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CANADA

The following is a review of the recent Canadian adoption of the UNCITRAL Model Law on International Commercial Arbitration.

The UNCITRAL Model Law on International Commercial Arbitration was adopted in 1986 as the Commercial Arbitration Code, the first federal law on arbitration in Canadian history. It is applicable to federal Ministries, Crown corporations and maritime matters. In addition, several common law provinces have adopted the Model Law. Finally, Quebec, a civil code jurisdiction, did not entirely copy the Model Law, but adjusted its provisions and also adopted Title XIII A of the Civil Code of Lower Canada (the pre-Confederation name of Quebec) and the new Book VII of the Code of Civil Procedure of Quebec which entered in force on November 11, 1986.

Quebec has a territory of 1,540,680 square kilometers and a population of about six and one-half million. These statistics make Quebec one of the larger Canadian provinces in territory. In population Quebec is larger than several Latin American states, such as Bolivia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, and Uruguay. The private law of Quebec is of French origin, similar to Latin American law; therefore, it may be of interest to examine the adjustments of the UNCITRAL Model Law in Quebec because a similar method of adoption may suit Latin American jurisdictions.

I. SCOPE OF APPLICATION

The UNCITRAL Model Law applies only to international commercial arbitration. There is no corresponding restriction in Quebec law. Article 1926.2 of the Civil Code prohibits arbitration only in disputes over the status or capacity of persons, family matters or questions of public order; however, an arbitration agreement cannot be opposed on the ground that the rules applicable to settlement of the dispute are in the nature of rules of public order (art. 1926.2). Thus, the Civil Code does not necessarily exclude arbitration in non-commercial matters. The Code of Civil Procedure applies to local, inter-provincial and international relations, but ar-

ticle 940.6 states that where matters of extra-provincial or international trade are at issue in an arbitration, the interpretation of this Title, where applicable, shall take into consideration: (1) the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on June 21, 1985; (2) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session held in Vienna in June of 1985; and (3) the Analytical Commentary on the draft text of a model law on international commercial arbitration contained in the report of the Secretary-General to the eighteenth session of the United Nations Commission on International Trade Law (art. 940.6).

Title II of the Code of Civil Procedure uses the concept, not of a foreign award, but of an award made outside Quebec, either in another Canadian province or territory, or in another state. The Code states that the interpretation of this Title shall take into account, where applicable, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958 (art. 948).

II. ARBITRATION AGREEMENT

Present law applies to an arbitration agreement where the parties submit a present or future dispute to one or more arbitrators instead of to courts (art. 1926.1). An arbitration agreement must be evidenced in writing. The agreement is deemed evidenced in writing if it is contained in an exchange of communications which attest to its existence or in an exchange of proceedings in which its existence is alleged by one party and not contested by the other (art. 1926.3). A stipulation which places one party in a privileged position with respect to the designation of the arbitrators is inoperative (art. 1926.4). An arbitration agreement contained in a contract is considered to be a separate agreement and a finding by arbitrators that the contract is null does not nullify the arbitration agreement by operation of law (art. 1926.5).

III. AUTONOMY OF THE WILL OF THE PARTIES AS TO PROCEDURE

Article 1926.6 of the Civil Code states that subject to peremptory provisions of law, the procedure of arbitration is governed by the contract or, failing that, by the Code of Civil Procedure. Article

940 of the Code of Civil Procedure repeats that the provisions of Title I apply to an arbitration where the parties have not made stipulations to the contrary; however, the parties cannot change provisions of chapter VII on the homologation or official sanction of the arbitration award, nor of chapter VIII on the annulment of the arbitration award, decisions of courts, and service of documents where the object is a judicial proceeding.

IV. LIMITATION OF THE JURISDICTION OF COURTS

Neither a judge nor a court can intervene in any question governed by this Title except in the cases provided for therein (art. 940.3). Either a judge or a court may grant provisional measures before or during arbitration proceedings on the motion of one of the parties (art. 940.4).

V. APPOINTMENT OF ARBITRATORS

The provisions of the Code on the number of arbitrators and the method of their appointment are not mandatory; they are applied only when the parties do not agree otherwise. As noted, art. 1926.4 renders inoperative a stipulation which places one party in a privileged position with respect to the designation of the arbitrators (art. 1926.4). Failing an agreement of the parties, there shall be three arbitrators. Each party shall appoint one arbitrator, and the two appointed shall appoint the third (art. 941). If one of the parties fails to appoint an arbitrator within thirty days, after having been notified by the other party to do so, or if the arbitrators fail to concur on the choice of the third arbitrator within thirty days after their appointment, a judge shall make the appointment on the motion of one of the parties (art. 941.1). These provisions correspond to article 10 and article 11(2) and (3) of the Model Law.

Instead of adopting articles 11(4) and (5) of the Model Law, the Code states that if the procedure of appointment contained in the arbitration agreement proves difficult to implement, a judge may, on the motion of one of the parties, take measures necessary to bring about the appointment (art. 941.2). This provision allows for the court's assistance when the appointment procedure is impossible and impracticable. Article 941.2, however, is not exclusive; the parties may agree on another solution.

Article 941.3 states that the decision of the judge under articles 941.1 and 941.2 is final, without appeal and mandatory. Judicial intervention in matters covered by articles 941.1 and 941.2 may be precluded by the parties when they agree on a procedure other than that described in these articles. Such is the case in some institutional arbitrations where the permanent arbitration body assists in appointment of arbitrators according to the rules of the Inter-American Commercial Arbitration Commission (articles 6 to 8 of the IACAC Rules of Procedure), the Rules for the International Chamber of Commerce Court of Arbitration (art. 2) or the Rules of the London Court of International Arbitration (art. 3).

VI. INCIDENTAL CESSATION OF ARBITRATOR'S APPOINTMENT

The grounds for recusal by an arbitrator (articles 942 to 942.2) include the grounds for the recusal of a judge. A judge may recuse himself for the following reasons:

1. if he is related or allied to one of the parties within the degree of cousin-german inclusively;

2. if he is himself a party to an action involving a question similar to the one in dispute;

3. if he has given advice upon the matter in dispute, or has previously taken cognizance of it as an arbitrator, if he has acted as attorney for any of the parties, or if he has made known his opinion extra-judicially;

4. if he is directly interested in an action pending before a court in which any of the parties will be called to sit as judge;

5. if there is mortal enmity between him and any of the parties, or if he has made threats against any of the parties since the institution of the action or within six months prior to the proposed recusal;

6. if he is tutor, subrogate-tutor, curator, presumptive heir or donee of any of the parties;

7. if he is a member of a group or corporation, or is manager or patron of some order or community which is a party to the suit;

8. if he has any interest in favouring any of the parties; and

9. if he is related or allied to the attorney or counsel or to the partner of any of them, either in direct line, or in collateral line in the second degree (art. 234).

A judge is disqualified if he or his consort is interested in the action (art. 235). These grounds are listed in the Code in a more detailed way than in the Model Law. In addition, the Code states that an arbitrator may recuse himself if he does not have the qualifications agreed to by the parties (art. 942). Provisions of articles 942 to 942.6 and of article 942.8 of the Code, however, can be modified or replaced by the agreement of the parties. Article 942.7 states that the judge's decision on the matter of recusal or revocation of appointment is final, without appeal, and is peremptory, but it will not be applied when the parties agree on another procedure which will render the assistance of the judge superfluous. Thus, the procedure of challenge (recusal) according to rules of procedure chosen by the parties will prevail. Decision on the challenge of an arbitrator may be made by the Inter-American Commercial Arbitration Commission (art. 12 of IACAC Rules), the Court of Arbitration of The International Chamber of Commerce (art. 2(7) of the ICC Rules) or by the London Court of International Arbitration (art. 3 of London CIA Rules).

VII. COMPETENCE OF ARBITRATORS

According to the Code, arbitrators may decide a matter of their own competence (art. 943). If the arbitrators declare themselves competent during the arbitration proceedings, a party may, within thirty days of being notified thereof, apply to the court for a decision on the matter. While such a case is pending, the arbitrators may hear the arbitration proceedings and make their award (art. 943.1). Both articles 943 and 943.1 are not peremptory; the parties may agree on another solution of these problems. Article 943.2, however, states that a court decision during arbitration proceedings recognizing the arbitrators' competence is final, without appeal, and cannot be modified by the parties. Article 1926.5 states that an arbitration agreement contained in a contract is divisible from the other clauses of the contract. A finding by the arbitrators that the contract is void does not void the arbitration agreement by operation of law (art. 1926.5). This provision corresponds to art. 16(1) of the Model Law.

VIII. ORDER OF ARBITRATION PROCEEDINGS

Chapter V, articles 944 to 944.11, of the Code of Civil Procedure is *ius dispositivum*. The chapter applies unless the parties

agree otherwise (art. 940 and art. 944.1). Article 944 corresponds to article 21 of the Model Law. The arbitrators arbitrate according to the procedure they determine, consistent with the rules agreed to by the parties. In the absence of the latter, arbitrators follow Title I "Arbitration Proceedings" of the Code of Civil Procedure (art. 944.1). The arbitrators have powers necessary to exercise their jurisdiction, including the power to appoint experts (art. 944.1). The Code does not follow the Model Law's distinction between experts appointed by arbitrators on one side and those called by the parties on another side. Proceedings are oral, but a party may produce a written statement (art. 944.3).

The arbitrators shall record a default and may continue the arbitration proceedings if one of the parties fails to state his claims, to appear at a hearing or to produce evidence in support of his claims. If the party who submitted the dispute to arbitration fails to state his claims, the arbitrators shall terminate the proceedings unless one of the other parties objects (art. 944.5).

Witnesses are summoned in the same manner as in cases before a court (arts. 944.6 and 280 to 283). When a person who has been duly summoned and to whom travelling expenses have been advanced fails to appear, a party may apply to a judge to compel him to appear in accordance with article 284. Accordingly, the judge may issue a warrant for his arrest and order that he be imprisoned until he has testified. The judge may also order such a person to pay, in whole or in part, the costs caused by his default. This order is very rarely given in practice. Where, without a valid reason, a witness refuses to answer or refuses to produce an object in his possession which is of interest to the dispute, a party may, with leave of the arbitrators, apply to a judge to issue a rule under article 53 (art. 944.8). Article 53 defines the consequences of contempt of court. These measures however, have not been applied in practice.

Each decision of the arbitrators shall be rendered by a majority. One arbitrator, however, with authorization of the parties or of all the other arbitrators may decide questions of procedure. Written decisions must be signed by all the arbitrators; if one of them refuses to sign or cannot sign, the others must record that fact, but the decision has the same effect as if it had been signed unanimously (art. 944.11).

IX. ARBITRATION AWARD

The arbitrators shall settle a dispute according to the rules of law which they consider appropriate and, where applicable, determine the amount of the damages. They cannot act as amiable compositeurs except with the prior assent of the parties. They shall, in all cases, decide according to the stipulations of the contract and take account of applicable usage (art. 944.10). Articles 945 through 945.7 of the Code of Civil Procedure on arbitration awards, are not peremptory. Article 945 states that the arbitrators are bound to keep the advisement secret. Each of them may, however, in the award, state his conclusions and the reasons on which they are based (art. 945). Dissenting opinions are thus allowed.

The Code allows the arbitrators to correct and/or interpret their award and also to render a supplementary award (arts. 945.5, 945.6 and 945.7). If the arbitrators do not render their decision within the corresponding application, a party may apply to a judge to make an order for the protection of the party's rights (art. 945.7). The judge's decision is final and without appeal (art. 945.8). The last provision is peremptory. It cannot be changed by agreement of the parties. The Code of Civil Procedure does not incorporate art. 32 of the Model Law regarding termination of arbitral proceedings without an award.

X. HOMOLOGATION OF THE ARBITRATION AWARD

The Code of Civil Procedure declares that the arbitration award is binding on the parties (art. 945.4). It cannot be put into compulsory execution, however until the award has been homologated and officially sanctioned (art. 946). A party may, by motion, apply to the court for homologation of the arbitration award (art. 946.1). The court examining a motion cannot inquire into the merits of the dispute (art. 946.2). The court may refuse homologation for the following reasons only: 1. one of the parties was unqualified to enter into the arbitration agreement; 2. the arbitration agreement is invalid under the law selected by the parties, or under the laws of Quebec; 3. the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case; 4. the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; or 5.

the mode of appointment of arbitrators or the applicable arbitration procedure was not observed. In the case of subparagraph 4, the only provision not sanctioned is the unanticipated element of the dispute, if it can be dissociated from the balance of the arbitration decision (art. 946.4). The court may not refuse homologation *sua sponte* unless it finds that the matter in dispute cannot be settled by arbitration in Quebec or that the award is contrary to public order (art. 946.5). The sanctioned arbitration award is executory as a judgment of the court (art. 946.6). These articles are peremptory; they cannot be modified by agreement of the parties. The Model Law does not deal with homologation, but article 36 on recognition and enforcement is similar to article 946.4 of the Quebec Code of Civil Procedure.

XI. ANNULMENT OF THE ARBITRATION AWARD

Recourse against an arbitration award is an application for its annulment (art. 947). Annulment is obtained by motion to the court or by opposition to a motion for homologation (art. 947.1). On the application of a party, the court may suspend the application for annulment for as long as necessary to allow the arbitrators to remove the grounds for annulment, even if the time prescribed in article 945.6 has expired (art. 947.3). The application for annulment must be made within three months after the arbitration award or of the decision rendered under article 945.6.

XII. RECOGNITION AND EXECUTION OF ARBITRATION AWARDS MADE OUTSIDE QUEBEC

Title II of Book VII, articles 948 through 951.2 of the Code of Civil Procedure apply to all arbitral awards made outside Quebec, including those made in other Canadian provinces and territories. Article 948 states that the interpretation of this Title shall take into account, where applicable, the United Nations 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It is irrelevant whether an award is ratified by a competent authority. 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 (art. 949).

An application for recognition and execution is made by way of a motion for homologation to the court in Quebec which would

have had competence to decide the matter. The motion must be accompanied by either the original or a copy of the arbitration award and of the arbitration agreement. These originals or copies must be authenticated by an official representative of the Canadian government, by a delegate-general, delegate or head of delegation of Quebec carrying on his duties outside Quebec, or by a government or a public officer of the place where the award was made (art. 949.1). A party against whom an arbitration award is made may object to its recognition and execution by establishing that:

1. one of the parties was not qualified to enter into the arbitration agreement;

2. the arbitration agreement is invalid under the law elected by the parties or, failing any such indication under the laws of the place where the arbitration award was made;

3. the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

4. the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement;

5. the manner in which the arbitrators were appointed or the arbitration procedure itself did not conform with the agreement of the parties or, if there was no agreement, with the laws of the place where the arbitration took place; or

6. the arbitration award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the place or pursuant to the laws of the place in which the arbitration award was made. In the case of subparagraph 4, if the irregular provision of the arbitration award described in that paragraph can be dissociated from the rest, the rest may be recognized and declared executory (art. 950). The court may postpone its decision in respect of recognition and execution of an arbitration award if the competent authority referred to in subparagraph 6 of the first paragraph of article 950 has made an application to have the award set aside or suspended. If the court postpones its decision, it may, on the application of the party applying for recognition and execution of the award, order the other to furnish security (art. 951). A court examining an application for recognition and execution of an arbitration award cannot inquire into the merits of the dispute (art. 951.1). The arbitration award as homologated is exec-

utory as a judgment of the court (art. 951.2).

XIII. CONCLUSION

Present Quebec law on arbitration presents a significant advantage in that it is applicable to all arbitrations which are not governed by special laws. The commercial community is not faced with the need to distinguish between international and non-international arbitration because the same procedure applies to both. Arbitral awards made both inside and outside Quebec must be homologated in Quebec for the purposes of their recognition and/or enforcement in Quebec. However, for enforcement in Quebec there is no need to obtain an exequatur or ratification of an award made outside Quebec by a foreign authority. Nor is there a reciprocity requirement. The parties are free to select procedure as they wish, whether by choice of an arbitration institution's rules or simply by describing the procedure in the arbitration agreement. There are few mandatory articles in Title I, Book VII of the Quebec Code of Civil Procedure. Those which are mandatory apply to motions submitted to a judge or a court. Thus, institutional arbitration rules such as those of the Inter-American Commercial Arbitration Commission, the International Chamber of Commerce, the Canadian Arbitration, Conciliation and Amicable Composition Centre, and non-institutional rules, such as the UNCITRAL Rules, can easily be applied in Quebec. Great deference is given to the will of the parties. There are no requirements as to the language of the arbitration. The motion for homologation can be submitted either in French or in English. Both languages are used without need for translation in the courts in Quebec. The same applies to federal courts within their jurisdiction. There are no restrictions as to citizenship of arbitrators.

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