2)	5(2)	5(2)	5(2)		4(2)		2(2)
Conciliation and mediation	5	30(1)	5	5	6		6		5		3

(*continued on next page*)

*Foreign Arbitral Awards Act
**The Enforcement of Foreign Arbitral Awards Act

ARB., Dec. 1985, No. 4, at 7. Although the arbitration law was recently partly modified in the Federal Republic of Germany, the leading West German scholars favor the incorporation of the Model Law. *See* Sandrock, *Das Gesetz zur Neuregelung des Internationalen Privatrechts und die internationale Schiedsgerichtsbarkeit*, 1987 RECHT DER INTERNATIONALEN WIRTSCHAFT Annex 2, No. 5.

36. For citations of the respective statutes, *see supra* notes 9, 10.

37. In Ontario, the district court also has jurisdiction. In Alberta, Manitoba, New Brunswick, and Saskatchewan, the application has to be submitted to the Court of Queen's Bench.

	Alta.	B.C.	Man.	N.B.	Nfld.	N.W.T.	N.S.	Ont.	P.E.I.	Sask.	Yukon
Repeating of hearing	6(1)	15(3)	6(1)	6(1)	7(1)	6(1)	7(1)		6(1)		4(1)
Removal of arbitrator	6(2)		6(2)	6(2)	7(2)	6(2)	7(2)		6(2)		4(2)
Rules applicable to substance of dispute	7	28(3)	7	7	8	7	8		7		5
Consolidation of proceedings	8	27(2) (3)	8	8	9	8	9		8		6
Reference to "court"	9		9	9	10	9	10		9		7
Stay of proceedings	10		10	10	11	10	11		10		8
Act binds Crown	11		11(1)	11(1)	12	11(1)	12(1)		11(1)		9(1)
Enforcement of award against Crown			11(2)	11(2)		11(2)	12(2)		11(2)		9(2)
Interpretation	12	6	12	12	13	12	13		12		10

*Foreign Arbitral Awards Act
**The Enforcement of Foreign Arbitral Awards Act