CAIRO REGIONAL CENTRE FOR INTERNATIONAL
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and Various Experiences in Adopting the Model Law
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THE CANADIAN LEGAL ENVIRONMENT SINCE THE ADOPTION OF THE UNCITRAL MODEL LAW

Dr. NABIL N. ANTAKI, F.R.S.C.*

Egypt has chosen to take its place among the many countries that have decided to modernize their legislation on international commercial arbitration by adopting the Model Law of the United Nations Commission on International Trade Law (UNCITRAL). The adhesion of this eminent Arab country - respected for its outstanding legal tradition - to this model meticulously wrought by the international legal community and now widespread, is indubitably a source of fulfillment for all those who cherish greater commercial and political harmony between the peoples of this planet. I have no doubt that henceforth, Egypt will play an even greater role in international commercial arbitration.

Obviously, arbitration has now come to the fore as the privileged means for resolving disputes in international trade. It is also unfortunately clear that this technique is far from being completely tried and true. The reasons underlying its mitigated success are many and varied. They result both from the fragility of supra-national law and from domestic circumstances involving politics, law and society. Furthermore, the adoption of up-to-date legislation - even a model law at that - is not a determining factor. The parties also need reassurance that past irritants have been removed.

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* Full Professor at l'Université Laval and President of the Québec National and International Commercial Arbitration Centre (QNICAC)

Experience shows that the improvement of the law is often a necessary step, but even more important - albeit an indispensable condition - is the replacement of a paradigm of hostility, whether latent or otherwise, by one more receptive to the development of mutual trust. In this area, the Canadian experience has much to say for itself.

For a long time, Canada was one of many countries that had not understood the critical underpinnings of international arbitration. Although international trade operators knew and appreciated the impressive professional value of Canadian international arbitrators, when the facade was pulled away Canada remained absent from the world scene of international arbitration. It is well worth recalling that in 1985, Canada still had not signed the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1956* (the New York Convention), that the federal government had not introduced legislation on arbitration, that provinces of English tradition and language already having such legislation, had held true to the outdated English model no longer adapted to changing needs, and that no legislator had yet deemed it worthwhile to pass legislation specific to international arbitration.

Then there is Québec. Québec, as we know so well, is in addition to being one of the larger provinces, a bilingual and bicultural society home to two legal systems. On the one hand, its *Civil Code* derives from the Code Napoléon while its *Code of Civil Procedure* and the organization of its Courts are similar to the Common Law system. As such, the Province is traditionally receptive to new legal ideas and in 1965, Québec stepped to the forefront of Canadian legislation by legalizing final and binding arbitration and providing a legal framework for its use. Unfortunately, the Courts did not share in this liberal-minded approach and it was only in the *Zodiac*[1] case handed down by the Supreme Court in 1983 that the courts accepted the fact, 18 years later! Even then, some Courts continued refusing to recognize the specificity of international arbitration[2] and insisted on applying to international business disputes the parochial attitude condemned by the U.S. Supreme Court in *Scherk* v. *Alberto-Culver Co.*[3]. Some

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1 Zodiac International Productions, Ltd v. The Polish Peoples' Republic, (1983) S.C.R. 529.

2 Argos Film v. Ciné 360, Inc., 500-05-0009214-832 (Mtl, S.C., 7 April 1987)

3 94 S.Ct. 2449, 2455 (1974)

will recall, with no regrets, several unfortunate decisions such as the one which dispatched a Rogatory Commission to France to interrogate the arbitrators!

An unprecedented symposium held in Québec in 1985[4] underscored the backwardness in international arbitration and urged federal and provincial authorities to sign the New York Convention and to adopt the Model Law that had just been adopted by UNCITRAL. It would be a gross exaggeration to claim that this first symposium was the moving force behind the basic transformations that followed suit, it is nonetheless widely recognized that this event played a pivotal and useful role.

The country was ripe for a quiet revolution in arbitration[5] and changes started to occur at a dizzying pace.

By June of 1986, Canada had signed the New York Convention[6] and had adopted the Model Law bearing the title *Commercial Arbitration Code* as an appendix to *An Act relating to commercial arbitration.*[7] For constitutional reasons, the Code only applies to arbitration in which at least one of the parties is a government department or Crown corporation and to matters in maritime or admiralty law. The act makes no distinction between domestic and international arbitration. It explicitly provides that preparatory texts of the Model Law may be used to interpret the Code and applies the liberal regime reserved by others for international trade arbitration to all arbitrations.

Canadian provinces[8] in the English legal tradition as well as the Territories rapidly followed the movement, but preferred to adopt two distinct acts: one was reserved for international arbitration based on the Model Law and the other, far more restrictive and limited, was aimed at domestic arbitration.

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4 N. Antaki et A. Prujiner (ed.), PROCEEDINGS OF THE 1st INTERNATIONAL COMMERCIAL ARBITRATION CONFERENCE, W & L, 1985, Montréal.

5 M. Lalonde, J.N. Buchanan et J.C. Ross, Domestic and International Commercial Arbitration in Québec: Current Status and Perspectives (1985) 45 R. du B. 705.

6 S.C. 1986, c. 21

7 S.C. 1986, c. 20

8 In reality, British Columbia was the first to pass legislation in this area. R.K. Paterson and B.J. Thompson, UNCITRAL ARBITRATION IN CANADA, Carswell, 1987, Toronto

Once again in 1986, Québec innovated[9]. Instead of adopting one or two specific acts, the legislator preferred incorporating the principles of the Model Law relating to the arbitration agreement into the *Civil Code* and those regarding procedure into the *Code of Civil Procedure* with a new reference to the Model Law and preparatory texts. The arbitration agreement became a nominate contract on an identical footing with the contract of mandate, sale or insurance and the flexible rules proposed by UNCITRAL for international arbitration were extended to domestic arbitration.[10]

The year 1986 also saw the creation of two dynamic arbitration centres in Canada[11], both of which have been highly active and successful in promoting institutional commercial arbitration throughout the business community and in legal and other professional associations as well as the judiciary[12].

The whirlwind of change had endured and grown. Committees, commissions and task forces sprung up while professional associations jumped into the debate. Canada was finally awakening to alternate techniques and was signaling the need to make up for lost time. In this upheaval, it is fitting to draw attention to the important work accomplished by the Québec Justice Department which led to the Justice Summit[13] and the methodical and promising approach of the dispute resolution project at the federal Justice Department. Once again, however, among the governments of Canada it is the Québec

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9 An Act to amend the Civil Code and the Code of Civil Procedure in respect of arbitration, L.Q. 1986, c. 73

10 For an authoritative critical appreciation of the Québec approach to international commercial arbitration, see G. Hermann, An International View of Québec's New Arbitration Law, in New Legislation on Arbitration and Professional Perspectives, QNICAC, January, 15, 1986 (Publication 87-01), See also J.E.C. Brierley, Québec Arbitration Law: A New Era Begins, 40 Arb. J. 20 (September 1985)

11 The British Columbia International Commercial Arbitration Centre (BCICAC) and the Québec National and International Commercial Arbitration Centre (QNICAC)

12 J. Thibault, Le Centre d'arbitrage commercial national et international du Québec et son règlement général d'Arbitrage, Rev. arb. 1994, 69 (Rules in the Appendix); J. Bédard, The UNCITRAL Arbitration Rules: A Comparative Analysis with the ICC Rules, The BCICAC Rules and the Québec Centre Rules, LL.M. Thesis (unpublished), Osgoode Hall Law School, Toronto, January 1992. For more specific information, please consult N. Antaki Complex Arbitration Management at the Québec Centre, ICCA, XII International Arbitration Congress, Vienna, November 1994

13 Report by the Task Force on Access to Justice (MacDonald Report) Jalons pour une plus grande accessibilité à la justice, Gouvernement du Québec, 1991

government that has blazed new trails by accepting to submit disputes to arbitration under the auspices of the QNICAC[14]

Despite the best legislative efforts, obviously parties would have refrained from arbitrating in Canada until they could rely on sufficient precedents to assess the real pros and cons of having cases heard there. Several years ago when asked for my professional advice, I even suggested to a willing party to wait and see. This is no longer the case and I can assure you without any hesitation that today Canada is as safe as any other forum with a long-standing tradition. A quick glance at a number of recent decisions explains my optimism[15].

THE ARBITRATION AGREEMENT [16]

The arbitration agreement is a contract separate from the other clauses and, as such, is now part of the *Civil Code*. The only matters excluded from arbitration are disputes over the status or capacity of persons, family matters or questions of public order, although arbitration cannot be opposed on the mere fact that the rules applicable to settlement of the dispute are in the nature of rules of public order.

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14 As an example, this extract is from the Decree pertaining to arbitration over the Montréal Olympic Stadium:

"WHEREAS both parties wish, in order to avoid long and costly litigation before the courts, to resort to an alternate means of settling the disputes in this matter, namely institutional arbitration under the supervisions of the Québec National and International Commercial Arbitration Centre;

WHEREAS the Québec National and International Commercial Arbitration Centre is a prominent international Québec institution whose main mandate consists in offering members of the business sector an advantageous alternate solution to the judiciary settlement of litigation of all kinds [unofficial translation]." Decree 1988-89, 13 December 1989, Gazette officielle du Québec, 3 January 1990, Part. 2, 44.

15 All Canadian law referring to international arbitration presently conforms with the principles of the Model Law. In addition, Canadian federal law and Québec law apply these same principles in domestic law. As such, we may for the purposes of this presentation illustrate this via examples taken from various jurisdictions.

16 CCQ Art. 2638 to 2643

We must first recall - and this will surprise some people - that Québec law has never limited arbitration to commercial matters and the principle prohibiting government, its agencies or parapublic institutions from resorting to arbitration[17] has seldom been invoked, but *ad hoc* arbitration has proven to be less than satisfactory.

The basic effect of this legislative change came when the courts ceased dismissing arbitration as an exceptional procedure and considered it to be a contractual technique for resolving disputes comparable to judiciary recourses.

Thus prior to legislative reform, the Courts used to limit the scope of arbitration in two different ways:

- the public order rule was interpreted so widely that statutory and non-contractual matters were generally declared non-arbitrable;[18] and,

- the arbitration agreement itself was interpreted so narrowly as to exclude all that had not been clearly agreed on in the original agreement like, for instance, damages. The more liberal decisions used to split the case thereby referring parties to arbitration for the core of the dispute and to civil courts for the evaluation of damages and interests.

By relying on legislative intent as grounds for accepting arbitration as an equivalent to courts of law, the judiciary now systematically refers disputants to arbitration and relies on the arbitrator to define the scope of his own competence even when statutory rights are involved. The following passage is taken from a unanimous decision of the Québec Court of Appeal and well illustrates the current attitude of the courts:

> [Translation] "The appellant's argumentation regarding the issue of public order presupposes - as I see it - that Arbitration is a departure from the general law.

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17 Les Constructions Gaubourg Inc., vs. Le Ministère des travaux publics, C.S. Québec, 200-05-002780-828 (16.11.82)

18 Procon (Great Britain) Ltd. vs. Golden Eagle Co. Ltd. (1976) C.A. 565.

With all due respect, this is not the case. By creating a private jurisdiction, arbitration is now an autonomous, nominate contract governed by the Code. Article 1926.1 defines it. The arbitration agreement is distinct from the contract in which it is contained. Furthermore, a broad and liberal interpretation in such matters is necessary, as taught by Professor Brierley. For this reason, care must be taken when consulting authoritative writings and case law prior to the reform. For instance, the following passage is totally obsolete yet was valid in its time as it was taken from a unanimous decision handed down in 1979:"

> "The arbitration clause is a departure from resorting to the courts of general law; furthermore with regard to its scope, and moreover the competence of the arbitral tribunal, such clause must be narrowly construed."

As noted by Justice Rothman, "the decision of our Court in the *Procon* case is a reflection of changing times."[19]

Then on another occasion, the Court of Appeal noted:

[Translation] "It was on October 30, 1986 that the legislator adopted *An Act to amend the Civil Code and the Code of Civil Procedure in respect of arbitration*. That same year the Act came into force on November 11. It thereby put an end to the traditional apprehension historically maintained by the legislator and case-law regarding this private and contractual means of justice for resolving disputes."[20]

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19 Condominiums Mont St-Sauveur Inc. vs. Construction Serge Sauvé Ltée, (1990) R.J.Q. 2783, 2785.

20 Ville de la Sarre vs. Gabriel Aubé Inc., C.A. Montréal 200-09-000589-918 (06.12.91)

Moreover, the courts are now unanimous in accepting that the arbitrator's competence extends not only to matters not clearly referred to in the contract and to damages and interests, but also to the attribution of extra interest rates previously clearly restricted by the *Civil Code* to courts of law[21]. Arbitrators can also now count on the general principle of fairness to complete a silent contract[22]. They can moreover decide on terms of payment when not prohibited from doing so under the agreement.[23]

The way in which some courts address the issue involving the rule of public order in an international contract illustrates this new trend. For instance, in a case where a losing party moved to vacate an international award because the arbitrators did not declare a payment made in Bilbao to release a ship null and illegal, the court distinguished this payment made under pressure to release a "hostage ship" from any other freely consented illegal payment. The decision would have been different if the domestic rule of public order had been applied.[24]

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21 Condominiums Mont St-Sauveur Inc., supra note no. 19. See also Riverside of Canada, Inc. v. Investissements Adonasa, Inc., 506-05-010363-891 (Mtl, S.C., 3 April 1990)

Mr. Justice Benoît stated in his opinion:

«... I prefer considering the interest as the fruit borne by the capital exactly to the proprietor by right of accession and consequently, I cannot convince myself that it would have been necessary to specifically mention the interest in the compromise as »he object of the dispute under the former Article 950."

«If the arbitrators cannot agree to either the legal interest or the additional indemnity, then it must be concluded that the legislator has made arbitration an illusory means for resolving conflicts other than by resorting to courts of law. What creditor should agree in advance to losing the fruit of the capital to which he is entitled ?" (unofficial translation).

22 Beaudry v. 151444 Canada Inc., 500-05-007202-904 (Mtl, S.C., 4 July 1990).

23 Quinette Coal Ltd. vs. Nippon Steel Corp. (1991) W.W.R. 219 (B.C. Court of Appeal)

24 Transport de cargaison (Cargo carriers) (KASC-CO) Ltd. vs. Industrial Bulk Carriers Inc., C.A. Montréal 500-09-000480-905 (15.06.90)

The *Code of Civil Procedure* covers, of course, the provisions of a procedural nature. CCP Article 940 clearly states that as far as arbitration is concerned, the provisions apply to arbitration only where parties have not made stipulations to the contrary. This leaves parties with full freedom to form a custom-made contract or adopt institutional rules. The only restrictions to contractual freedom relate to the general principles of *audi alteram partem*; provisions relating to opposition to an award, the annulment of an award or the recognition of a foreign award and the non-availability of appeal from a lower court decision assisting parties in the case of a dead-lock or similar situations.

The obvious legal preference for the contractual approach of arbitration over the procedural one has been well understood by the courts. For instance, where an action is brought regarding a dispute in a matter for which the parties have an arbitration agreement, the court shall, upon application by either of them[25], refer the case to arbitration unless it has been inscribed on the roll or the court finds the agreement null.[26]

A judge or the Court cannot intervene in any question governed under the title on arbitration, especially in an international case,[27] except in cases provided for therein, but provisional measures can be granted before or during arbitration proceedings on the motion of one of the parties without interrupting the arbitration procedures.[28] Finally the parties may grant an arbitrator the power of rendering interim awards or provisional measures to which they are bound.[29]

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25 Dunhell Personnel System Inc. vs. Dunhill Temps Edmonton Ltd. (1993) A.J.N. 716 (Alberta Court of Appeal); Nanisivik Mines Ltd. vs. Canarctic Shipping Co., Federal Court of Appeal, 10.02.94

26 Ville de la Sarre, supra note 20

27 Supra note 23

28 J.E. Dallaire Automobiles Inc. vs. Auto Nissan du Canada Ltée., C.S.Q. 200-05-00059-919 (12.04.91); Trade Fortune Inc. vs. Amalgamated Mill Supplies Ltd. (1991) B.C.J.N. 427 (B.C.)

29 Quinette Coal Ltd. vs. Nippon Steel Corp. (1989) 1 W.W.R. 120

APPOINTING ARBITRATORS [30]

In *Sport Maska*, the Supreme Court[31] clearly distinguished arbitration from other means of resolving disputes like mediation and technical appraisal, and indicated that arbitration is a technique very similar to court of law adjudication. This decision prompted a new approach to the independence of arbitrators.

Contracts issuing from the Québec Department of Agriculture, for instance, are contracts of adhesion that at one time used to appoint the Minister responsible for the Department as arbitrator in the event of a dispute with the other party. A number of lower court decisions confirmed an award by this official person. Following an opposition to homologation, the Court of appeal referred in its *Desbois* decision to the new law and unanimously voided the award as contrary to the fundamental principles of natural justice[32].

Since the *Desbois* case, a number of persons have privately raised doubts about an arbitration procedure that allows the chairperson of a sports or business association or professional corporation to designate a member to arbitrate disputes between a member and a person from the general public. The case can be distinguished from the *Desbois* one, but we should not be surprised if in the near future, this question should resurface.

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30 C.C.P. Art. 941 to 942.8

31 Sport Maska, Inc., v. Zittrer, (1988) 1 S.C.R.; cf. also Neremberg v. Prodevco Immobilière, Inc. 500-09-000-580-905 (Mtl, C.A., 7 May 1990) unreported confirming the S.C. decision (10 April 1990).

32 Desbois v. Les industries A.C. Davie, Inc., 200-09-000700-879 (Mtl, C.A., 26 April 1990).

This judicial trend in favor of a completely independent panel of arbitrators has been extended, at least by one Ontario Court, to the traditional pattern allowing each party to appoint its arbitrator and both appointees to choose the third member of the tribunal when one of the parties considered its appointee to be its personal representative[33].

Quebec courts step in to curb any abuse, but they do not risk going so far as to prohibit parties from having their say in choosing arbitrators.

The court's concern with curbing any infringement on the independence and integrity of the arbitral system is balanced by an equivalent interest in not tolerating motions to recuse arbitrators when such action disguises an attempt to derail arbitration or intimidate an arbitrator or the Arbitration Centre.

ARBITRAL PROCEEDINGS [34]

Unless otherwise agreed by the parties, arbitrators proceed with the arbitration in accordance with the procedure they have determined. This basic principle has always been respected.

The Courts have gone one step further in deciding that the arbitrators can modify the contractual stipulations of the parties for reasons of efficiency. In a case on record, a Court firmly refused to see in the arbitrators' acts an indication of bias in favor of one of the parties[35]

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33 King-Yonge Properties Ltd v. The Great-West Life Ass Co., Ont. S.C., File RE2699)86 released, March 30, 1989.

"...the respondent argues that the type of arbitration contemplated in the lease takes for granted partisanship on the part of each party's designated arbitrator, with third arbitrator performing the role of referee. In such a type of arbitration, the respondent argues that the role of each arbitrator picked by a party is to act as advocate to the latter through the thick and the thin of the arbitration process, to the making of the award. If I apprehend the respondent's position properly on this score, each party picks a champion, not a judge, and the champions pick the third arbitrator who performs the role of a judge (emphasis added).

34 C.C.P. Art. 943 to 944.11

35 Regie des installations olympiques, R.I.O. v. Barbés and others and QNICAC, 500-05-011075-908 (Mtl, S.C., 27 September 1990). Appeal rejected by 500-09-001454-909 (C.A. Mtl, 16 October 1990).

CCP Article 944.3 states that "Proceedings are oral. A party may nevertheless produce a written statement." In a case where the parties agreed to written submissions only, the losing party tried to vacate the award as contrary to public order and the principles of justice. The Court bluntly rejected the argument[36].

Arbitrators resolve the dispute in conformity with the rules of law that they deem appropriate and, if applicable, determine damages. Arbitrators act as amiables compositeurs if the parties grant them such power.

THE ARBITRATION AWARD [37]

CCP Article 945.2 states that "The arbitration award must be made in writing by a majority of voices. It must state the reasons on which it is based." The wording is clear. The written form seems to be a condition of validity of the award, especially since Article 945.3 requests that the award contain an indication of the date and place at which it was made.

One might argue, however, that the in-writing requirement does not figure in Article 940 which enumerates the peremptory provisions of the Act, leaving the arbitrators free to deliver at least interim awards orally. In an international context, this interpretation would be dangerous due to the requirements under the New York Convention. At present, we have no judicial indication on this point.

As far as the motivation of the award is concerned, there are a number of interesting decisions to rely upon. The Courts have decided that an award does not have to be motivated in legal terms, especially when the arbitrators are commercial persons. It is sufficient, the Court says, that the ratio be clear even in succinct terms[38].

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36 Silverberg v. Clark Hooper plc., 500-09-000133-900 (Mtl, C.A., 6 February 1990), unreported, confirming the Superior Court decision (23 January 1990).

37 C.C.P. Art. 945 to 945.8

38 Navigation Sonamar, Inc. v. Algona Steamships, 500-05-000385-870, (Mtl, S.C., 16 April 1987).

One interesting Court proceeding went one step further in deciding that its power to review an award was even more limited when the arbitrator is an *amiable compositeur* than in other cases[39].

HOMOLOGATING, ANNULLING AND RECOGNIZING FOREIGN AWARDS [40]

Since the enactment of the new CCP in 1965, in the course of a motion for homologation Québec Courts have been forbidden from enquiring into the merits of a dispute, but it was not clear whether parties would have a cause of action based on the Superior Court's superintending power.

The 1986 amendments clarified the situation by restricting the possible course against an arbitration award to an application for its annulment by a motion to the Court or by opposition to a motion for homologation.

The amendments clearly limited the Court's discretionary power by adopting the limited cause for annulment or refusal of homologation to the reasons presented in the New York Convention and reiterated the ones in the Model Law.

It is again interesting to note that nowadays, Québec Courts frequently refer to the Model Law preparatory reports, even in domestic cases, although they have no legal obligation to do so, thus showing their willingness to construe the law along accepted international principles[41].

CONCLUSION

When the Model Law was adopted in Canada in 1986, many thought that change would be a matter of years. They have been pleasantly surprised. It is indeed remarkable to see the speed with which in countries where the rule of law is sacred, the legal profession and the courts assimilate this new law. Egypt is indubitably on the right track and the courts - I am convinced - will pick up the gauntlet in applying the letter and the spirit of this new legislation.

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39 Beaudry c 141444 Canada, Inc., 500-05-007202-904 (Mtl, S.C., 4 July 1990), unreported.

40 C.C.P. Art. 946 to 951.2

41 Navigation Sonamar Inc. c. Algona Steamships, supra note 38

The Canadian experience clearly demonstrates in addition the important role that a credible arbitration centre can play in training, consulting and ensuring public relations. The Cairo Centre and its officers have established their credentials and deserve our congratulations. Today more than in the past, the Cairo Centre has become indispensable and its role, essential.

Beyond the shadow of a doubt, the Canadian experience also bears witness to the fact that the development of international arbitration can spur the development of domestic arbitration. In Canada, many contracts and as many contractors have taken advantage of provisions under the Model Law. While the critical factors of domestic arbitration differ from those of international arbitration, both have in common the quest for efficient and rapid justice. At a time when economic and trade barriers are falling everywhere, the outdated principles of the State's monopoly over the administration of justice must be reviewed and set in the new framework of the advantages of international arbitration available to dynamic domestic players.

These observations can in no way pretend to present a comprehensive view of Canadian law since the adoption of the Model Law and even less can they pretend that Canada - contrary to all other countries - does not have its own share of surprising and eccentric decisions. It would also be an illusion to believe that Canada does not harbour its proper horror stories of procedural chaos and systematic gridlock. Our purpose has rather been one of demonstrating how Canadian law has in less than eight years come into the mainstream of countries having a tradition of arbitration - wa kullu man sara alaldarbi ousal!