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Why Canada Leads as the Model Law Turns 25

Barry Leon (Perley-Robertson, Hill & McDougall LLP) · Tuesday, August 10th, 2010

It is true that Canada did not qualify for FIFA's World Cup and did not dominate at the Winter Olympics. However, when it comes to the UNCITRAL Model Law on Commercial Arbitration, Canada is a leader.

This year marks the 25th anniversary of the Model Law. Since becoming the first state signatory to the Model Law in 1986, Canada has played a key role in the Model Law's development and judicial interpretation. Indeed, of the 316 decisions reported by the UNCITRAL Secretariat on the Model Law, over one-third (112) emanate from Canadian courts.

At this silver anniversary of the Model Law, it is timely to reflect on the significance of Canada's contributions, and on what the Canadian experience tells us about the prospects for the Model Law.

In 1985, the UN General Assembly expressed the conviction that the Model Law "significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations." When it was made in 1985, that declaration may have been premature. The optimism, however, has proven to be warranted.

UNCITRAL succeeded in creating a model statute that reflects an international consensus on the requirements of a modern arbitration regime. It has helped – and continues to help – guide many states, and sub-national territories, in reforming and modernizing their laws on arbitral procedure, both domestic and international. It has helped carry forward the fundamental principle, set out in Article 8(1) of the Model Law – and in Article II(3) of the New York Convention – that courts must refer parties to arbitration except where their arbitration agreement is found to be "null and void, inoperative or incapable of being performed."

Canada's federal government and all 13 provinces and territories have essentially adopted the Model Law, either as a schedule to a short statute, or as the substance of their international arbitration statute or codified law, and generally, as the core of their domestic arbitration law. In Ontario, for instance, the Model Law was implemented in the International Commercial Arbitration Act, and in Québec, most provisions of the Model Law were implemented in substance through amendments to the Civil Code of Québec and the Code of Civil Procedure. Given this early and decisive commitment to the Model Law, it is perhaps unsurprising that a strong judicial policy in favor of arbitration has emerged in Canada since 1986 (which is also when Canada ratified the New York Convention).

With 14 jurisdictions all featuring a long history of application of the Model Law and over one-

third of the decisions reported by the UNCITRAL Secretariat coming from Canadian courts, Canada is no spectator in the development of international arbitration law. To some degree, where Canada goes, so goes the Model Law.

The 'scorecard' of the Canadian appellate courts and the Supreme Court of Canada indicates they have taken a broad, pro-arbitration approach on almost all aspects of the Model Law, and arbitration generally, to come before them. They have been deferential to arbitration agreements – particularly international commercial arbitration agreements – by construing them broadly, staying court proceedings, deciding that almost all matters are arbitrable, and enforcing arbitral awards.

The following key cases are of particular interest:

In *Desputeaux v. Éditions Chouette (1987) inc.* [2003] 1 S.C.R. 178, https://www.canlii.org/en/ca/scc/doc/2003/2003scc17/2003scc17.html, the Supreme Court of Canada ruled that most types of disputes, in particular intellectual property disputes – in this case, copyright – are arbitrable. It stated that "[i]f Parliament had intended [in the Copyright Act] to exclude arbitration in copyright matters, it would have clearly done so…" The Court affirmed that legislation "cannot be assumed to exclude arbitral jurisdiction unless it expressly so states," and ruled "[t]he parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding." The enactment of the Model Law is cited as an indication of Parliament's recognition of the legitimacy and importance of arbitration.

In *Dalimpex Ltd. v. Janicki*, (2003) 64 O.R. (3d) 737 (Ont. C.A.), https://www.canlii.org/en/on/onca/doc/2003/2003canlii34234/2003canlii34234.html, the Ontario Court of Appeal accepted that courts should defer to the judgment of the arbitrator as to whether a dispute is arbitrable: "… it is at least arguable that the disputes, in … arbitration proceeding in Poland, fall within the scope of the arbitration agreement and that the preferable approach is to leave any definitive pronouncement on the scope of the agreement to be determined by the arbitral tribunal as decision-maker of first instance [Court of Arbitration in Poland]." This approach "is consistent with the wording of the legislation and the intention of the parties to review their disputes to arbitration."

In *Woolcock v. Bushert*, (2004) 246 D.L.R. (4th) 139; 192 O.A.C. 16, (Ont. C.A.), https://www.canlii.org/en/on/onca/doc/2004/2004canlii35081/2004canlii35081.html, the Ontario Court of Appeal concluded that the words "relating to" in the arbitration clause enjoy "…a wide compass. So long as the matter in dispute is referable to the interpretation or implementation of some provision of the Agreement, it is arbitrable [under the arbitration clause]." It held that claims under the statutory "oppression remedy" (a statutory corporate law remedy empowering a court to grant broad remedies to shareholders, creditors, directors, officers, and others for conduct that is oppressive, unfairly prejudicial, or unfairly disregards the interests of the complainant) can be brought in an arbitration and statutory remedies can be granted by an arbitral tribunal.

GreCon Dimter inc. v. J.R. Normand inc., [2005] 2 S.C.R. 401, https://www.canlii.org/en/ca/scc/doc/2005/2005scc46/2005scc46.html, is a Supreme Court of Canada decision concerning the parties' choice of a dispute resolution forum for a contract dispute. Based on the legislative context, which includes Québec's codification of principles of private international law such as the Model Law, the Supreme Court of Canada held that the rule of the autonomy of the parties to choose a forum for dispute resolution prevails over the procedural rule

of the single forum. It noted "…there are numerous provisions [of the Québec Civil Code] that allow the parties considerable freedom of choice regarding the law that will be applicable to specific juridical acts or situations, including provisions on … arbitration agreements." The Supreme Court confirmed "the legislature's tendency toward recognizing the existence and legitimacy of the private justice system, which is often consensual and is parallel to the state's judicial system." The Court stated that arbitration and choice of forum clauses are important to foster the "certainty and foreseeability required for purposes of the critical components of private international law, namely order and fairness."

In *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, https://www.canlii.org/en/ca/scc/doc/2007/2007scc34/2007scc34.html, consumers attempted to bring a class action suit against Dell. The Supreme Court of Canada ruled that the claim should be referred to arbitration pursuant to an arbitration clause in the terms and conditions of sale. The Court framed the "competence-competence" principle as a general rule that a challenge to the arbitrator's jurisdiction must first be resolved by the arbitrator. The only exception is where the challenge is based solely on a question of law, in which case the court's expertise prevails. The test is set out as follows: "[i]f the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record."

In *Coderre v. Coderre*, 2008 QCCA 888, https://www.canlii.org/en/qc/qcca/doc/2008/2008qcca888/2008qcca888.html, the Model Law is cited by the Québec Court of Appeal as a tool to interpret the arbitration provisions of Québec's Code of Civil Procedure. Significant reforms were made to the Code of Civil Procedure in 1986. The Court confirmed that the "… reform as a whole was inspired by the Model Law … and its spirit infuses the provisions devoted to arbitration in the Civil Code and the Code of Civil Procedure". The Court ruled that "… arbitration agreements and the powers of arbitrators must be interpreted broadly and generously."

In *Jean Estate v. Wires Jolley LLP*, 2009 ONCA 339, https://www.canlii.org/en/on/onca/doc/2009/2009onca339/2009onca339.html, the Ontario Court of Appeal dealt with a dispute concerning the validity of a law firm's contingency fee agreement. First, the Court held that the court could rule on arbitrability, but only because the case fell within a narrow exception established in Dell (see above). Second, the Court held that "[g]iven the strong policy of deference afforded to arbitration agreements,… simply because the Solicitors Act refers to a Superior Court judge as having the jurisdiction to protect clients' rights, this does not mean that disputes arising between a solicitor and a client may not be submitted to arbitration. The Act simply identifies the person within the judicial system empowered to make a decision. The right to have an independent decision maker who can interpret the agreement and make a decision respecting a contingency fee dispute is preserved through arbitration and hence the public policy of the Act, the provision of a forum for legitimate dispute resolution, is not undermined."

In *Dancap Productions Inc. v. Key Brand Entertainment Inc.*, 2009 ONCA 135, https://www.canlii.org/en/on/onca/doc/2009/2009onca135/2009onca135.html, the Ontario Court of Appeal followed the approach to the interpretation of the Model Law adopted in Dalimpex and Dell, and found that the lower court judge erred "… in ruling on the scope of the arbitration clause rather than leaving the issue to the arbitrator." This was not a case where it was clear and obvious

that the arbitration clause did not apply.

Most recently, in *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19, https://www.canlii.org/en/ca/scc/doc/2010/2010scc19/2010scc19.html, the Supreme Court recognized that "[h]aving adopted both the [New York] Convention and the Model Law, …, there is no doubt that Alberta is required to recognize and enforce of eligible foreign arbitral awards." The Court also re-stated what it held in Dell that "an arbitral award is not a judgment or a court order … '[a]rbitration is part of no state's judicial system' and 'owes its existence to the will of the parties alone'."

Soon the Supreme Court of Canada will issue its judgment in *Seidel v. Telus Communications Inc.*, on appeal from the British Columbia Court of Appeal, (2009) 304 D.L.R. (4th) 564, https://www.canlii.org/en/bc/bcca/doc/2009/2009bcca104/2009bcca104.html. The Court's judgment may decide how a court faced with a motion to stay under Article 8(1) of the Model Law should react when the action is a proposed class action, whether certification can be considered concurrently with the motion to stay (refer the parties to arbitration), and whether the arbitration clause is rendered "inoperable" if the action is certified.

These court decisions are examples of Canada's contribution to the interpretation, application and development of the Model Law and to helping it achieve the UN General Assembly's conviction that the Model Law "significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations."

The consistency of the Canadian appellate and Supreme Court decisions indicates that we can anticipate from Canadian courts a continued stream of pro-arbitration jurisprudence interpreting, applying and developing the Model Law consistent with the Model Law's objectives.

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