Globalization and Commercial Dispute Resolution

The Honourable Marc LALONDE, P.C., O.C., Q.C.*

* Partner, Stikeman, Elliott, Montreal, Quebec. The author would like to thank Ms. Shelley Kierstead of Osgoode Hall Law School for her assistance with the preparation of this text.

In the current era of exploding free trade pacts among nations,[1] public attention tends to focus on disputes that arise between the governments which are signatories to the trade pacts and the mechanisms used to resolve such disputes. There is no question that it is important to examine the routes taken to resolve these cases. In this way, the strengths and weaknesses of the dispute resolution mechanisms incorporated into the agreements can be assessed, providing valuable information with which to develop mechanisms for future agreements.[2] It is equally important, however, to think about the impact that increased international trade has on private parties who do not necessarily have sufficient clout to lobby for government representation but who wish to take advantage of freer trading opportunities. It is imperative to recognize that in order for freer trade to impact effectively on the greatest number of businesses possible, private dispute resolution mechanisms must evolve to meet transnational commercial players' needs for access to justice. What follows is a discussion of some of the currently utilized private dispute resolution mechanisms, with a special focus on Canada and some of its strengths and weaknesses as a facilitator of dispute resolution in the international commercial context.

I. CANADA'S HISTORIC APPROACH TO INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION — RELIANCE ON THE JUDICIARY

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1. As one author notes, 60% of world trade now takes place within free trade agreements or among countries that have decided to achieve free trade by a certain date. See C.F. Bergsten, "Globalizing Free Trade" in J.J. Schott, ed., *The World Trading System : Challenges Ahead* (Washington, D.C. : Institute for International Economics, 1996) at 265. Bergsten then illustrates the extent to which global free trade arrangements are occurring by noting that the European Union has completed its "single internal market", that the 18 countries of the Asia Pacific Economic cooperation forum have committed themselves to free trade and investment in the near future, and that other agreements such as the ASEAN Free Trade Area in Southeast Asia and Mercosur (Argentina, Brazil, Paraguay and Uruguay) in Latin America exist. These are of course in addition to the *North American Free Trade Agreement* 17 December, 1992, Can. T.S. 1994, No. 2, 32 I.L.M. 605 [hereinafter *NAFTA*] which effected a new trade relationship among Canada, Mexico and the United States, numerous bilateral free trade agreements such as the agreement signed between Canada and Chile, *Canada — Chile Free Trade Agreement*, July 5, 1997, T.W.C. 1997, No. 5, 36 I.L.M. 1067, and the World Trade Organization Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negociations, April 15, 1994, T.W.C. 1994, No. 1, 32 I.L.M. 1125, which replaces the *General Agreement on Tariffs and Trade* (*GATT*) October 30, 1947, Can. T.S. 1947, No. 27, 55 U.N.T.S. 187.

2. The need to tailor the dispute resolution mechanisms contained in the *Canada/United States Free Trade Agreement* [22 December 1989, Can. T.S. 1989, No. 3, 27 I.L.M. 281] to address political, cultural and legal differences affecting trade relations among two of the *NAFTA* partners was discussed by S.D. Fitch in "Dispute Settlement Under the North American Free Trade Agreement : Will the Political, Cultural and Legal Differences Between the United States and Mexico inhibit the Establishment of Fair Dispute Settlement Procedures?" (1992) 22 Calif. W. Int'l. L. J. 353.

During the last couple of decades, we have witnessed world wide economic growth. International trade has grown faster than domestic trade and is the engine of growth for newly industrialized countries.[3] Between 1973 and 1995, the estimated value of foreign direct investment in the world has increased by 1,250%, while the value of exports of goods has known an increase of 850%, and this does not include the value of international trade in services which for 1996 was estimated at $1,200 billion.[4]

For many years, Canadians were content to have disputes arising from their commercial relations resolved through a chosen judicial system. This option seemed particularly appropriate when Canada's volume of trade with and investment in countries other than the United States was rather small. Canadian and American parties were accustomed to relying on conflict of laws principles to establish the appropriate forum and laws to be applied to the resolution of any disputes that arose between them. It seemed that Canada and the United States felt comfortable with each other's primarily common law judicial systems.

Indeed, Canada has traditionally been well regarded as having a strong judicial system and rule of law. Further, in recent years, the Supreme Court of Canada has produced a number of judgments based on cases involving interprovincial and international elements which illustrate the Court's perception of the importance of facilitating the flow of commerce through the application of a concept of judicial comity.

In *Morguard Investments Ltd.* v. *De Savoye*,[5] for example, the Supreme Court of Canada unanimously concluded that the traditional common law principles relating to the recognition and enforcement of foreign judgments needed substantial amendment. The traditional principles had dictated that a court could refuse to enforce a judgment when, among other things, the defendant had not attorned to the jurisdiction of the court which made the original judgment, either by virtue of his or her residence, through contractual agreement, or by taking part in the court proceedings.[6] Mr. Justice La Forest, who rendered the decision on behalf of a unanimous court, stated that courts of one province should give full faith and credit to the judgments given by a court in another province or a territory, so long as that court had appropriately exercised jurisdiction in the action.[7]

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3. The World Trade Organization Secretariat's first report on trade developments in 1996 and outlook for 1997 indicates that in 1996, trade growth remained at least twice as large as GDP growth in America, Latin America, and Western Europe, and was above the world average for countries such as Russia and the Ukraine. World Trade Organisation, *Annual Report 1997, Special Topic : Trade and Competition Policy*, Vol. 1 (General WTO Publications, 1997) at 8-19.

4. World Trade Organisation, *Annual Report 1996, Special Topic : Trade and Foreign Direct Investment*, Vol. 1 (Geneva : WTO Publications, 1996) at 73.

5. *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256 [hereinafter *Morguard* cited to S.C.R.].

6. *Emanuel* v. *Symon*, [1908] 1 K.B. 302. (C.A.) is the case frequently cited as setting out the traditional principles.

7. *Supra* note 5 at 1102.

Such jurisdiction would be properly asserted where there was a real and substantial connection between the forum court and the action.[8]

While the facts in *Morguard* gave rise to interprovincial and not international issues, by its dicta in *Morguard* and its decisions in other recent conflict of laws cases, the Supreme Court has implied a willingness to apply its comity principle in international settings. It becomes clear from reading the *Morguard* decision itself and judgments such as *Hunt* v. *T & N. plc*[9] that Mr. Justice La Forest views the concept of comity not as something set in stone but rather as a principle that "must be adjusted in the light of a changing world order",[10] since the "business community operates in a world economy and we correctly speak of a world community [...where] accommodating the flow of wealth, skills and people across state lines has now become imperative".[11] In establishing a basis for his discussion of the appropriate circumstances for a court to grant an injunction against parties litigating in another jurisdiction, Mr. Justice La Forest, again writing for the majority in the *Amchen Products Inc*. v. *British Columbia (Workmen's Compensation Board)* case, applied the definition of comity he had adopted in *Morguard*. Where both British Columbia and Texas were logical fora for the litigation to take place, he concluded that based on the application of the principles of comity outlined earlier in the judgment, the injunction should not have been granted since the decision of the Texas court to assert jurisdiction was appropriate. A survey of judgments rendered in relation to the recognition and enforcement of international judgments shows that at least some Canadian lower courts have showed a willingness to extend the principles enunciated in *Morguard* to non-domestic cases.[12]

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8. *Ibid.* at 1106.

9. *Hunt* v. *T & N. plc*, [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16.

10. *Morguard, supra* note 5 at 1097.

11. *Ibid.* at 1098. A case that also clearly establishes the applicability of the comity principle in an international context is *Amchem Products Inc.* v. *British Columbia (Workmen's Compensation Board)* [1993] 1 S.C.R. 897, 102 D.L.R. 96, (4th). In *Amchem*, manufacturers and suppliers of asbestos products sought an anti-suit injunction against British Columbia residents who had commenced tort actions against them in Texas for damages allegedly arising from the British Columbia residents' exposure to asbestos. In the courts below, an interlocutory injunction against the residents had been granted. The key issue before the Supreme Court was whether this injunction should be upheld in light of Canada's *forum non conveniens* and anti-suit injunction rules.

12. A few examples are *Moses* v. *Shore Boat Builders Ltd.* (1993), 106 D.L.R. (4th) 654 (B.C.C.A.); *Clark* v. *Lo Bianco* (1991), 59 B.C.L.R. (2d) 334 (S.C.); *Federal Deposit Insurance Corp.* v. *Vanstone* (1992), 88 D.L.R. (4th) 488 (B.C.S.C.); and *McMickle* v. *Von Straaten* (1992), 93 D.L.R (4th) 74 (S.C.). For one comment on the applicability of *Morguard* in an international setting, see H.S. Fairley, "Enforcement of Foreign Judgments by Canadian Courts : A New Age of Uncertainty" (1996) 2 Can. Int'l. Lawyer 1.

Whatever the advances and strengths of the Canadian judicial system, however, it remains true that Canadians are increasingly dealing with parties located in countries that employ judicial systems dissimilar to theirs. A readily apparent example is Mexico, with whom Canada is now a growing direct trading partner.

The Mexican legal system has been described as differing significantly from both common law and some civil law countries. Unlike common law countries, Mexican judicial decision making is not based on the rule of *stare decisis*. "Unlike many centralized civil law countries, Mexico has a federal system with decentralized power leading to federal laws and federal courts" as well as individual state civil codes, procedural laws and courts.[13] This phenomenon, however, should not be too unfamiliar to Canadian business persons and their lawyers. Unfortunately, the Mexican judicial system has been subject to allegations of corruption[14] which naturally produce some discomfort for non-Mexican parties about the possibility of having disputes referred to that system. And I wish to stress that I could have chosen far worse examples, among countries Canadian businesses are dealing with.

When one considers that Canada, the United States and Latin American countries have manifested their intent to create a free commerce zone encompassing the entire hemisphere by the year 2005,[15] and that Latin American institutions of justice have generally been regarded as weak, a few things become apparent. First, the comfort of familiar judicial systems will not be the standard rule for parties contemplating transnational business initiatives in the future. Secondly, countries wishing to prosper in a global market must consider the type of infrastructure and institutions that best support free trade at a private party level. Douglas North, a leading economist, predicts that as the world economy becomes more integrated, "competition among nations will be won by those with the best institutions".[16] Both the annual reports on development of the World Bank and UNCTAD in 1997 focus on the positive roles of government in sponsoring and supporting economic growth and development. In that regard, the World Bank has specified the following, in the order listed, as the critical "core" functions of the state :

1. establishing a foundation of law;

2. maintaining a non-distortionary policy environment, including macro-economic stability;

3. investing in basic social services and infrastructure;

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13. J. Mayer, "Recent Mexican Arbitration Reform : The Continued Influence of the *"Publicistas"* (1993) 47 U. Miami L. Rev. 913 at 916.

14. *Ibid.* at 917.

15. See *Summit of the Americas : Declaration of Principles and Plan of Action* (1995) 34 I.L.M. 808 at 811.

16. D. North, "Transactions Costs, Institutions, and Economic Performance" (1992) Occasional Papers Number 30, International Center for Economic Growth, cited by R.M. Sherwood, G. Shepherd & C. Marcos de Souza in "Judicial Systems and Economic Performance" (1994) 34 Quarterly Rev. of Economics and Finance 101 at 102 [hereinafter Judicial Systems].

4. protecting the vulnerable; and

5. protecting the environment.

II. SUPPORTING THE GLOBAL MARKET — INFRASTRUCTURE AND INSTITUTIONS

A. Infrastructure

As alluded to earlier, many emerging economies do not have adequate dispute resolution systems in place. As Latin American countries and many others are discovering, the development of dispute resolution mechanisms which adequately meet the needs of commercial parties is an important correlative to a market economy and the infrastructure associated with such an economy.[17]

While one cannot perhaps define with precision the elements of the ideal infrastructure, one can generally assert that there must be an assembly that can enact effective legislation[18] as well as a government that can implement it, a trained and regulated legal profession[19] an independent and competent judiciary,[20] a competent public service that operates with integrity, and effective enforcement of legal rights.[21]

In sum, countries wishing to enter the globalized market economy must put the appropriate infrastructure in place. Access to foreign investment depends on enforceability of obligations, and, in effect, the adoption of a market economy and a westernized legal system. A country that cannot or will not meet such standards puts its economic development at risk. Where market economies are emerging around the world, the trend is not driven by external institutions like the World Bank, but rather by the fact that it is now widely understood that viable economic growth can be sustained only through a market economy, that the discipline of the market protects against distorted allocation of

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17. E. Buscaglia & T.S. Ulen, "A Quantitative Assessment of the Efficiency of the Judicial Sector in Latin America" (1997) 17 Int'l Rev. L. & Econ. 275 at 276.

18. The Mexican effort to reform its economic policies is a good illustration of this point. Between December of 1982 and April of 1996 nearly 80% of Mexican national legislation was newly enacted or modified : H. Fix-Fierro & S. Lopez-Ayllo, "The Impact of Globalization on the Reform of the State and the Law in Latin America" (1997) 19 Hous. J. Int'l L. 785 at 795. For a discussion of another country's efforts in this area, see C.N. Ngwasiri, "The Effect of Legislation on Foreign Investment : The Case of Cameroon" (1989) 23 Journal of World Trade 109.

19. The challenges posed in establishing a legal system in Cambodia with a limited number of trained professionals is discussed by C. Kim & J.L. Falt "Law of the Bar : Kingdom of Cambodia" (1997) 27 Calif. W. Int'l L.J. 357.

20. Judicial Systems, *supra* note 16 at 103-106.

21. Another commentary addressing the Latin American judicial structure emphasizes this point : "A free and robust market can thrive only in a political system where individual freedoms and property rights are accorded respect and where redress for violations of such rights can be found in fair and equitable courts". M. Dakolias, "A Strategy for Judicial Reform : The Experience in Latin America" (1995) 36 Va. J. Int'l L. 167 at 168.

resources, and is the best way to deliver wealth to the citizens of the world. Countries that opt out do so at a terrible cost — and one need only look to North Korea for an example.

B. Institutions

As Canadian manufacturers and other firms have expanded their markets beyond the United States, they have learned, sometimes through difficult experience, that they cannot rely on national legal systems for dispute resolutions. The solution to this concern has increasingly been the use of arbitration.

Arbitration is perceived as having a number of advantages over court based adjudication. Provided the parties are committed to a speedy resolution, arbitration may be faster and cheaper than litigation. However, one should not base recourse to international commercial arbitration upon these factors, because in doing so one runs the risk of disappointment since speedy resolution in arbitration proceedings, as in court litigation, may not be the priority of one party. Other factors, in my view, provide stronger support for arbitration. For instance, many parties want to avoid being exposed to any perceived biases of domestic judicial systems and prefer to rely on the neutrality of arbitrators. The ability to choose the applicable law and situs of arbitration, and to select arbitrators who have a special expertise in the particular type of business which underlies the dispute, is desirable to many commercial parties.[22] In addition, many parties, whether state agencies or companies active in international business, prefer the confidential nature of arbitration which allows them to avoid making headlines in domestic and international media as a result of judicial proceedings.

Arbitration even allows parties to avoid the strict application of legal principles to the resolution of their disputes by having them authorize an arbitrator to use the powers of *amiable compositeur*. This authority means that as opposed to deciding a matter solely through the application of legal rules, the arbitrator may have resort to equitable considerations.[23] In some specialized arbitration such as maritime arbitration under the Baltic Exchange, the application of the *audi alteram partem* principle is not even required and awards may be rendered without the arbitral panel having heard from each party.

Further, arbitration provides for the simplification of conflict of laws rules and easier enforcement of awards compared to judicial decisions.

Finally, international commercial arbitration also allows for flexibility of awards which in most cases, international litigation cannot yet offer. One award, rendered in 1989 under the American Arbitration Association Rules, and published with the consent of the parties, provides a good illustration of this point.

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22. See the discussion by H. Camp Jr., "Binding Arbitration : A Preferred Alternative for Resolving Commercial Disputes between Mexican and U.S. Businessmen" (1991) 22 St. Mary's L. J. 717 at 724.

23. For discussions of the concept of *amiable compositeur* see S. Jarvin, "Limits of an Arbitrator's Powers" (1986) 2 Arb. Int'l 140 and J. Lew, *Applicable Law in International Commercial Arbitration* (New York : Oceana Publications, 1978) at 510-513.

IBM v. *Fujitsu*[24] arose out of bitter disputes between the parties over the extent to which Fujitsu could use IBM programming material in the development of Fujitsu's IBM-compatible operating system software. IBM filed a demand for arbitration with the American Arbitration Association, alleging that Fujitsu had used IBM programming material in violation of IBM's intellectual property rights under agreements that attempted to settle previous disputes between the parties. Soon thereafter, Fujitsu filed various counterclaims against IBM.

The parties gave the panel full authority to settle the disputes. The first interesting factor in the case is that upon the resignation of the panel's chairman for personal reasons, the parties agreed that the remaining two panel members should hear the case. The next distinctive facet of the case is the solution offered by the panel and unchallenged by either party.

The arbitration panel found that Fujitsu did have outstanding monetary obligations to IBM. However, the arbitrators also concluded that it was in the parties' best interests to maintain their commercial relationship. As a result, the existing arrangements between IBM and Fujitsu were to continue and IBM was to license certain future products to Fujitsu. If the parties failed to agree, the arbitrators were to determine the appropriate royalties to be paid to IBM, and supervise the transactions that were to take place within the structure established in the arbitral award. It is difficult to imagine this degree of flexibility existing within the judicial setting.

1. NAFTA Private Dispute Settlement Provisions

Arbitration has been characterised as the primary source for the settlement of private international commercial disputes in the *NAFTA*. First, article 2022 encourages to "the maximum extent possible [...] the use of arbitration and other means of alternative dispute resolution[25] for the settlement of international commercial disputes between private parties in the free trade area".

Additionally, the *NAFTA*'s Investor Chapter[26] contains an arbitration mechanism whereby a party and a state may submit investment disputes to arbitration. Article 1120 of the *NAFTA* provides that this arbitration must be conducted in accordance with one of three sets of rules :

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24. *IBM* v. *Fujitsu*, American Arbitration Association's Opinion of September 15, 1987, case no. 13T-117-063-85, (1987) 4 J. Int'l Arb. 156.

25. While not specifically defined in the *NAFTA*, the term "other means" has been interpreted to mean mediation and conciliation. J.I. Miller, "Dispute Resolution Under NAFTA" (1994) 21 Pepperdine L. Rev. 1313 at 1359-1360.

26. *NAFTA*, ch. 11.

1. The *ICSID Convention*,[27] provided that both the disputing party and the Party of the investor are parties to it;

2. The *Additional Facility Rules* of *ICSID*, provided that either the disputing party or the Party of the investor, but not both, is a party to the *ICSID Convention*; or

3. The *UNCITRAL* Arbitration Rules.[28]

Already, three arbitration cases have been filed under article 1120, one against the Government of Canada, two against the Government of Mexico, all by American companies.

The *NAFTA* Investor Chapter is merely one instance among many other international agreements whereby States bind themselves in advance to international arbitration with parties which have not yet been identified. This evolution represents a significant evolution from the traditional concept of the *clause compromissoire*, as defined even in a document as recent as the *UNCITRAL Model Law*.

2. Canada's Progress on International Commercial Arbitration Initiatives

Canada was a latecomer to the field of international commercial arbitration and it is still lagging in some respects.

In 1986, Canadian governments, which had been somewhat slower than those of other nations to respond to the growing need for its institutions to facilitate international commercial arbitration, enacted arbitration legislation that either adopted or was modeled closely on the *UNCITRAL Model Law on International Commercial Arbitration*.[29] These enactments[30] replaced predecessor legislation which was based on the *English Arbitration*

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27. *Convention on the Settlement of Investment Disputes between States and Nationals of other States*, March 18, 1965, 575 U.N.T.S. 8359 (also known as the *World Bank Convention* or the *Washington Convention*).

28. The *United Nations Commission on International Trade Law Arbitration Rules*, approved by the United Nations General Assembly on December 15, 1976.

29. The General Assembly of the United Nations adopted Resolution 40/72 on December 11, 1985, approving the *Model Law on International Commercial Arbitration* as adopted by the United Nations Commission on International Trade Law on June 21, 1985, A/40/17, Annex. [hereinafter *Model Law*].

30. Alberta : *International Commercial Arbitration Act*, S.A. 1986, c. I-6.6; British Columbia : *International Arbitration Act*, R.S.B.C. 1996, c. 233; Manitoba : *International Commercial Arbitration Act*, S.M. 1986, c. 32; New Brunswick : *International Commercial Arbitration Act*, S.N.B. 1986, c. I-12.2; Newfoundland : *International Commercial Arbitration Act*, S.N. 1986, c. 45 (now R.S.N. 1990, c. I-15); Northwest Territories : *International Commercial Arbitration Act*, S.N.W.T. 1986, c. 6; Nova Scotia : *International Commercial Arbitration Act*, S.N.S. 1986, c. 12 (now R.S.N.S. 1989, c. 234); Ontario : *International Commercial Arbitration Act*, S.O. 1988, c. 30 (now R.S.O. 1990, c. I.9); Prince Edward Island : *International Commercial*

Act, 1889[31] and the antiquated provisions of the *Quebec Code of Civil Procedure*. The Model Law was designed as a prototype which would appeal to a broad range of nations, and which would promote party autonomy and strength of arbitration.[32] Canada became the first country to adopt the Model Law, a step that has since been taken by many other countries.

During the same time frame, and sometimes as part of the same enactment, Canadian governments passed legislation adopting the *United Nations Foreign Arbitral Awards Convention*,[33] commonly referred to as the New York Convention.[34] This Convention, to which there are 112 parties, effectively makes it easier for parties to enforce a foreign arbitral award than it is to enforce a foreign judgment. One might wish a similar arrangement could exist for the enforcement of judgments, but it is not evident that this could occur with the same level of success as the New York Convention. One way to facilitate the enforcement of foreign judgments may be to execute bilateral enforcement agreements between countries with similar levels of judicial development. These agreements would most logically correspond with trade agreements between such countries.

Canadian legislation is now very open to international commercial arbitration, and one author has characterized the enactments described above as placing Canada "in the vanguard of efforts to unify international arbitral law".[35] Case law based on the Model Law legislation shows clear judicial willingness to interpret arbitration agreements in contracts broadly so that the goal of promoting arbitration may be ensured.[36] In the

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Arbitration Act, S.P.E.I. 1986, c. 14 (now R.S.P.E.I. 1988, c. I-5); Quebec : *An Act to amend the civil Code and the Code of Civil Procedure in respect of arbitration*, S.Q. 1986, c. 73; Saskatchewan : *International Commercial Arbitration Act*, S.S. 1988-89, c. I-10.2; Yukon : *Foreign Arbitral Awards Act*, R.S.Y. 1986, c. 70; Canada : *Commercial Arbitration Act*, S.C. 1986, c. 22.

31. *Arbitration Act, 1996*, (U.K.), 1996, c. 23. See W. Graham's related discussion in R. Paterson & B. Thompson, eds., *UNCITRAL Arbitration Model in Canada* (Toronto : Carswell, 1987) at 79-80.

32. G. Hermann, "The Role of the Courts under the UNCITRAL Model Law Script" in J. Lew, ed., *Contemporary Problems in International Arbitration* (London : School of International Arbitration, Centre for Commercial Law Studies, Queen Mary College, 1986) 164 at 166-167.

33. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, C.T.S. 1986, No. 43, U.N.T.S. 330 No. 3.

34. See I. Dore, *The UNCITRAL Framework for Arbitration in Contemporary Perspective* (Norwell, MS : Kluwer Academic Publishers Group, 1993) at 171 to 173 for a discussion of the implementing schemes adopted by the provinces and the Federal Government.

35. *Ibid.* at 181.

36. Some examples are : *ABN Ambro Bank Canada* v. *Krupp Mak Maschinenbau GnmH.*, (1996) 135 D.L.R. (4th) 130, [1996] O.J. No. 1574 (Div. Ct.); *Automatic Systems Inc.* v. *Bracknell Corp.* (1994), 113 D.L.R. (4th) 449 (Ont. C.A.); *Gulf Canada Resources Ltd.* v. *Arochem International Inc.* (1991) 1 B.C.A.C. 158, [1991] B.C.J. No. 3090; *Kaverit Steel and Crane Ltd.* v. *Kare Corp*. (1992), 87 D.L.R. (4th) 129, 40 C.P.R. (3d) 161 (Alta. C.A.); *Kvaerner Enviropower Inc.* v. *Tanar Industries Ltd*, [1994] A.J. No. 778 (C.A.); *Nanisivik Mines Ltd.*

domestic sector, one should also give special recognition to the steps taken by the Canadian judiciary to integrate alternative dispute resolution into the judicial process. Such steps have even reached a level higher than the courts of first instance. In August of this year, the Quebec Court of Appeal became the first Canadian Court of Appeal to offer mediation in private civil disputes. One of four selected judges of the Court of Appeal mediates each dispute for which parties have filed a mediation request with the clerk of the Court. The project has had remarkable success to date.

The number of arbitrations heard by the most prominent international arbitration centres has recently grown at a rapid pace.[37] Canada has joined other nations in establishing new arbitration centres.[38]

Despite its impressive work on the legislative front, Canada continues to lag behind other countries in becoming a signatory to important international conventions. In particular, notwithstanding the fact that 139 countries have joined the *ICSID Convention*, Canada has not done so. The Convention was designed to facilitate the arbitration of investment disputes between governments and private foreign investors. It is a shame that thirty-two years after the Convention's creation, Canada is standing in splendid isolation, not having taken the necessary steps to become a party. Given the Canadian federal structure, it is necessary to obtain provincial cooperation in taking these steps, but on the basis of cooperation exhibited with respect to the adoption of the Model Law, it is unlikely to be problematic from the perspective of the provincial Attorneys General. The delay in ratification does not reflect any particular objection to the Convention, but rather the fact that Canada's participation does not appear to be viewed as important or pressing. Such an attitude is not appropriate in times where clear advantages are to be gained from accessing all available mechanisms to facilitate dispute resolution.

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v. *F.C.R.S. Shipping Ltd.* (1994), 113 D.L.R. (4th) 536 [1994] 2 F.C. 662 (C.A.); and *Stancroft Trust Ltd.* v. *Can-Asia Co.* (1990), 67 D.L.R. (4th) 131, [1990] B.C.J. No. 401 (B.C.C.A.). Also, for a decision illustrating judicial deference to arbitral awards and reasoning, see *Navigation Sonamar Inc.* v. *Algoma Steamships Limited*, [1987] R.J.Q. 1346 (Que. Sup. Ct.) where Gonthier J. (as he then was) noted that the arbitrators could not be criticized for expressing themselves as commercial men and not as lawyers.

37. Between 1987 and 1992, the American Arbitration Association's (AAA) international commercial arbitration caseload had increased from 106 to 204 cases. (The AAA handles over 40,000 domestic cases each year). Likewise, of the 7,500 arbitrations the International Chamber of Commerce (ICC) had heard from its inception in 1923 to 1993, 3,500 had taken place in the previous 10 years. See B.S. Murphy, "ADR's Impact on International Commerce" (1993) Disp. Resolution J. 68 at 69.

38. The British Columbia International Commercial Arbitration Centre and the Quebec National and International Commercial Arbitration Centre.

III. CAUTIONS ABOUT THE USE OF ARBITRATION

The comments above should not be viewed as endorsing arbitration as some form of legal Shangrila. Just as problems have been identified with the use of courts to resolve transnational commercial disputes, so too have concerns been raised respecting arbitration as an alternative dispute resolution mechanism.

I would like to note three points of particular relevance. They all have to do with predictability. While the confidentiality of arbitration is attractive to many parties, that same confidentiality impacts the predictability of outcomes. An important element of an effective judicial system which will support optimal market activity is that it has predictable outcomes.[39] One means by which this predictability is established is through the publication of decisions. In the common law system, the doctrine of *stare decisis* is intended to further facilitate predictability.

In the United States, in domestic arbitration, the arbitrator need not give reasons. In international arbitration, decisions must be justified though they are generally unreported unless the parties agree to divulgation or an award is challenged before a court. The ICC has produced selected reports of some of its cases,[40] removing elements that would allow identification of the parties. To the extent that such decisions are reported and analysed,[41] they will contribute to a growing body of principles. In addition, there is a considerable body of judicial decisions in North America and in Europe particularly, which have addressed a number of issues arising out of the arbitral process.

But there is more to the issue of predictability than the mere publication of sanitized versions of selected arbitral awards. Which brings me to my second point on the question of predictability.

The New York Convention was enacted in order to facilitate and standardize the enforcement of arbitral awards. Those awards, however, are enforced by national courts which may have different views as to the legal status of such awards.

The common view is that for an award to be enforceable abroad, it should be recognized as valid in the country where the arbitration took place. The *UNCITRAL Model Law* itself has made the place of arbitration the reference point for international arbitration and judicial procedure. Yet, three rather recent decisions, one by United States District Court of Columbia and the other two by the French Cour de Cassation (the *Hilmarton* and the *Chromalloy* decisions) have shaken that conventional view by

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39. *Supra* note 16 at 103.

40. See, for example, S. Jarvin & Y. Derains, eds., *Collection of ICC Arbitral Awards, 1974 to 1985* (Paris : ICC Publications, 1990); S. Jarvin, Y. Derains & J. Arnaldez, eds., *Collection of ICC Arbitral Awards,* 1986 to 1990 (Paris : ICC Publications, 1994); and D. Hascher, Y. Derains & J. Arnaldez, eds., *Collection of ICC Arbitral Awards,* 1991 to 1995 (Paris : ICC Publications, 1997).

41. Some analysis is undertaken in F. De Ly, *International Business Law and Lex Mercatoria* (Amsterdam : Elesvier Science Publishers, 1992).

enforcing awards that had already been annulled in their country of origin;[42] these precedents, if they are to be followed, will lead to the creation of stateless national awards which could be enforced in certain jurisdictions, on the basis of the local laws of those jurisdictions, even though the award itself had no valid legal existence in the country where the arbitration took place. Needless to say, such a development has given rise to a raging debate in the literature on arbitration[43] and to concern about the impact of excessive liberalism in the enforcement of awards.

It is therefore not surprising to see that some authors are now proposing a revision of the New York Convention to consolidate the efficiency of the international arbitration process and to better adapt it to the new developments in international trade. One suggestion, which would address the issue raised by the *Hilmarton* and the *Chromalloy* cases, is the creation of an International Court of Arbitral Awards, which would combine limited appellate powers with full and exclusive jurisdiction on setting aside awards and recognition and an enforcement of awards.[44]

My third and last point on the issue of predictability has to do with the law to be applied. Despite the desire of some parties to avoid the strict application of a particular national law, there exists a lively debate about the existence and applicability of a customary body of rules known as the *lex mercatoria*.

Berthold Goldman was one of the earliest advocates[45] for the proposition that there exists a body of principles which has arisen spontaneously through the interactions of international commercial parties and that these principles should be recognized as "law". Throughout his career, Professor Goldman argued for the recognition of the new *lex mercatoria*. In his view, evidence of a still developing yet autonomous body of positive law, which he termed "customary transnational law", could be found in both arbitral awards and decisions of courts on review of arbitral awards. One author has recently argued in favour of a "*lex constructionis*" as a distinct area from or within the "*lex mercatoria*".[46]

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42. Versailles, June 29, 1995, Rev. arb. 1995 639 (*Omnium de Traitement et de Valorisation-OTV* v. *Hilmarton)*, A.J. van den Berg, ed., Yearbook Commercial Arbitration, Vol. XXI (The Hague : Kluwer Law International, 1996). No. 230 United States District Court, District of Columbia, July 31, 1996 (*Chromalloy Aeroservices Inc.* v. *The Arab Republic of Egypt*), 939 Fed. Supp. (D.D.C. 1996) 907.

43. See e.g. J. Paulsson, "Rediscovering the N.Y. Convention : Further Reflections on Chromalloy" (1997) 12 Int'l Arb. Rep. 20. See also, H.G. Gharavi "Enforcing Set Aside Arbitral Awards : France's Controversial Steps Beyond the New York Convention", (1996) 6 J. Trans. Law & Policy 93, and E.A. Schwartz, "Comment on Chromalloy, Hilmarton à l'Américaine" (1997) 14 J. Int'l Arb. 125.

44. J. Werner, "The Trade Explosion and Some Likely Effects on International Arbitration", (1997) 14 J. Int'l Arb. 5.

45. B. Goldman, "Les conflits de lois dans l'arbitrage international de droit privé" (1963) 109 Rec. des Cours 347.

46. C. Molineaux, "Moving Toward a Construction Lex Mercatoria, A Lex Constructionis," (1997) 14 J. Int'l Arb. 55.

Sceptics point to several of the *lex mercatoria*'s drawbacks. First, its contents are uncertain. The fact that awards are often not published leads to a jurisprudential vacuum which might, in the view of one author, lead to arbitrators applying transnational norms not to better ascertain parties' intent, but rather to justify applying their private normative preferences. William Park states :

> *References to chameleon like notions of* lex mercatoria *or* amiable composition *add a source of uncertainty, and may lend themselves to abuse as a vehicle for the improper intrusion of an arbitrator's personal normative preferences into contract dispute resolution*.[47]

Park, who is not alone in his view,[48] acknowledges the usefulness of references to trade usages by arbitrators as a way of filling gaps in the applicable law. He also recognizes that parties occasionally enter into agreements stipulating that the norms of international commerce are to govern their contract, and that sometimes, even absent such specific agreement, arbitrators determine that the intent of the parties was to have the agreement submitted to international norms.[49] However, he and his co-authors of the book *International Chamber of Commerce Arbitration* take the position that ICC arbitrators "run the risk of doing mischief if they declare the *lex mercatoria* to be the governing law".[50]

A number of commentators adopt the stance that there are no general principles whose roots may not be traced to domestic legal systems.[51] They stress the view that the constituent elements of the *lex mercatoria* are so ill defined that as a whole it does not promote the development of international commerce, the needs of which have been defined as simplicity, predictability, and rigour and promptness in execution of obligations.[52] The debate on this issue is unlikely to be resolved in the near future.

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47. W. Park, *International Forum Selection* (Boston : Kluwer Law International, 1995) at 75-76.

48. For example, F.A. Mann, "*Lex Facit Arbitrum*" in P. Sanders, ed., *International Arbitration : Liber Amicorum for Martin Domke* (The Hague : Martinus Nijhoff, 1967) 157, would agree strongly with Park's characterizations.

49. W.L. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration*, 2d ed. (Paris : ICC Publications, 1990) at 294-295.

50. *Ibid.* at 300.

51. See A. Kassis, "L'arbitre, les conflits de lois et la *lex mercatoria"* in N. Antaki & A. Prujiner, eds., *Proceedings of the 1st International Commercial Arbitration Conference* (Montreal : Wilson & Lafleur, 1986) 133.

52. T. Popescu, "Commentaire : L'arbitre, les conflits de lois et la *lex mercatoria*", *ibid*. 146 at 149.

CONCLUSION

The objectives of parties to a commercial dispute are very often limited in scope. Most of the time, they seek not perfect justice, but a speedy, cost-effective and confidential resolution that appears to be fair and maintains their on-going relationships. There is a strategic benefit in seeking to make the Canadian judicial and dispute resolution systems attractive to parties from other jurisdictions. Canada has taken some steps toward effecting an open and encouraging approach to arbitration, but more initiatives can and should be taken in the years to come as free trade continues to flourish. In particular, as I stated earlier, it is imperative that Canada take prompt steps to adhere to the *ICSID Convention*.