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# Recent Developments in Inter-American Commercial Arbitration

*Charles Robert Norberg\**

## I. INTRODUCTION

Arbitration has become an effective procedure for resolving international commercial disputes in the Western Hemisphere. A framework of treaties exists, establishing substantive law and procedure for that purpose. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)<sup>1</sup> has been ratified by sixteen Western Hemisphere countries. The Inter-American Convention on International Commercial Arbitration (1975)<sup>2</sup> has been ratified by thirteen countries. Furthermore, the World Bank's Convention establishing the International Centre for the Settlement of Investment Disputes has been ratified by four Latin American countries and six anglophobe Western Hemisphere countries and it has been signed but not yet ratified by three countries in the Hemisphere. Additionally, important changes have been made in the domestic laws of countries such as Argentina, Canada, Colombia, Peru and Venezuela, contributing to this new legal and economic climate.

In the Caribbean area, a committee of the Caribbean Law Institute is preparing to recommend that the governments of the area adopt the UNCITRAL model law on international commercial arbitration; the corresponding UNCITRAL procedural rules; and the establishment of a

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<sup>1</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38.

<sup>2</sup> Opened for signature January 30, 1975, OAS/SER.A/20 (SEPF), *reprinted in* 14 I.L.M. 336 (1975). The text of the Inter-American Convention is reprinted in Appendix I of this Article.

single focal point to administer international commercial arbitrations in the Caribbean area.

This new climate has made enforceable a contract clause to arbitrate both present and future disputes as well as their ensuing arbitral awards. To facilitate this activity, the Inter-American Commercial Arbitration Commission (IACAC) has strengthened its network of national sections throughout the Western Hemisphere including new national sections in Bolivia, Guatemala and Paraguay.

An educational program including widespread dissemination of information about alternate dispute resolution is planned to begin in the fall of 1991. The Executive Committees of the IACAC and the AICO (Association of Iberoamerican Chambers of Commerce) will meet jointly in Panama, June 23-25, 1991 to plan a series of seminars to take place in each country of the Western Hemisphere. A set of uniform teaching materials, including cassettes and audiovisual tapes, is being prepared jointly by the National Chambers of Commerce in Bogota, Colombia and in Mexico City for use in these seminars. Following the seminars, a set of these teaching materials will be given to the local National Chamber of Commerce, Bar Association and National University Law School for the continuing use of the business and legal communities.

These new developments in treaty and domestic law, together with an educational program of seminars and a strengthened network of national sections of the IACAC, will lead to a greatly increased use of arbitration and other alternate dispute resolution procedures within the Western Hemisphere.

## II. DISCUSSION

"Latin American legal scholars and jurists interested in private international law had considered the subject of international commercial arbitration and the enforcement of foreign arbitral awards in the Treaties of Montevideo of 1889 and 1940 as well as in the Bustamante Code of Private International Law of 1928. Title III, articles five through seven of the Montevideo Treaty of 1889 provided that foreign arbitral awards in civil and commercial matters would be enforced in a signatory state if the award had been made by a tribunal that was in the international field. Additional requirements for enforcement were that the award had the character of a final judgment, and was considered as *res judicata* in the country in which it was rendered; that the defendant had been legally summoned and represented or that he was declared to be in default pursuant to the laws of the country where the action was instituted; and that the award was not contrary to the public policy of the country in which it

was to be enforced.”<sup>3</sup>

Articles 423 through 433 of the 1928 Bustamante Code<sup>4</sup> provided for the reciprocal enforcement among the signatory countries of foreign arbitral awards. That Code was ratified by Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama and Peru.

While the United States had participated in the Havana Conference, it had never become a party to the treaties. Nevertheless, the business and legal communities in the country continued to express their interest in participating in a program to arbitrate inter-American commercial disputes. On December 23, 1933, the Seventh International Conference of American States met in Montevideo, Uruguay and adopted resolution XLI<sup>5</sup> providing in part as follows:

That with a view to establishing even closer relations among the commercial associations of the Americas entirely independent of official control, an inter-American commercial agency be appointed in order to represent the commercial interest of all republics and to assume, as one of its most important functions, the responsibility of establishing an inter-American system of arbitration.

Pursuant to that resolution, the Pan-American Union and the American Arbitration Association established the Inter-American Commercial Arbitration Commission in 1934. The OAS felt that inter-American commercial arbitration needed further definition and in 1956 the Inter-American Council of Jurists met in Mexico City. The Council promulgated a model law; however, no country adopted it.<sup>6</sup> After further study the Inter-American Juridical Committee met in Rio de Janeiro and in 1967 prepared a draft of a proposed Inter-American Convention on International Commercial Arbitration.<sup>7</sup> That draft was considered in Panama in 1975 at the First Specialized Inter-American Conference on Private International Law (CIDIP 1) and officially promulgated as an OAS Convention.<sup>8</sup>

The text of the Convention is attached hereto at Appendix I. The

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<sup>3</sup> Norberg, *Inter-American Commercial Arbitration - Unicorn or Beast of Burden?*, 5 PACE L. REV. 607 (1985).

<sup>4</sup> Convention on Private International Law, Feb. 20, 1928, 86 L.N.T.S. 246, T.I.A.S. No. 1930.

<sup>5</sup> Resolution of Dec. 23, 1933, Seventh International Conference of American States, Montevideo, Uruguay.

<sup>6</sup> Draft Uniform Law on Inter-American Commercial Arbitration, Resolution VIII of the Third Meeting of the Inter-American Council of Jurists, Mexico City, Mexico, at 55 (1956).

<sup>7</sup> Report of the Inter-American Juridical Committee on International Commercial Arbitration, Feb. 19, 1968, OAS Doc. SER i/vi (1968).

<sup>8</sup> Organization of American States, Inter-American Specialized Conference on Private International Law (CIDIP 1) held in Panama, Republic of Panama, Jan. 14-29, 1975.

Convention essentially replicates the provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) with the major difference that the Inter-American Convention provides for a mechanism to administer international commercial arbitrations in the Hemisphere and, in addition, provides for rules of procedure. Article 3 of the Inter-American Convention provides:

In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the Rules of Procedure of the Inter-American Commercial Arbitration Commission.

The United Nations Convention has no similar provision. The United Nations Convention has been ratified in the Western Hemisphere by: Antigua and Barbuda, Argentina, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, Guatemala, Haiti, Mexico, Panama, Peru, Trinidad and Tobago, the United States and Uruguay.

The Inter-American Convention has been ratified by: Chile, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Panama, Peru, United States and Venezuela.

The essential provisions of the Conventions recognize as enforceable an agreement in writing to submit present or future disputes to arbitration and that the courts will enforce that clause. In the United Nations Convention, foreign arbitral awards are recognized and enforced pursuant to a simplified procedure calling only for the duly authenticated original award or a certified copy thereof; and the original agreement in writing or a certified copy.

Recognition and enforcement of the award may be refused only if the party against whom it is invoked produces proof of incapacity or lack of due process; that the award was beyond the terms of the submission; that the tribunal was improperly organized; or that the award had not yet become final and binding. The award will also be denied recognition and enforcement if (a) the subject matter is not capable of settlement by arbitration under the law of that country; or (b) would be contrary to the public policy of the country where it is sought to be enforced.

With the exception of Article 3, the Inter-American Convention is essentially the same as the United Nations Convention. As pointed out, Article 3 recognizes the Inter-American Commercial Arbitration Commission and its rules of procedure. The Commission has its administrative headquarters office in the secretariat building of the Organization of American States, Washington, D.C. and functions through National Sections in most of the countries of the Hemisphere. Each National Section is represented by a member of the Council of the Commission which meets at least once every two years to set policy. Between meetings of

the Council, the work of the Commission is directed by its Executive Committee. The appointment of panels of arbitrators and the selection of the sites for the arbitration is the responsibility of the Director General.

The rules of procedure of the IACAC are the rules prepared by the United Nations Commission on International Trade Law (UNCITRAL) and recommended for use by the United Nations General Assembly.<sup>9</sup> The IACAC adopted the rules in 1977 with very few modifications to make them adaptable in the Western Hemisphere. The significant provisions of the Inter-American Convention are:

- A. An arbitration clause is now enforceable both for present and future disputes;
- B. An agreement to arbitrate may be "set forth in an instrument, signed by the parties, or in the form of an exchange of letters, telegrams or telex communications." A notarized public instrument (*escritura publica*) is no longer required.
- C. The Inter-American Convention permits appointment of arbitrators to be delegated to a third party whether natural or juridical; arbitrators may be nationals or foreigners. Thus, appointment of arbitrators can be delegated to the IACAC or another administrative body.
- D. The Convention provides for the mandatory use of the IACAC rules if the parties have not expressly chosen their own rules. If any of those rules may conflict with local procedural rules, the question of whether the latter are regarded as mandatory public policy must be decided by the local courts.

The United States is a party to the Inter-American Convention. On August 15, 1990 President George Bush signed H.R. 4314 (Pub. L. No. 101-369), the bill implementing the Inter-American Convention, following its enactment by Congress on August 4. The articles of ratification had previously been signed on November 10, 1986 by then-President Ronald Reagan (Appendix II). The U.S. State Department deposited the completed instrument of ratification with the Organization of American States on September 27, 1990; the Convention went into effect 30 days thereafter.

The implementing legislation (Appendix III) amends Title 9 of the U.S. Code by adding a new Chapter 3 consisting of sections 301 to 307. Chapter 1 of Title 9 (sections 1-14) is the original Federal Arbitration Act while Chapter 2 of Title 9 (sections 201-208) is the implementing legislation for the United Nations Convention.

To be expressly noted is the possibility that in a given case both the

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<sup>9</sup> G.A. Res. 98, 31 U.N. GAOR Supp. (No. 39) at 442, U.N. Doc. A/31/39 (1976).

United Nations and the Inter-American Conventions may be equally applicable. To resolve this problem, Section 305 of Title 9 provides, inter alia:

- (1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.
- (2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

It has been noted that, with the exception of Brazil and Bolivia, the major countries of the Western Hemisphere have ratified either the United Nations, the Inter-American, or both conventions. Additionally, several of the Latin American countries have amended their domestic legislation to facilitate the international commercial arbitration process, providing for the enforceability of an arbitration clause, the use of a foreigner as an arbitrator, and in general creating a climate that is hospitable to the process of international commercial arbitration. For an excellent article see *Arbitration in Latin America: Overcoming Traditional Hostility* by Dr. Horacio A. Grigera Naon in 5 *Arbitration International* 137 (1989).

This interest in becoming more hospitable to modernizing alternative dispute resolution procedures has reached the Caribbean area as well. The Caribbean Law Institute of Florida State University College of Law has established an Arbitration Advisory Committee<sup>10</sup> which has met three times since 1989. The Committee has reviewed the domestic legislation of the countries of the area and noted that only Antigua and Barbuda, Cuba, Haiti and Trinidad and Tobago have ratified the United Nations Convention. None have ratified the Inter-American Convention. It was further learned that no country had enacted contemporary legislation designed to integrate its dispute settlement law and procedure into the contemporary global system of international arbitration.

In consequence, the Committee has recommended: (1) that the governments that have not yet done so ratify both the United Nations and the Inter-American Conventions; (2) enact the UNCITRAL model law on international commercial arbitration; (3) adopt the UNCITRAL prepared rules of procedure for international commercial arbitration; and (4) study the possibility of establishing a focal point in the Caribbean community to provide a capacity for administering international commercial arbitration. It might be organized in cooperation with the Caribbean Chambers of Commerce and Industry.

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<sup>10</sup> Tallahassee, Florida 32306-1-34; Prof. Elwin Griffith, Executive Director.

### III. CONCLUSION

International commercial arbitration and other methods of alternative dispute resolution are presently receiving significant endorsement and support in the Western Hemisphere. In a speech presented October 26, 1990, at a lunch meeting of the Inter-American Bar Foundation, Mr. Enrique Iglesias, President of the Inter-American Development Bank, said that “. . .the Bank has recognized the importance of the use of arbitration as a mechanism to resolve controversies between countries and private investors and in trade matters in general. . .[T]he Bank is considering the eventual promotion of arbitration mechanisms to facilitate private foreign investment in the region.”

These sentiments were given further elaboration by Dr. Roberto Danino, General Counsel of the Inter-American Investment Corporation, when addressing a seminar on Arbitration in the Americas on January 24, 1991, at the Association of the Bar of the City of New York. He endorsed the concept of international arbitration which, along with other measures, could encourage a vigorous flow of private investment to the Latin American region. A study soon to be underway by the IADB group, would follow a three-track approach to encourage arbitration in the Americas:

One track would be geared to promoting the use of arbitration in each of the regional developing countries, both for intra-country as well as international disputes. A second track would focus on whether to promote an existing arbitration facility or to create a new facility, so as to establish an institution responsive and in tune with the dispute settlement requirements of the region. Finally, the third track would concentrate on establishing a “clearing house” for the promotion of alternate dispute resolution techniques in the region. The specific parameters of each of these tracks will of course be developed in accordance with the conclusions reached in the study.

We have seen that barriers and obstacles to an increased use of international commercial arbitration are coming down, and a treaty-based system of international arbitration has emerged in their place. A series of seminars on international commercial arbitration and measures of alternate dispute resolution is planned to take place throughout the Western Hemisphere beginning in the fall of 1991. With the support and leadership of the Inter-American Bank Group, the climate for international commercial arbitration throughout the Western Hemisphere is bright indeed.



APPENDIX I

# Text of Inter-American Accord

Following is the text of the 1975 Inter-American Convention on International Commercial Arbitration, recently ratified by the U.S.

The Governments of the Member States of the Organization of American States, desirous of concluding a Convention on International Commercial Arbitration, have agreed as follows:

## Article 1

An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument, signed by the parties, or in the form of an exchange of letters, telegrams or telex communications.

## Article 2

Arbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or juridical person.

Arbitrators may be nationals or foreigners.

## Article 3

In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.

## Article 4

An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.

## Article 5

1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the state in which recognition and execution is requested:

- a. That the parties to the agreement were subject to some incapacity under the applicable law or that

the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the state in which the decision was made; or

- b. That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or
- c. That the decision concerns a dispute not envisaged in the arbitration agreement between the parties to submit it to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or
- d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the state where the arbitration took place; or
- e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the state in which, or according to the law of which, the decision has been made.

2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the state in which the recognition and execution is requested finds:

- a. That the subject of the dispute cannot be settled by arbitration under the law of that state; or
- b. That the recognition or execution of the decision would be contrary to the public policy ("ordre public") of that state.

## Article 6

If the competent authority mentioned in Article 5.1 e has been requested to annul or suspend the arbitral decision, the authority before which such decision is invoked may, if it deems appropriate, postpone a decision on the execution of

the arbitral decision and, at the request of the party requesting execution, may also instruct the other party to provide appropriate guarantees.

## Article 7

This Convention shall be open for signature by all Member States of the Organization of American States.

## Article 8

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

## Article 9

This Convention shall remain open for accession by any other State. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

## Article 10

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification.

## Article 11

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

## Article 12

This Convention shall remain in force indefinitely, but any of the State Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

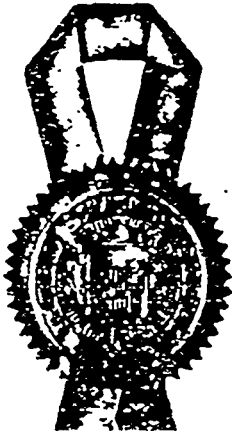
APPENDIX II

**Senate of the United States**

IN EXECUTIVE SESSION

**Resolved**, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Inter-American Convention on Commercial Arbitration adopted by the First Inter-American Specialized Conference on Private International Law, at Panama City, Panama, on January 30, 1975, and signed by the United States on June 9, 1978, subject to the following reservations:

1. Unless there is an express agreement among the parties to an arbitration agreement to the contrary, where the requirements for application of both the Inter-American Convention on International Commercial Arbitration and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards are met, if a majority of such parties are citizens of a state or states that have ratified or acceded to the Inter-American Convention and are member states of the Organization of American States, the Inter-American Convention shall apply. In all other cases, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards shall apply.
2. The United States of America will apply the rules of procedure of the Inter-American Commercial Arbitration Commission which are in effect on the date that the United States of America deposits its instrument of ratification, unless the United States of America makes a later official determination to adopt and apply subsequent amendments to such rules.
3. The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.



Attest:

*Jo Anne L. Coe*  
Secretary



APPENDIX III  
TITLE 9, UNITED STATES CODE

Chap.	Sec.
1. General provisions.....	1
2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards.....	201
3. Inter-American Convention on International Commercial Arbitration.....	301

CHAPTER 3. INTER-AMERICAN CONVENTION ON INTERNATIONAL  
COMMERCIAL ARBITRATION

Sec.
301. Enforcement of Convention.
302. Incorporation by reference.
303. Order to compel arbitration; appointment of arbitrators; locale.
304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity.
305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.
306. Applicable rules of Inter-American Commercial Arbitration Commission.
307. Chapter 1; residual application.

**§ 301. Enforcement of Convention**

*The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.*

**§ 302. Incorporation by reference**

*Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter "the Convention" shall mean the Inter-American Convention.*

**§ 303. Order to compel arbitration; appointment of arbitrators; locale**

*(a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.*

*(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention.*

**§ 304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity**

*Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.*

APPENDIX III (CONTINUED)

*§ 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958*

*When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:*

*(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.*

*(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.*

*§ 306. Applicable rules of Inter-American Commercial Arbitration Commission*

*(a) For the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.*

*(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules of the Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.*

*§ 307. Chapter 1; residual application*

*Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.*

# International Commercial Arbitration Law In Canada

*Paul J. Davidson\**

## I. INTRODUCTION

Canada has experienced a "revolution in arbitration practice"<sup>1</sup> since the beginning of 1986. No longer can it be said that "Canadian business interests and Canadian governments appear to have little interest in the subject of international trade arbitration."<sup>2</sup> This revolution has engendered and is exemplified by Canada's May 12, 1986 accession to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)<sup>3</sup>, and by Federal and Provincial legislation implementing this Convention as well as Federal and Provincial legislation updating international commercial arbitration law in their respective jurisdictions.

With all the advantages of arbitration, one may ask why it has not seen more use in Canada. The reluctance to use arbitration to settle international disputes was attributable to two main difficulties which until quite recently existed in Canada.

The main difficulty was the extent to which the courts could interfere in and control the arbitral process, thereby destroying one of the main reasons for using the arbitration process, i.e., to avoid the domestic

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<sup>1</sup> The Honourable Brian R.D. Smith, Q.C., former Attorney General of British Columbia, Opening Remarks at the Conference, "East Meets West: Resolution of International Commercial Disputes in the Pacific Rim", Vancouver, B.C., Canada (May 12, 1986).

<sup>2</sup> Brierly, *International Trade Arbitration: The Canadian Viewpoint*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATIONS 826 (Macdonald ed. 1974).

<sup>3</sup> 330 U.N.T.S. No. 4739 (1959).

courts. The Canadian arbitral system (at least in the common law provinces and territories) was (and to a large extent as regards *domestic* arbitrations still is) based upon the English Arbitration Act of 1889. This Act was rooted in nineteenth century perceptions which looked upon the arbitral process as a somewhat suspicious departure from the court's normal jurisdiction and something that courts could only tolerate as long as the courts controlled the process.

The stated case procedure of the Arbitration Act of 1889 presents one of the clearest indications of court control. This procedure led one English judge to comment that the English Act "is nearly unique in the degree of interference it permits the courts in the conduct of arbitrations and the settlement of disputes thereby."<sup>4</sup>

The stated case procedure allows the arbitrator on his/her own motion, or on the motion of one of the parties, or at the direction of the court, to "state a special case"; i.e., submit a question of law to be decided by the court. This led to the possibility that a party interested in delay could take advantage of this procedure to remove the arbitration proceedings into the courts where there was a possibility of delay and two further levels of appeal with additional delay—sometimes on a preliminary point of law.

The second major difficulty with using arbitration for international disputes was the problem of enforcing an award obtained in a foreign jurisdiction. Domestically, arbitration awards are enforced in the same manner as court judgements. However, prior to changes in Canadian law in 1986, a foreign arbitration award was enforced either a) by an action in court based on the award or b) pursuant to Reciprocal Enforcement Acts. These latter acts provided very limited means of enforcement and in most cases it proved necessary to commence a court action to enforce the award, with the attendant delays and additional costs.

In 1986, Canada finally took steps to address these problems which had made Canada an unwelcome setting for international commercial arbitration. First, Canada acceded to the New York Convention and second, Canadian jurisdictions passed legislation to implement provisions of the UNCITRAL Model Law on International Commercial Arbitration. These actions have resulted in revolutionary changes to arbitration law and practice in Canada.

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<sup>4</sup> *Prodexport Co. v. Man. Ltd.*, 3 W.L.R. 845 (1972). It should be noted that the Act of 1889 ((U.K.), ch.49) has been extensively revised since its original enactment so that the English law on arbitration now differs in a number of important respects from the law of the various jurisdictions in Canada which are still based on it. In particular, the amendments made by the Act of 1979 (U.K. ch. 43) substantially limited the amount of interference by the courts.

This article discusses Canada's accession to the New York Convention and its implementation in Canada, and Canada's adoption of the UNCITRAL Model Law on Arbitration. Reference will also be made to the growing number of arbitration centers in Canada. However, in order to understand Canadian legislation related to arbitration, a basic understanding of the Canadian constitutional framework for legislation is necessary. This paper therefore commences with a brief discussion of the constitutional background.

## II. THE CONSTITUTIONAL FRAMEWORK

Canada is a federal state with legislative powers divided between the Federal Parliament and Provincial Legislatures. The Constitution Act, 1867 sets out enumerated classes of subjects over which the Provinces have exclusive legislative competence (s.92) and classes of subjects over which the Federal Parliament has exclusive legislative competence (s.91). The Federal Parliament, in addition, holds the legislative authority over residual matters not assigned exclusively to the Provincial Legislatures.

Neither "arbitration" nor "enforcement of arbitration awards" is specifically mentioned among the subjects set out in the enumerated classes. However, this does not mean that these matters automatically fall within the residue of subjects and therefore within Federal competence. To the contrary, the traditional view holds that these subjects come within Provincial competence under subsections 92(13) ("Property and Civil Rights in the Province") and 92(14) ("The Administration of Justice in the Province"). This results from the broad interpretation given to these heads of Provincial jurisdiction. In fact, prior to 1986, the only legislation relating to arbitration and enforcement of arbitration awards existed at the provincial level.

Because of this constitutional position, no "Canadian Law" relating to international commercial arbitration exists. Rather each of the ten provinces and two federal territories which comprise Canada have enacted arbitration law. In addition, as of May 1986 there is also Federal arbitration law although it is limited in its application. It should also be noted that in the absence of any statutory provision dealing with a particular matter, nine of the provinces and the two territories apply the common law derived from England, and the civil law, derived from France applies in the Province of Quebec.

This division of legislative powers also affects the implementation of treaty obligations in Canada. With respect to treaty obligations, the Federal government is the only sovereign authority with the power to enter into treaty obligations with other sovereign states. However, treaty obli-

gations in Canada must be implemented by legislation and it is argued that the Federal Parliament may only enact legislation implementing treaty obligations which fall within federal competence, and if the subject matter falls within provincial competence then only the provinces may pass the implementing legislation. This results from the holding in the Labor Conventions case<sup>5</sup> where Lord Atkin stated:

[I]f in the exercise of her new functions derived from the new international status Canada incurs obligations they must so far as legislation is concerned, when they deal with Provincial classes of subjects, be dealt with by co-operation between the Dominion and the Provinces.<sup>6</sup>

Based on this approach, the only obligation that Canadian federal authorities can assume and effectively discharge, if a treaty's subject matter falls within provincial competence, is that of bringing the substance of the treaty provisions to the attention of provincial authorities encouraging each province to separately pass its own implementing legislation.

### III. ACCESSION TO THE NEW YORK CONVENTION

The above constitutional position accounted for Canada's hesitancy to accede to the New York Convention. Without the ability to guarantee implementation of obligations under the Convention, the federal authorities, who had the power to enter into treaty obligations, were reluctant to become a party to the Convention. Canada would only accede to the Convention when all provinces agreed to cooperate with each other and the federal authorities in coordinating their internal laws. As there seemed to be a general lack of interest in arbitration by the average Canadian business person,<sup>7</sup> it seemed unlikely that such legislation would be enacted. The position was summarized in a letter from the Federal Minister of Justice dated September 21, 1979:<sup>8</sup>

From time to time over the last number of years the Federal Government has considered carefully the advantages of and the prospects for ratification of the Convention by Canada. When the matter was last under active study

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<sup>5</sup> A.G. for Canada v. A.G. for Ontario, 1937 A.C. 326 (1937).

<sup>6</sup> *Id.* at 354. It should be noted that the reasoning of Lord Atkin in the Labour Conventions case has received much adverse criticism and the Supreme Court of Canada has indicated a willingness to reconsider the Labour Conventions case: see, MacDonald v. Vapour Canada Ltd., 2 S.C.R. 134 (1977) and Schneider v. The Queen, 139 D.L.R. 3d 417 (1983). However, a discussion of this matter is beyond the scope of this paper and legislation in Canada has proceeded on the basis that this traditional approach is the law. For a criticism of the present approach and an argument for a much broader federal jurisdiction in implementing treaty obligations, see Davidson, *Uniformity in International Trade Law: The Constitutional Issue*, 11 Dalhousie L.J. 677 (1988).

<sup>7</sup> On this point see: Brierly, *supra* note 2 at 833; Castel, *Canada and International Arbitration*, 36 Arb. J. 6 at 8 (1981); and Mendes and Binavine, *Canada and the New York Convention on Foreign Arbitral Awards*, Can. Arb. J. 2 at 7 (1984).

<sup>8</sup> As quoted in Castel, *supra* note 7 at 9-10.



by this Department, it was considered that full implementation of the Convention would require legislation at the provincial level. The enforcement of foreign arbitral awards in Canada by Canadian courts is largely a matter falling within the competence of provincial legislatures. While the "federal state clause" in Article XI might go some way to allowing Canadian ratification and implementation without concurrent legislative action on the part of all of the provinces, provincial implementing measures would be necessary in order for the Convention to have any significant effect in Canada. While the Federal Government is prepared to undertake the necessary consultation with the provinces to ensure uniform implementation of the Convention throughout Canada, the complexities of such efforts coupled with the apparent lack of demand within the private sector have to date tended to militate against Canadian participation in the Convention.

However, in the early 1980's there was an increased emphasis on trade and also an increased interest in the use of arbitration for the settlement of international commercial disputes. International commercial arbitration was a topic on the programme of the First International Trade Law Seminar, sponsored by the Federal Department of Justice in Ottawa on October 20, 1983 and was the main topic of the Second International Trade Law Seminar, October 22, 1984. UNCITRAL was working on a draft Model Law on International Commercial Arbitration and the Federal Department of Justice became involved and sent a representative to the meeting of the International Council for Commercial Arbitration held in Lausanne in May of 1984 which considered the Model Law, and elicited and submitted comments to UNCITRAL on the draft Model Law. With all this renewed interest in international commercial arbitration, the time seemed ripe to reconsider Canada's accession to the N.Y. Convention. In August 1984, the Federal Department of Justice took the initiative and the Minister of Justice sent letters to his Provincial and Territorial counterparts to see if there was any current interest in acceding to the Convention. The response was very positive. After much Ministerial correspondence and discussion it was agreed that the Convention should be adopted and that the provinces would all pass implementing legislation. The speed and unanimity of this decision indicate the importance attached to this matter and exemplifies federal-provincial cooperation. It is hoped this cooperation will be reflected in other important trade matters.

The Uniform Law Conference, which provides a forum for discussion and drafting uniform legislation and plays an important role in making it easier for Canada to accede to conventions on international commercial law, played an important role in the federal-provincial cooperation required in this matter. In the summer of 1984, the Conference agreed to draft uniform legislation to implement the 1958 New York

Convention and in August of 1985 adopted a form for acceding the Convention. On May 1st, 1986, the Honourable John C. Crosbie, Minister of Justice and Attorney General of Canada, introduced legislation<sup>9</sup> to permit Parliament to implement the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention). This legislation was passed with the unanimous consent of all parties, reflecting the importance attached to Canada's participating in this Convention. On May 12, 1986 Canada filed its instrument of accession to the N.Y. Convention with the Secretary General of the United Nations. The Convention came into force in Canada in accordance with Article XII of the Convention on the ninetieth day after deposit of this instrument, on August 10, 1986. In addition to the Federal legislation, all provinces and territories now have legislation in place to allow for recognition and enforcement of arbitral awards in compliance with the provisions of the N. Y. Convention.<sup>10</sup>

It is hoped that the implementation of the New York Convention will "facilitate Canadian international trade by providing for greater flexibility in arranging foreign business transactions and will be of substantial value to business interests throughout Canada."<sup>11</sup> Prior to Canada's accession to the Convention, enforcing an arbitral award in Canada could prove to be a time-consuming process, which could include bringing an action before a court. This meant that Canadian business persons were not in a strong position to request arbitration agreements in their international contracts, as they could not assure their business partners

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<sup>9</sup> United Nations Foreign Arbitral Awards Convention Act, Bill C-107 of the First Session of the Thirty-third Parliament, 33-34-35 Eliz. II, 1984-85-86; now R.S.C. 1985, ch.16 (2nd Supp.).

<sup>10</sup> Alberta: International Commercial Arbitration Act, Alta. Stat. ch. I-6.6 (1986-87);

British Columbia: Foreign Arbitral Awards Act, B.C. Stat. ch. 74 (1985);

Manitoba: International Commercial Arbitration Act, Man. Stat. ch. 32 (1986-89) (c.C151 of Continuing Consolidation);

New Brunswick: International Commercial Arbitration Act, N.B. Stat. ch. I-12.2 (1986);

Newfoundland: International Commercial Arbitration Act, Nfld. Stat. ch. 45 (1986);

Nova Scotia: International Commercial Arbitration Act, N.S. Rev. Stat. ch. 234 (1989);

Ontario: International Commercial Arbitration Act, Ont. Stat. ch. 30 (1988). This Act repealed the Foreign Arbitral Awards Act, Ont. Stat. ch. 25 (1986), which had originally implemented the New York Convention;

Prince Edward Island: International Commercial Arbitration Act, P.E.I. Stat. ch. 14 (1986);

Quebec: An Act to amend the Civil Code and the Code of Civil Procedure in Respect of Arbitration, Que. Stat. ch. 73 (1986);

Saskatchewan: The Enforcement of Foreign Arbitral Awards Act, Sask. Stat. ch. E-9.11 (1986), as amended by Sask. Stat. ch. 8 (1988-89);

Northwest Territories: International Commercial Arbitral Act, N.W.T. Ord. ch. 6 (1986(1));

Yukon: Foreign Arbitral Awards Act, Yuk. Stat. ch.4 (1986).

<sup>11</sup> Minister of Justice and Attorney General of Canada, News Release, "Justice Minister Introduces International Arbitration Legislation", Ottawa, May 1, 1986.

that Canada would readily recognize and enforce foreign arbitral awards. With accession to the New York Convention and implementing legislation in place, Canadian business persons can now give this assurance.

Although accession to the New York Convention and the implementation of the convention at the federal and provincial levels has dramatically improved the enforcement situation in Canada, a party outside Canada must still be careful when enforcing an award in Canada. Enforcement is governed not by one piece of legislation, but by thirteen pieces of implementing legislation (i.e. the Federal legislation and legislation of the ten provinces and two territories) and the party seeking enforcement must ensure that the enforcement proceeds according to the relevant statute. A party may have to undertake proceedings in more than one jurisdiction if the defendant has assets in more than one jurisdiction. As the implementing legislation is generally uniform this should not cause great difficulties, although slight differences might exist from one jurisdiction to another.

The Federal implementing legislation, the United Nations Foreign Arbitral Awards Convention Act, S.C. 1986, ch. 21, applies to Canadian enforcement of awards rendered by foreign arbitral tribunals, relating to matters within the jurisdiction of the Federal Parliament, such as arbitrations where one of the parties is Her Majesty in right of Canada, a departmental corporation, a crown agency<sup>12</sup> or if the arbitration relates to maritime or admiralty matters. For the purpose of seeking recognition and enforcement of such arbitral awards pursuant to the Convention, application may be made to the Federal Court or any superior, district or county court.<sup>13</sup>

In the case of recognition and enforcement within a province or a territory, recourse must be made to the relevant provincial or territorial legislation to determine the appropriate route. In Alberta, a party must apply to the Court of Queen's Bench (Alta.);<sup>14</sup> in British Columbia to the Supreme Court (B.C.);<sup>15</sup> in Manitoba to the Court of Queen's Bench (Man.);<sup>16</sup> in New Brunswick to the Court of Queen's Bench (N.B.);<sup>17</sup> in Newfoundland to the Trial Division (Nfld.);<sup>18</sup> in Nova Scotia to the Trial

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<sup>12</sup> For definition of the terms "departmental corporation" and "crown agency" see *infra* notes 33-35.

<sup>13</sup> Can. Stat. ch. 21, § 6 (1986).

<sup>14</sup> International Commercial Arbitration Act, Alta. Stat. ch.I-6.6, § 3 (1986).

<sup>15</sup> Foreign Arbitral Awards Act, B.C. Stat. ch. 74, § 4 (1985).

<sup>16</sup> International Commercial Arbitration Act, Man. Stat. ch. 32, § 3 (1986-87).

<sup>17</sup> International Commercial Arbitration Act, N.B. Stat. ch. I-12.2, § 3 (1986).

<sup>18</sup> International Commercial Arbitration Act, Nfld. Stat. ch. 45, § 4 (1986).

Division of the Supreme Court (N.S.);<sup>19</sup> in Ontario to the Supreme Court of Ontario or to the District Court;<sup>20</sup> in Prince Edward Island to the Trial Division of the Supreme Court (P.E.I.);<sup>21</sup> in Quebec to the court which would have had competence in Quebec to decide the matter in dispute;<sup>22</sup> in Saskatchewan to Her Majesty's Court of Queen's Bench for Saskatchewan;<sup>23</sup> in the Northwest Territories to the Supreme Court (N.W.T.);<sup>24</sup> and in the Yukon to the Supreme Court (Yukon).<sup>25</sup>

The Federal and Provincial implementing legislation is generally<sup>26</sup> uniform in declaring, as provided in Article 1 paragraph 3 of the Convention, that "it will apply . . . only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial . . . ." However, different interpretations of this provision across Canada may arise from the actual wording of the implementing legislation. For example, section 4 of the Federal legislation provides:

The Convention applies only to differences arising out of commercial legal relationships, whether contractual or not

without stating under which law the commercial nature of the legal relationships is to be determined.

In the case of provincial and territorial legislation, the applicable law will be that of the respective province or territory and this law may vary from province to province and territory to territory. For example, the British Columbia legislation provides in section 3 that:

This Act applies only to the recognition and enforcement of awards respecting differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of British Columbia (emphasis added).<sup>27</sup>

Although other legislation may not specify the law of the province

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<sup>19</sup> International Commercial Arbitration Act, N.S. Rev. Stat. ch. 234, § 4 (1989).

<sup>20</sup> International Commercial Arbitration Act, 1988, Ont. Stat. ch. 30, § 1(8) (1988). *See infra* note 43 and accompanying text.

<sup>21</sup> International Commercial Arbitration Act, P.E.I. Stat. ch. 14, § 3 (1986).

<sup>22</sup> An Act to Amend the Civil Code and the Code of Civil Procedure in Respect of Arbitration, Que. Stat. ch. 73, § 2 (1986) (new art. 949.1 of the Code of Civil Procedure).

<sup>23</sup> The Enforcement of Foreign Arbitral Awards Act, Sask. Stat. ch. E-9.11, § 6 (1986 as amended).

<sup>24</sup> International Commercial Arbitration Act, N.W.T. Ord. ch. 6, § 4 (1986(1)).

<sup>25</sup> Foreign Arbitral Awards Act, Yuk. Stat. ch. 4, § 4 (1986).

<sup>26</sup> Quebec does not have a commercial reservation but provides that, "An arbitration award shall be recognized and executed if the matter in dispute is one that may be settled by arbitration in Quebec and if its recognition and execution are not contrary to public order." (New Art. 949 of the Code of Civil Procedure, as amended by Que. Stat. ch. 73 (1986)).

<sup>27</sup> In this regard, see the discussion of when an arbitration is considered commercial under the B.C. International Commercial Arbitration Act, § 1(6), *infra* note 38. *See also*, in Saskatchewan, ". . . under the law of Saskatchewan": Sask. Stat. ch. E-9.11, § 5 (1986); in the Yukon, ". . . under the law of the Yukon": Yuk. Stat. ch. 4, § 3 (1986).

or territory, since the matter will come before a provincial or territorial court, that court will normally apply its own law in interpreting such a provision. This may not present a significant problem as there is fair uniformity across Canada, at least in the common law provinces and territories, in the area of commercial law because of their common origin in the English common law. Quebec does not have a commercial reservation.<sup>28</sup>

Another area where originally some difference in application of the Convention existed was the area of reciprocity. When the province of Saskatchewan first passed implementing legislation, it made a declaration restricting recognition and enforcement of awards to those made in the territory of another Contracting State.<sup>29</sup> However, Saskatchewan has now eliminated this reciprocity provision.<sup>30</sup>

#### IV. ADOPTION OF THE UNCITRAL MODEL LAW ON ARBITRATION

The UNCITRAL Model Law on arbitration provides for very strict limitations on court interference in the arbitral process; the role of the court under the Model Law is to act as a facilitator to ensure the smooth functioning of the arbitration process rather than to interfere in it. In keeping with the idea that the parties should have the greatest degree of autonomy possible in arranging their affairs, the Model Law provides only the minimum of mandatory rules, leaving the parties free to agree on the procedure to be followed by the arbitral tribunal in deciding the case.<sup>31</sup> (In this regard, the provisions of rules such as the UNCITRAL Arbitration Rules should be kept in mind for possible adoption by the parties.)

The second development of importance in Canadian law related to international commercial arbitrations, along with the accession to the New York Convention, is the modernization of the law dealing with the conduct of international commercial arbitrations in Canada. Both at the federal and provincial levels new legislation in this regard has arisen from the rapid enactment of legislation to implement the provisions of the UNCITRAL Model Law. As the Model Law is not contained in a treaty but merely presents a suggested model for arbitration law, the problems discussed above with respect to treaty implementation in Canada did not

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<sup>28</sup> *Supra* note 26.

<sup>29</sup> Sask. Stat. ch. E-9.11, § 5 (1986).

<sup>30</sup> Sask. Stat. ch. 8, § 5 (1988-89).

<sup>31</sup> *UNCITRAL Model Law on International Commercial Arbitration*, as adopted by the United Nations Commission on International Trade Law on 21 June 1985, 24 *Int'l Leg. Mat.* 1302 (1985), Article 19.

apply. Each province, territory and the federal government was free to enact legislation reflecting the Model Law as it wished, or even not to enact such legislation at all.

Canada was the first country to adopt the Model Law into domestic law, and all provinces and territories and the federal government have now passed legislation enacting the provisions of the Model Law. These new arbitration acts have now catapulted Canada into the forefront of nations having modern arbitration laws. However, the form of the legislation varied. The federal government and all of the provinces other than British Columbia and Quebec chose to enact legislation in a similar form whereby the Model Law is appended as a schedule with the enacting legislation being relatively short and only dealing with additions, limitations or alterations to the provisions in the Model Law. British Columbia enacted the substance of the Model Law in its own comprehensive statute and Quebec amended its Civil Code and Code of Civil Procedure to substantially reflect the provisions of the Model Law.

The following discussion of the Canadian legislation assumes some knowledge of the provisions of the UNCITRAL Model Law and only deals with those areas where the Canadian legislation varies from the Model Law.

#### A. The Federal Legislation

The Commercial Arbitration Act<sup>32</sup> was introduced into the Federal Parliament on May 1, 1986 and passed with the unanimous consent of all parties. This is the first time that the Federal Parliament has legislated with respect to federal arbitration, the only previous legislation dealing with arbitration having been at the provincial or territorial level.

The new federal procedural code is modelled after the Model Law on International Commercial Arbitration. Except for a few very minor alternations, Canada's Commercial Arbitration Act reproduces the Model Law exactly, as the Commercial Arbitration Code, a Schedule to the Act. The following discussion only deals with points peculiar to the new federal arbitration legislation.

The first point to note is that the Commercial Arbitration Act is not limited in its application to international commercial arbitration. In fact, the word "international" which appears in paragraph (1) of article 1 of the Model Law has been deleted from paragraph (1) of article 1 of the Commercial Arbitration Code set out in the Schedule to the Act.

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<sup>32</sup> Commercial Arbitration Act, R.S.C. ch. 17 (2nd Supp. 1985), as amended by R.S.C. ch. 1, §§ 8-10 (4th Supp. 1985).

Paragraphs (3) and (4) of article 1 of the Model Law, which contain a description of when arbitration is international, are deleted as a consequence and paragraph (5) of the Model Law appears as paragraph (3) of the Code.

The Commercial Arbitration Act is, however, limited. Section 5 para.2 provides:

The Code applies only in relation to matters where at least one of the parties to the arbitration is Her Majesty in right of Canada, a departmental corporation or a Crown corporation or in relation to maritime or admiralty matters.

Departmental corporation and Crown corporation are defined by reference to the Financial Administration Act.<sup>33</sup> Departmental corporation is defined in that act by reference to a list of corporations set out in Schedule II of that act,<sup>34</sup> and Crown corporation is defined as:

A parent Crown corporation or a wholly-owned subsidiary.<sup>35</sup>

Arbitrations with any other parties not involving maritime or admiralty matters fall within the provincial arbitration legislation in force in the province where the arbitration takes place. This is in keeping with the viewpoint that arbitration is essentially a matter of property and civil rights within the province and therefore within provincial jurisdiction, except for select areas where the federal parliament has jurisdiction.

Of interest is subsection (2) of section 4 of the Act which provides that recourse may be had to certain documents in interpreting the Code. This departs from the traditional approach to interpreting statutes in Canadian courts which has normally precluded an examination of such documents to determine legislative intent.<sup>36</sup> Subsection 4(2) provides as follows:

4.(2) In interpreting the Code, recourse may be had to

(a) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, held from June 3 to 21, 1985; and

(b) the Analytical Commentary contained in the Report of the Secre-

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<sup>33</sup> R.S.C. ch. F-11 (1985 as amended).

<sup>34</sup> *Id.* at § 2.

<sup>35</sup> *Id.* at § 83(1). "Parent Crown corporation" is further defined as a corporation that is wholly-owned directly by the Crown, but does not include a "departmental corporation"; "corporation", "includes a company or other body corporate wherever or however incorporated"; and "wholly-owned subsidiary", "means a corporation that is wholly-owned by one or more parent Crown corporations directly or indirectly through any number of subsidiaries each of which is wholly-owned directly or indirectly by one or more parent Crown corporations". Further definitions of when a corporation is "wholly-owned. . ." are also included in § 83(2) of the act.

<sup>36</sup> For a detailed discussion of statutory interpretation see, Dreidger, CONSTRUCTION OF STATUTES (2nd ed. 1983)(especially at 149-163).

tary General to the eighteenth session of the United Nations Commission on International Trade Law.

It is hoped that reference to such documentation may assist in an interpretation of the provisions of the Code which will be uniform with interpretations in other jurisdictions which adopt the Model Law.

For purposes of court assistance and supervision, Article 6 of the Code provides that these functions shall be performed by "the Federal Court or any superior, county or district court."

It is important to note that the Act provides for regulation of terms and conditions for arbitration agreements. Section 8 of the Act, as amended, provides:

The Governor in Council, on the recommendation of the Minister of Justice, may make regulations prescribing the terms and conditions on which Her Majesty in right of Canada, a departmental corporation or a Crown corporation may enter into an arbitration agreement.

These regulations will be important for determining the enforceability of arbitration agreements entered into by such entities.

#### B. The Provincial and Territorial Legislation

In addition to the federal legislation, the provinces and territories have also enacted legislation establishing procedural arbitration codes based on the Model Law, to provide rules for international commercial arbitration within each jurisdiction. As each province or territory is a separate jurisdiction, its particular legislation will have to be referred to in order to determine the exact applicable law. Although provincial and territorial legislation is based on the Model Law, as noted above, different approaches to implementing the Model Law and slight differences in the law may exist from jurisdiction to jurisdiction. As space is limited, the following discussion only considers the legislation of three provinces: i) the legislation of British Columbia where the provisions of the Model Law are incorporated into the body of a comprehensive Arbitration Act, with some slight wording/drafting changes; ii) the legislation of Ontario as an example of the approach where the Model Law is appended to the enacting legislation as a schedule; and iii) the legislation in Quebec. In case of an arbitration taking place in any other province or territory, a party must reference the legislation of the respective province or territory.<sup>37</sup>

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<sup>37</sup> Alberta: International Commercial Arbitration, Alta. Stat. ch. I-6.6 (1986-87);

British Columbia: International Commercial Arbitration Act, B.C. Stat. ch. 14 (1986), as amended by ch. 46, §§ 33-35 (1986);

Manitoba: International Commercial Arbitration Act, Man. Stat. ch. 32 (1986-87) (ch. C151 of Continuing Consolidation);



### 1. *British Columbia*

British Columbia has passed legislation to deal with international commercial arbitrations in the form of the International Commercial Arbitration Act.<sup>38</sup> The Act is based on the UNCITRAL Model Law and, in fact, the section numbers of the Act correspond to the article numbers of the Model Law. However, slight wording/drafting changes and some additions to the provisions of the Model Law exist so that the Act does not reproduce exactly the Model Law, as does the Federal legislation which simply attaches the Model Law as a Schedule. The following discussion deals only with those alterations that create a major addition or change to the Model Law and does not comment on other minor drafting changes.

The first additions occur in section 1 of the Act dealing with the scope of application. Subsection (5) has been added which provides that for the purposes of determining whether an arbitration is international as defined in subsection (3), which is the same as paragraph (3) of Article 1 of the Model Law, "the provinces and territories of Canada shall be considered one state." This provision establishes that the law applies only where there is some connecting factor outside of Canada and does not apply to interprovincial disputes. Without this provision, each province and territory in Canada could have arguably been considered a "state" as they each are considered as separate jurisdictions within Canada.

The British Columbia Act then contains a definition of when an arbitration is commercial. Subsection (6) of section 1 provides:

An arbitration is commercial if it arises out of a relationship of a commercial nature including, but not limited to, the following:

- (a) a trade transaction for the supply or exchange of goods or services;
- (b) a distribution agreement;
- (c) a commercial representation or agency;
- (d) an exploitation agreement or concession;
- (e) a joint venture or other related form of industrial or business cooperation;

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New Brunswick: International Commercial Arbitration Act, N.B. Stat. ch. I-12.2 (1986);  
Newfoundland: International Commercial Arbitration Act, Nfld. Stat. ch. 45 (1986);  
Nova Scotia: International Commercial Arbitration Act, N.S. Rev. Stat. ch. 234 (1989);  
Ontario: International Commercial Arbitration Act, Ont. Stat. ch. 30 (1988);  
Prince Edward Island: International Commercial Arbitration Act, P.E.I. Stat. ch. 14 (1986);  
Quebec: An Act to Amend the Civil Code and the Code of Civil Procedure in Respect of Arbitration, Que. Stat. ch. 73 (1986);  
Saskatchewan: International Commercial Arbitration Act, Sask. Stat. ch. I-10.2 (1988);  
Northwest Territories: International Commercial Arbitration Act, N.W.T. Ord. ch. 6 (1986(1));  
Yukon: International Commercial Arbitration Act, Yuk. Stat. ch. 14 (1987).  
<sup>38</sup> B.C. Stat. ch. 14 (1986), as amended by B.C. Stat. ch. 46, §§ 33-35 (1988).

- (f) the carriage of goods or passengers by air, sea, rail or road;
- (g) the construction of works;
- (h) insurance;
- (i) licensing;
- (j) factoring;
- (k) leasing;
- (l) consulting;
- (m) engineering;
- (n) financing;
- (o) banking;
- (p) investing.

Although this is not an exhaustive definition, it does give a clear idea of the types of activity which will be considered "commercial" within British Columbia. This definition may also be important for purposes of section 3 of the British Columbia Foreign Arbitral Awards Act discussed above.

The interpretation provision, article 2 of the Model Law, has been expanded by the equivalent provision, section 2 of the British Columbia Act. That Act includes a definition of "arbitral award" - "means any decision of the arbitral tribunal on the substance of the dispute submitted to it and includes (a) an interim arbitral award including an interim arbitration award made for the preservation of property and (b) any award of interest or costs"; and a definition of "party" - "means a party to an arbitration agreement and includes a person claiming through or under a party." The latter definition can be seen to extend application of the Act to persons other than just the original parties to the agreement. Finally, the provision contains definitions of "B.C. Arbitration Center", "Chief Justice", and "Supreme Court" which terms are referred to elsewhere in the Act.

The wording of article 3 of the Model Law has been altered somewhat in section 3 of the British Columbia Act. The Model Law reads:

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

- (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;
- (b) the communication is deemed to have been received on the day it is so delivered.

whereas the British Columbia Act reads:

**Receipt of written communications**

3.(1) Unless otherwise agreed by the parties,

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address, and

(b) the communication is deemed to have been received on the day it is so delivered.

(2) If none of the places referred to in subsection (1) (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered mail or by any other means which provides a record of the attempt to deliver it.

The re-positioning of paragraph (b) of Article 3 seems to indicate that the deeming provision as to when the communication is delivered does not apply to the situation outlined in subsection (2) of the British Columbia Act, whereas it arguably does apply to the same situation in the case of the Model Law.

Article 6 of the Model Law has been omitted, because the relevant court or other authority for certain functions of arbitration assistance and supervision has been specified in the relevant sections of the Act. In its place a new section 6 dealing with the construction of the Act has been inserted. This section provides:

6. In construing a provision of this Act a court or arbitral tribunal may refer to the documents of the United Nations Commission on International Trade Law and its working group respecting the preparation of the UNCTRAL Model Arbitration Law and shall give those documents the weight that is appropriate in the circumstances.

The same comments apply to this section as to the similar provision in the Federal legislation discussed above.

On August 18, 1988 Section 11 of the Act, dealing with the appointment of arbitrators, was amended to ensure that, where the Chief Justice of the Supreme Court of British Columbia is asked to appoint an arbitrator, the Chief Justice shall not appoint a sole or third arbitrator of the same nationality as that of one of the parties, unless the parties have previously agreed to it.

The British Columbia Act contains a provision in its section 13 dealing with the challenge procedure set out in paragraph (3) of Article 13 of the Model Law. The British Columbia Act provides that where a request is made to the Supreme Court (the specified court) to decide on the challenge:

[T]he Supreme Court may refuse to decide on the challenge, if it is satisfied that, under the procedure agreed upon by the parties, the party making the request had an opportunity to have the challenge decided upon by other

than the arbitral tribunal.<sup>39</sup>

Thus, for example, where the parties have referred the challenge to an arbitral institution for decision, the court may refuse to intervene.

The British Columbia Act has added to Article 15 of the Model Law dealing with the appointment of a substitute arbitrator, to clarify the status of the arbitration when a new arbitrator is appointed:

- (3) Unless otherwise agreed by the parties,
  - (a) where the sole or presiding arbitrator is replaced any hearings previously held shall be repeated and
  - (b) where an arbitrator, other than the sole or presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.
- (4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section is not invalid solely because there has been a change in the composition of the tribunal.

In Part 5, dealing with the conduct of arbitral proceedings, the British Columbia Act has made additions to Article 24 of the Model Law. Subsection (4) of section 24 of the British Columbia Act which incorporates the provisions of paragraph (3) of Article 24 of the Model Law reads as follows:

All statements, documents, or other information supplied to, *or application made to*, the arbitral tribunal by one party shall be communicated to the other party . . . . (The italics represent the additional language.)

In addition, a new paragraph has been added to this provision as subsection (5):

Unless otherwise agreed by the parties, all oral hearings and meetings in arbitral proceedings are to be held in camera.

Article 26 of the Model Law dealing with experts appointed by the arbitral tribunal has been expanded by the British Columbia Act. In addition to the provisions of article 26, the British Columbia Act also provides:

- (3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the expert's possession with which he was provided in order to prepare his report.

This addition ensures each party full access to information in order to enable that party to properly prepare any response to such expert testimony.

Article 27 of the Model Law dealing with court assistance in taking evidence has been expanded to provide for court assistance in consolidat-

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<sup>39</sup> B.C. Stat. ch 14 § 13(5) (1986).

ing arbitrations. Subsections 27(2) and (3) of the British Columbia Act provide:

(2) Where the parties to 2 or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, the Supreme Court may, on application by one party with the consent of all the other parties to those arbitration agreements, do one or more of the following:

(a) order the arbitrations to be consolidated on terms the court considers just and necessary;

(b) where all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with section 11 (8);

(c) where all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.

(3) Nothing in this section shall be construed as preventing the parties to 2 or more arbitrations from agreeing to consolidate those arbitrations and taking any steps that are necessary to effect that consolidation.

Article 28, paragraph (2) of the Model Law dealing with rules applicable to the substance of the dispute has been changed in the corresponding subsection of the British Columbia Act. Paragraph (2) of Article 28 reads:

Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

Subsection (3) of section 28 of the British Columbia Act reads:

Failing any designation of the law under subsection (1) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

The British Columbia Act appears to give the arbitral tribunal wider discretion than the Model Law in determining the applicable law, in that it doesn't restrict the arbitral tribunal to determine the applicable law in accordance with a set of conflict of laws rules.

Section 30 of the British Columbia Act incorporates Article 30 of the Model Law dealing with settlement. However, the British Columbia Act adds as subsection (1) of section 30 the following provision:

It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

Although it may be appropriate for the arbitral tribunal to encourage settlement of the dispute, this provision calls for a number of caveats. First, any such suggestion must be in neutral terms (i.e., it is appropriate to suggest generally to the parties that they should settle for reasons of expenses and time, etc.); however, it would be inappropriate to

suggest to one of the parties that it would be in the interests of that party to settle. Second, the arbitral tribunal should not suggest a formula for settlement unless both parties request the tribunal to do so. Even in such a case it would not be advisable for the tribunal to comply with the request unless the parties agree in advance that the non-acceptance of such suggestion does not impair the ability of the tribunal to continue with the arbitral proceedings.

It is this author's opinion that the use of mediation, conciliation or other procedures to encourage settlement, endangers the arbitral tribunal. Where the arbitrators act in such a capacity during the course of the arbitration and the attempt at settlement fails, the arbitrators may have compromised the independence and impartiality required for continuing with the arbitral proceedings and may no longer enjoy the confidence of the parties. This would then require the complete re-arbitration of the matter. If arbitrators use such procedures, it is suggested that they take great care to avoid such disqualification, and, in particular, that the arbitrators participate in such procedures only if the parties agree in advance that notwithstanding the failure of such attempts at settlement, the authority of the arbitrators remains unimpaired.

The British Columbia Act makes further provisions with regard to the form and contents of the awards contained in the Model Law. In addition to those provisions set out in Article 31 of the Model Law, Section 31 of the British Columbia Act provides:

- (6) The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award.
- (7) Unless otherwise agreed by the parties, the arbitral tribunal may award interest.
- (8) Unless otherwise agreed by the parties, the costs of an arbitration shall be in the discretion of the arbitral tribunal which may, in making an order of costs,
  - (a) include as costs,
    - (i) the fees and expenses of the arbitrators and expert witnesses,
    - (ii) legal fees and expenses,
    - (iii) any administration fees of the B.C. Arbitration Center or any other institution,
    - (iv) any other expenses incurred in connection with the arbitral proceedings, and
  - (b) specify
    - (i) the party entitled to costs,
    - (ii) the party who shall pay costs,
    - (iii) the amount of costs or method of determining that amount, and
    - (iv) the manner in which the costs shall be paid.

In section 33 of the British Columbia Act which deals with correc-

tion and interpretation of award, it is significant to note that the British Columbia legislation has omitted the phrase "with notice to the other party" which appears in paragraphs (1(a)), (1(b)) and (3) of Article 33 of the Model Law.

In dealing with recognition and enforcement of the arbitral award, the British Columbia Act has allowed for the possibility of less onerous provisions than those contained in the Model Law by inserting the phrase "Unless the court orders otherwise"<sup>40</sup> before the provisions contained in the first sentence of paragraph (2) of Article 35 of the Model Law. This is in keeping with the note to that paragraph set out in the Model Law.<sup>41</sup>

## 2. Ontario

Ontario has introduced legislation based on the Uniform Act adopted and recommended for enactment by the Uniform Law Conference. The legislation is relatively short as it basically adopts the Model Law in a Schedule to the Act, with the Act only setting out any departures from or additions to the Model Law. This is the same approach followed in the Federal legislation and the legislation of the other provinces and territories, other than British Columbia and Quebec.

The Ontario legislation is contained in the International Commercial Arbitration Act,<sup>42</sup> the long title of which is An Act to Implement the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law. This Act received Royal Assent and came into effect on June 8th, 1988. The legislation is more similar to the Federal legislation than to that of British Columbia in that it adopts the Model Law as set out in a Schedule to the Act with the Act only setting out any departures from or additions to the Model Law, rather than re-enacting the Model Law in its own words with changes and additions incorporated. The following reviews those provisions where the Act alters or adds to the provisions of the Model Law.

Section 1 para.(4) provides that:

1.(4) In articles 34(2)(b)(i) and 36(1)(b)(i) of the Model Law: "the law of this State" means the laws of Ontario and any laws of Canada that are in force in Ontario.

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<sup>40</sup> B.C. Stat. ch. 14 § 35(2) (1986).

<sup>41</sup> "The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions."

<sup>42</sup> Ont. Stat. ch. 30 (1988).

Article 34 deals with setting aside an award, and Article 36 deals with grounds for refusing recognition or enforcement. Both Articles provide that the remedy is available, *inter alia*, if "the court finds that the subject of the dispute is not capable of settlement by arbitration under the law of this state." As mentioned above, Canada is a Federal state with 13 separate jurisdictions each having arbitration laws. The above provision of the Ontario law clarifies that for the purposes of determining the arbitrability of a dispute, the relevant law is that in force in Ontario.

Section 1 para.(7) provides that:

1.(7) In article 1 (3) of the Model Law, "different States" means different countries, and "the State" means the country.

This provision clarifies that the law applies only where some connecting factor outside of Canada exists and does not apply to inter-provincial disputes. Without this provision, it would have been arguable that each province and territory in Canada was a "state" as they are each considered as separate jurisdictions within Canada. Section 1 para.(8) provides that:

1.(8) In the Model Law, a reference to "a competent court" means the Supreme or District Court.<sup>43</sup>

The Court system in Ontario is currently undergoing reform, and as part of this reform the above courts have been reorganized into a single court - the Ontario Court of Justice (General Division). Thus, as of September 1, 1990, for purposes of assistance and supervision the court or other authority is the Ontario Court of Justice (General Division).

Section 2 para.3 deals with application of the Model Law and provides:

2.(3) Despite article 1(3)(c) of the Model Law, an arbitration conducted in Ontario between parties that all have their places of business in Ontario is not international only because the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

In this situation, the courts may determine that the arbitration is domestic (provincial) and that the arbitration should be conducted pursuant to the law applicable to domestic arbitrations.

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<sup>43</sup> Similarly, in other jurisdictions: in Alberta, the Court of Queen's Bench (Alta), § 9(1); in Manitoba, the Court of Queen's Bench (Man.), § 9(1); in New Brunswick, the Court of Queen's Bench (N.B.), § 9(1); in Newfoundland, the Trial Division (Nfld.), § 10(1); in Nova Scotia, the Trial Division of the Supreme Court (N.S.), § 9(1); in Prince Edward Island, the Trial Division of the Supreme Court (P.E.I.), § 9(1); in Saskatchewan, Her Majesty's Court of Queen's Bench (Sask), §§ 2(1) and 8; in the Northwest Territories, the Supreme Court (N.W.T.), § 9; in the Yukon, the Supreme Court (Yukon), § 7. All section references are to the respective provincial acts.



Section 3 of the Act adds to the provisions of the Model Law the following:

3. For the purpose of encouraging settlement of a dispute, an arbitral tribunal may, with the agreement of the parties, use mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reasons of the mediation, conciliation or other procedure.

This provision is similar to that of subsection 30(1) of the British Columbia Act discussed above<sup>44</sup> and the same caveats apply. However, one should note that it specifically provides in the above section that "*with the agreement of the parties*, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators . . ." (emphasis added).

Section 4 of the Act adds to the provisions of Article 15 of the Model Law dealing with the appointment of a substitute arbitrator. It provides:

4.(1) Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the Model Law, any hearing held prior to the replacement or removal shall start afresh.

(2) The parties may remove an arbitrator or a substitute arbitrator at any time prior to the final award, regardless of how the arbitrator was appointed.

This provision may be compared with subsections 15(3) and 15(4) of the British Columbia Act discussed above.<sup>45</sup> It should be noted that, unlike the British Columbia Act, *in any case*, unless the parties otherwise agree, the hearings *must* be repeated. No room to continue the proceedings at the discretion of the tribunal exists if the arbitrator replaced is other than the sole or presiding arbitrator as in the British Columbia legislation.

Section 5 provides that:

5. Article 11(1) of the Model Law shall be deemed to read as follows:

(1) A person of any nationality may be an arbitrator.

This provision reflects Ontario law which prohibits discrimination on the basis of nationality.

Section 6 of the Act gives the arbitral tribunal a wider discretion in determining the applicable law than does paragraph (2) of Article 28 of the Model Law:

6. Despite article 28(2) of the Model Law, if the parties fail to make a

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<sup>44</sup> *Supra* pp. 113-114. This provision on conciliation has been deleted from the legislation of the Northwest Territories.

<sup>45</sup> *Supra* note 38 and accompanying text.

designation pursuant to Article 28(1) of the Model Law, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances respecting the dispute.

This appears to give the arbitral tribunal wider discretion than the Model Law in determining the applicable law, in that it doesn't restrict the arbitral tribunal to determine the applicable law in accordance with a set of conflict of laws rules.

Section 7 of the Act adds to the provisions of the Model Law by allowing for court assistance in ordering the consolidation of arbitration proceedings:

- 7.(1) The Supreme or District Court, on the application of the parties to two or more arbitration proceedings, may order,
- (a) the arbitration proceedings to be consolidated, on terms it considers just;
  - (b) the arbitration proceedings to be heard at the same time, or one immediately after another; or
  - (c) any of the arbitration proceedings to be stayed until after the determination of any other of them.
- (2) Where the Court orders arbitration proceedings to be consolidated pursuant to clause 1(a) and all the parties to the consolidated arbitration proceedings are in agreement as to the choice of the arbitral tribunal for that arbitration proceeding, the court shall appoint the arbitral tribunal chosen by the parties, but if the parties cannot agree, the Court may appoint the arbitral tribunal for that arbitration proceeding.
- (3) Nothing in this Section shall be construed as preventing the parties to two or more arbitration proceedings from agreeing to consolidate those arbitration proceedings and taking such steps as are necessary to effect that consolidation.<sup>46</sup>

Section 10 provides that:

10. For the purposes of articles 35 and 36 of the Model Law, an arbitral award includes a commercial arbitral award made outside Canada, even if the arbitration to which it relates is not international as defined in article 1(3) of the Model Law.

This provision extends the provisions in the Model Law for the recognition and enforcement of arbitral awards to all commercial arbitration awards made outside Canada. This, in effect, serves to implement the New York Convention on Foreign Arbitral Awards and section 14 of the act thus repeals the Foreign Arbitral Awards Act, 1986 passed earlier to implement the Convention.

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<sup>46</sup> This provision has been redrafted in the legislation of the Northwest Territories as follows:

8.(1) Where

- (a) the parties to two or more arbitration agreements agree to consolidate their respective arbitral proceedings, and
- (b) the parties cannot agree on a matter necessary to conduct the consolidated arbitral proceeding, the Supreme Court may, upon the application of one party with the consent of all the other parties, make such order in respect of that matter as it considers necessary for the consolidation of the arbitral proceedings.

The legislation specifically extends its application to Her Majesty in right of the Province of Ontario by section 12:

12. This Act applies to an arbitration to which Her Majesty is a party.

Finally, in interpreting the Act, as with the Federal and British Columbia legislation, the Act provides that reference may be had to certain documents which would not normally be taken into consideration in interpreting a statute:

13. For the purpose of interpreting the Model Law, recourse may be had, in addition to aids to interpretation ordinarily available under the law of Ontario, to,

(a) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (June 3-21, 1985); and

(b) the Analytical Commentary contained in the Report of the Secretary General to the eighteenth session of the United Nations Commission on International Trade Law, as published in *The Canada Gazette*, Part I, Vol.120, No.40, October 4, 1986, Supplement.

### 3. *Quebec*

Quebec, like British Columbia, has enacted a free-standing piece of legislation adopting the basic structure of the Model Law, rather than legislating by reference and annexing the Model Law as a schedule. Arbitration law in Quebec is set out in An Act to Amend the Civil Code and the Code of Civil Procedure in Respect of Arbitration<sup>47</sup>. This Act amends the Civil Code (C.C.) of Lower Canada (Quebec) by inserting, after article 1926, "Title Thirteenth A: of Arbitration Agreements"; and replaces Book VII of the Code of Civil Procedure (C.C.P.) (articles 940-951) with a new Book VII "Arbitrations". The following discussion deals with a few differences from the Model Law and the other Canadian legislation.

As with the Federal legislation, the Quebec law applies to all arbitral proceedings and is not restricted to international arbitration alone. Moreover, the law is not limited to commercial matters; only disputes over the status or capacity of persons, family matters or questions of public order cannot be submitted to arbitration.<sup>48</sup> However, article 940.6 of the Code of Civil Procedure dealing with interpretation of the Arbitration title of the Civil Code of Procedure and which provides for reference to the Model Law, the UNCITRAL Report on the work of its eighteenth session, June 3 to 21 1985, and the Analytical Commentary contained in the Report of the Secretary General to the eighteenth session of UNCI-

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<sup>47</sup> Que. Stat. ch. 73 (1986), in effect November 11, 1986.

<sup>48</sup> *Id.* at Art. 1926.2 C.C.

TRAL, is limited and only applies "in the case of arbitration involving a matter of extra-provincial or international commerce."

With respect to the autonomy of the parties to an arbitral proceeding, the Quebec law gives more autonomy to the parties than does the Model Law. Article 1926.6 of the Civil Code provides that "Subject to the peremptory provisions of law, the procedure of arbitration is governed by the contract or, failing that, by the Code of Civil Procedure." The peremptory provisions are set out in article 940 of the Code of Civil Procedure which enumerates only a very few mandatory provisions. These provisions deal primarily with the finality of a decision of a judge in certain matters and the provisions on homologation of the award or annulment of the award.

On two points the Quebec Law adopts a different rule than the Model Law. First, with respect to hearings and written proceedings, Article 24 of the Model Law provides that, "subject to any contrary agreement of the parties, the arbitral tribunal shall decide whether to hold oral hearings . . . ." This contrasts with article 944.3 of the Code of Civil Procedure: which provides: "Proceedings are oral. A party may nevertheless produce a written statement."

Second, with respect to rules applicable to the substance of the dispute, Article 28 of the Model Law provides that "the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties" and in default of such choice shall apply "the law determined by the conflict of laws rules which it considers applicable." "In all cases, the arbitral tribunal [must] decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction." The Quebec law gives a wider discretion to the arbitrators, providing in article 944.10 of the Code of Civil Procedure that "[t]he arbitrators shall settle the dispute according to the rules of law which they consider appropriate . . . ."

On certain points, the Quebec law has added to the provisions of the Model Law. For example:

1. The Quebec law adds a provision regarding the designation of arbitrators which is not expressly provided for in the Model Law. Article 1926.4 of the Civil Code provides that "A stipulation which places one party in a privileged position with respect to the designation of the arbitrators is inoperative."
2. With respect to the powers of the arbitrators, article 944.1 of the Code of Civil Procedure provides that "[t]hey have all the necessary

powers for the exercise of their jurisdiction . . . .” This is broader than any provision in the Model Law.

3. Articles 944.6 to 944.9 incorporate the provisions of the Code of Civil Procedure with respect to the procedure of summoning and hearing of witnesses and give the arbitrators certain powers in this regard.
4. Article 945 provides that the arbitrators are bound to keep the deliberations secret. However, each one may, in the award, set out their conclusions and reasons.
5. Article 945.4 sets out that “[t]he arbitration award binds the parties upon being made.”
6. Articles 946 to 946.6 provide for homologation of the arbitration award.

In other cases, there are provisions of the Model Law which the Quebec law has not set out:

1. Article 17 of the Model Law regarding power of the arbitral tribunal to order interim measures and to require appropriate security in connection with such a measure.
2. Article 18 providing that the parties are to be treated equally. However, note article 1926.4 of the Civil Code, mentioned above, which provides that “[a] stipulation which places one party in a privileged position with respect to the designation of the arbitrators is inoperative.”
3. Article 20 regarding the place of arbitration.
4. Article 22 regarding the language or languages to be used in the arbitral proceedings.
5. Article 26(2) regarding participation of the expert appointed by the arbitral tribunal in a hearing where the parties have the opportunity to put questions and to present expert witnesses in order to testify on the points at issue.
6. Article 27 regarding court assistance in taking evidence. However, note articles 944.6 to 944.9 discussed above which incorporate the provisions of the Code of Civil Procedure with respect to the procedure of summoning and hearing of witnesses and give the arbitrators certain powers in this regard.
7. Article 32 regarding termination of the arbitral proceedings.

Although these matters are not dealt with specifically, article 944.1 of the Code of Civil Procedure, discussed above, which provides that the arbitrators “have all the necessary powers for the exercise of their jurisdiction . . . .” would in most cases allow the arbitrators to deal with these issues if the parties themselves did not address them.

Finally, with respect to enforcement of awards, it should be noted that Quebec is the only province to extend the provisions regarding enforcement so that they apply not only to international awards but also to domestic awards, that is, awards from another province in Canada.<sup>49</sup> Also, enforcement is not limited to commercial awards but extends to all awards "if the matter in dispute is one that may be settled by arbitration in Quebec and if its recognition and execution are not contrary to public order."<sup>50</sup>

## V. INTERNATIONAL ARBITRATION CENTERS

Apart from the effect of the old arbitration acts, in the past arbitration was not extensively used in Canada for the resolution of international commercial disputes because of the absence of machinery for the appointment of arbitrators and the administration of the proceedings, and the unfamiliarity of the arbitration procedure to business persons. In order to encourage the use of arbitration in Canada and to provide the machinery for the appointment of arbitrators and the conduct of proceedings, as well as to foster research and disseminate information on arbitration, the Canadian Arbitration, Conciliation and Amicable Composition Centre was established in Ottawa on November 12, 1980. The Centre was established in Ottawa in order to take advantage of Ottawa's proximity to both the common law and civil law legal systems. In addition, many arbitration clauses call for arbitration in the capital of the defendant's country.

The Canadian Arbitration Centre was active in encouraging the Canadian government to accede to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and in commenting on earlier drafts of the Model Law.

Since the mid nineteen-eighties, there has been a growing interest in the establishment of arbitration centres in Canada. On May 12, 1986, the British Columbia International Arbitration Centre was opened in Vancouver, and on January 15, 1987, the Quebec National and International Commercial Arbitration Centre was inaugurated in Quebec City.

## VI. CONCLUSION

Canada has experienced a revolutionary change in the field of international commercial arbitration since 1986. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral

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<sup>49</sup> *Id.* at Art. 948 C.C.P.

<sup>50</sup> *Id.* at Art. 949 C.C.P.

Awards (1958) is fully effective and the Federal government and Provinces have all enacted, with some slight modifications, the UNCITRAL Model Law. Canada has gone from being an unfavorable situs for international commercial arbitrations to being one of the most favorable, with easy enforcement and the most modern of international commercial arbitration laws.