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L. Yves Fortier

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## THE LAW AND ECONOMICS OF DISPUTE RESOLUTION IN THE CANADA-UNITED STATES CONTEXT: THE CANADIAN PERSPECTIVE

*L. Yves Fortier, C.C., Q.C.\**

### I. INTRODUCTION

Not so long ago, a pistol duel at forty paces was the preferred method of dispute resolution in North America. The result was cost-efficient, took little time, and was not subject to appeal. Nowadays, dispute resolution in Canada and the United States is generally associated with the adversarial court process, even though it offers none of the advantages just stated and is complicated by the participation, not of mere seconds, but of whole batteries of litigation lawyers.

My career as a litigator has led me into this arena more than once. Formal litigation, however, with its emphasis on procedural rules and its seeming acceptance of even the most aggressive litigious approach, has often proved unsatisfactory to the business community, which is concerned as much with the preservation of on-going relationships as with the contractual dispute itself. My experience as Canada's Ambassador to the United Nations has taught me that friction-lowering dispute resolution at the international level is perhaps even more important; when it fails there, recourse can be had to more than duelling pistols and it is as often as not the innocent seconds who fall victim. As an ambassador confronted with delicate political issues, and as a practitioner of international commercial law, I have had the opportunity, both first and second-hand, to assess a whole array of methods for resolving disputes and conflicts of various sorts.

Though well-structured and generally perceived to be fair, traditional litigation can no longer claim to be *the* solution to today's major international business disputes. Of course, many lawyers continue to prefer the time-tested litigation they are used to, remaining skeptical of the advantages of mechanisms which settle disputes without recourse to the courts. On the other hand, confronted with the costs, in terms of time, money, and uncertainty of the North American court process, governments, businessmen and even lawyers are ever more becoming attracted by what has been dubbed "alternative dispute resolution" (ADR).

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\* Canada's Ambassador and Permanent Representative to the United Nations; Canada's Former Representative to the Security Council of the United Nations [1989-90]; Senior Partner (on leave), Ogilvy Renault, Montreal, Canada.

These words evoke thoughts of a process outside and separate from the court system, operating on some consensual or amicable plane. In many business circles, the tools of alternative dispute resolution - arbitration, mediation and other settlement techniques - are promoted and favored as efficient and economic counterparts to adversarial and costly litigation. The recent evolution of the practice and of the statutory frameworks surrounding dispute resolution in Canada, as well as the current economic agenda, point in that direction. Today, dispute resolution in North America calls for mechanisms which combine efficiency and fairness and meet both the need to come to a conclusion of the dispute at hand, and the equally important need to nurture rather than to poison on-going business relationships. As those relationships show a greater and greater tendency to be international, the gravity of attaining such goals increases.

The current economic agenda militates in favor of alternative dispute resolution mechanisms. The world economy is constantly becoming more and more integrated. Not only is this true on a global scale, with the recent opening of Eastern European markets and the unification of the European market, but it is also true within the North American context where trade flows continue to grow and the Free Trade Agreement promises to open wider the border which separates the markets of Canada and the United States. As trade becomes more and more international, so do commercial disputes and conflicts; so must their resolutions. While Canada's trade in goods and services is growing with other countries, at this stage it is the American market that is by far the most important to Canada.

This recent growth in international trade and economic integration has made more apparent the need for a new system of resolution of international commercial disputes. It appears less and less acceptable to the business community to continue to struggle with different national dispute resolution systems while, at the commercial level, uniformity reigns. The integration of markets worldwide compels the emergence of dispute resolution mechanisms free from the curial system's often petty procedural obstacles, its jurisdictional uncertainties, its costs and its adversarial aftertaste; it demands, in short, mechanisms which allow not only settlement of conflicts but preservation and expansion of trade.

Dispute resolution in the Canada-United States context is at a crossroads. The gradual elimination of trade barriers between the two countries and the growing economic integration dictate the growth of ADR not as a replacement of the traditional curial process, of course, but as an available alternative brought to clients' attention by their ever-mindful legal servants, keen to avoid the uncertainties of resorting to litigation in a foreign provincial or state jurisdiction. On the other hand, though the concept of ADR is foreign neither to Canadian nor American law, it has yet to develop into a full-fledged field of practice or into an option which comes as readily to mind as it should.

My purpose today is to examine how these dispute resolution mechanisms can work in the North American context in commercial business-to-business disputes as well as in country-to-country disagreements. In both Canada and the United States, there have been numerous national experiences of alternative dispute resolution which have proved successful. In addition, the growth in Canada-United States trade offers both the impetus and the golden opportunity to develop new systems for resolving conflicts which will in turn increase business and trade between the two countries.

The globalization of the economy and the implementation of the Free Trade Agreement (FTA), find a ready partner in alternative dispute resolution. All three are combining to make a slowly accelerating, growing snowball which strengthens all three partners and, while obliterating nothing in its path, nevertheless cutting a swath and leaving a definite mark.

## II. ALTERNATIVE DISPUTE RESOLUTION

The recognition of alternative dispute resolution mechanisms in Canadian and U.S. law is fairly recent. In fact, fairly recently, the right to apply to the courts was seen as a fundamental right which no one could waive, even if both contractual parties so wanted. For example, it was not until 1983 that the Supreme Court of Canada recognized the right of Canadians to prefer conventional contractual arbitration to the judicial court system.<sup>1</sup>

Alternative dispute resolution is often said, almost by rote, to include a variety of practices among which are arbitration, mediation, negotiation, and mini-trials, as well as varying amendments made from time to time to the procedural rules of Canadian and U.S. civil courts to facilitate the disclosure of evidence and argument prior to trial. However, by definition this list is not exhaustive since *alternative* dispute resolution will always seek to create new "alternatives," paving the way for the creation of flexible and original solutions to disputes, designed by the parties themselves. Not only may the parties address disputes on a contract-by-contract basis but they may do so on a dispute-by-dispute basis, sometimes even with different mechanisms for the interlocutory disagreements than for the merits to which they lead.

It has become trite to say that alternative dispute resolution mechanisms can be used in numerous situations. It is arguably now only where one party has a determined interest not to have the dispute resolved, or acts in bad faith, that there will be no choice but to resort to the traditional litigation process. Business disputes and commercial relationships at the international level are particularly well suited for ADR, except perhaps where state intervention is involved, as in environmental or anti-

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<sup>1</sup> *Zodiac Int'l Prod., Inc. v. Polish People's Republic*, 1 S.C.R. 529 (1983).

trust disputes. Besides, in *Guenter Pauly & Jose Pena v. Biotronik, GmbH, a German Corp.; Micro Systems Engineering, Inc., an Oregon Corp.; and Dr. Max Schaldach*,<sup>2</sup> an Oregon federal court recently said, citing the Supreme Court decision in *Mitsubishi Motors v. Soler Chrysler-Plymouth*,<sup>3</sup> that “even claims arising under the Sherman Act could be arbitrated under a contract requiring arbitration of all disputes in Japan.”<sup>4</sup>

The most traditional and well-known form of ADR is obviously arbitration, which has been widely used in labor law for some years but is now a widespread practice in purely commercial fields. In 1989, for example, more than 55,000 commercial cases were filed with the American Arbitration Association, based in New York. Nevertheless, we should remember that its application to domestic or international commercial disputes remains relatively new and there is much teething left to be done.

Arbitration is still the classic method of alternative dispute resolution. At the international level, it is the most widely used mechanism to limit the courts' involvement in resolving commercial disputes. Nearly every successful non-curial mechanism of dispute resolution is a variant of arbitration.

Arbitration offers several key advantages to business-minded litigants. First, the parties can tailor the procedure to the particular nature of their contracts, of their businesses, or of their disputes. This flexibility and informality allows the parties to circumscribe or widen the jurisdiction of the arbitrators. That is, the disputants control the dispute resolution system themselves.

Another major advantage is the availability of neutral experts as arbitrators. These experts, unlike state-appointed judges, can have the technical knowledge of the business, familiarity with the specialized nature of the activities conducted by the disputants, easy fluency with the parties' usual terminology, and comfort with the interplay of various jurisdictions' particular customs and practices. This speeds the proceedings along, often leads to a fairer and better balanced resolution, (at least from the businessman's point of view), and gives to arbitration a flavor of in-house settlement which traditional litigation will always lack.

Furthermore, contrary to the court process, arbitration preserves the confidentiality of the proceedings. Arbitration can be conducted in private, protecting the public image of the companies involved. The decision itself can be kept from the glare of publicity. This is often of primary importance where adverse publicity surrounding a court trial might significantly injure the reputation and business of one or both parties, or where industrial trade secrets are at issue.

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<sup>2</sup> 738 F. Supp. 1332 (D.Or. 1990).

<sup>3</sup> 473 U.S. 614 (1985).

<sup>4</sup> *Id.*

Next, since arbitration is generally not conducted in an adversarial forum, it usually provides a better chance of preserving on-going business relationships between the parties.

My experience with international arbitration also shows another advantage, rarely mentioned by commentators, which is the ability to cope with more than one language. A courtroom in Michigan is an inhospitable place for witnesses from Quebec or Mexico, unless they are fluent in America's first language. And the courtroom lawyer in Michigan would rather not have to proceed through court translators. Arbitration proceedings, on the other hand, can be equipped with simultaneous translation and stringent rules regarding documentary translation to suit the needs of the particular case. That being said, I believe unilingual practitioners of any language are at a disadvantage in multilingual arbitrations; as far as possible, the translation must be for the clients and the witnesses, not for counsel.

In addition, arbitration usually provides a speedier and cheaper resolution than does traditional litigation. I say "usually" because this is not always so and, I believe, it is becoming less often so. For this reason, I discuss last the cost advantage, normally touted by arbitration advocates as the prime attraction. The attraction is fading. Some participants, and some jurisdictions, tend to allow for more interference from the civil courts than others. Like relatives, one cannot always choose the participants, but, like friends, one can often influence the choice of jurisdiction.

Experience has demonstrated that all too often numerous court applications testing the arbitrator's powers prior to the arbitration itself, or to question the enforceability of arbitral awards render the ADR system as costly, time-consuming, and complex as the curial process which it aims to avoid. Applications challenging the jurisdiction of the arbitration proceedings or the scope of the arbitration awards appear to be the biggest threat to alternative dispute resolution. In that respect, I cannot help but express my regret that the recent experience in the United States is frightening for the future of ADR. Multiple challenges on the arbitration process, coupled with an arbitration process copied too slavishly from the court system, (e.g., extensive discoveries and cross-examinations), have gradually diluted the ADR advantages to the point that one is often forced to wonder whether there is any real advantage left.

Of course, the Supreme Court of the United States has recently recognized the strong federal policy in favor of arbitration.<sup>5</sup> Nevertheless, unless the parties clearly and unmistakably provide otherwise, the question whether an arbitration agreement exists is to be decided by the courts, not the arbitrators.<sup>6</sup> Similarly, applications to stay arbitration

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<sup>5</sup> See, *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

<sup>6</sup> *AT&T Technologies Inc. v. Communication Workers of America*, 475 U.S. 643 (1986).

proceedings will be granted until the court decides this issue, as the District Court for the District of Columbia recently did in *Smith Wilson Co. v. Trading & Development Establishment*.<sup>7</sup>

As of late, U.S. cases have demonstrated that these challenges can stall arbitration proceedings for years. In *James P. Corcoran v. Ardra Insurance Co., Ltd.*, for example, Ardra, a Bermuda-based reinsurer, has appealed a lower court ruling which held that an arbitration clause in a reinsurance contract is not enforceable. In this case, six years have elapsed and the issue of arbitrability of the dispute has not yet been settled. Ardra demanded arbitration back in May, 1985, and has twice moved that lower courts compel arbitration, but the motions were denied and the state supreme court has refused to order the parties to arbitrate.

I know of several Canadian lawyers who recommend against choosing the United States as the site of arbitration for precisely this tendency of constantly challenging the arbitration process before the courts. Perhaps American jurisdictions should follow the lead of others (mentioned below) which have strictly limited the cases for judicial intervention in order not only to attract alternative dispute resolution, but to allow the process to go on smoothly and efficiently as the parties clearly intended.

Mediation is also often associated with alternative dispute resolution, and there are now "ADR" experts who boast of specialization in mediation. Mediation is a non-binding procedure by which a mediator helps parties reach an agreement through negotiation and communication. However, I hesitate to qualify mediation as an alternative dispute resolution mechanism since it is, and always has been, part of the task of lawyers to help clients see all the facts of the case and to discuss settlement alternatives with their colleagues and their clients.

Rather than an alternative dispute resolution standing on its own, mediation is a necessary element of both the curial process and the arbitration proceedings. I believe lawyers have a duty to their clients to point out the common ground, to seek areas of settlement, to predict outcomes and to narrow the field of dispute. To my mind, this is mediation and has been going on for ages.

This is not to say that innovative approaches to this exercise are forbidden. For example, one of my partners integrates a mediative mini-trial into arbitration proceedings. In pre-arbitration meetings of all parties, he exchanges evidence and argument in much the same way as it would be done at the final hearing. All counsels' clients see the strengths and weaknesses of their respective positions and can nearly predict for themselves the likely outcome if the arbitration is taken to its conclusion. This often leads to settlement prior to the arbitration proceeding on the merits.

All these elements argue for an increase in the use of arbitration. Other dispute settlement mechanisms in international commercial dis-

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<sup>7</sup> 744 F. Supp. 14 (D.D.C. 1990).

putes and recent developments at the national level in Canada and in Canada-United States relations also suggest that dispute resolution in North America is evolving along this avenue.

### III. CANADIAN INTERNAL LAW

Both in Canada and in the United States, arbitration has recently taken deeper roots in internal law. Since 1985, Canada has acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention; enacted much legislation on international commercial arbitration; and opened two international commercial arbitration centers. Domestic law on arbitration usually lags behind the international rules for arbitration. In Canada, however, the law is at least keeping pace with developments at the international level.

The first international standard for arbitration was the New York Convention. This Convention provides for a stay of judicial proceedings in cases where the parties have previously agreed to resort to arbitration, and allows for easy enforcement of foreign arbitral awards through registration in domestic courts. Canada is a contracting state under the New York Convention, and all provinces and territories have implemented this treaty within their jurisdictions. It can now be said that the New York Convention is fully in effect throughout Canada.

Canada has gone beyond simple implementation of the New York Convention and has adopted legislation along the lines of the Model Law on International Commercial Arbitration adopted in June, 1985, by the United Nations Commission on International Trade Law (UNCITRAL). The emergence of this Model Law, created under the auspices of UNCITRAL, is arguably the most noteworthy development of the procedural backdrop against which arbitration can flourish. This Model Law deals with all facets of the arbitration process. Not only does it reproduce the provisions of the New York Convention regarding enforcement, but it also provides a set of tools for the conduct of international arbitration in the jurisdictions which adopt it. Essentially, it is aimed at limiting court involvement in the international commercial arbitration process, thereby meeting the concern of many civil lawyers that arbitration not be unduly delayed by hearings on questions of jurisdiction and appeals from an initial curial ruling.

Canada was the first country to enact the UNCITRAL Model Law. Today, the federal government and all the provinces and territories have incorporated the Model Law into their legislation. (In the United States, only a few states have thus far implemented the model). The federal Commercial Arbitration Act of 1986 is the first piece of legislation dealing with arbitration in matters of federal jurisdiction. It extends the application of the Model Law to domestic as well as international arbitration. At the provincial level, the provinces have enacted legisla-



tion on international arbitration, with British Columbia and Quebec extending these rules to domestic arbitration as well.

Quebec law goes further than any other provincial legislation in favoring arbitration. The New York Convention and the Model Law were implemented as amendments to the Quebec Civil Code and the Code of Civil Procedure. Quebec law applies the same treatment to all arbitral awards, whether in commercial matters or not, whether rendered inside or outside of Quebec or Canada. It specifically states that the legislation must be interpreted by taking into account the New York Convention.

It should also be observed that Article 940.6 of the Quebec Code of Civil Procedure dictates that, where matters of extra-provincial or international trade are at issue in an arbitration, interpretation of not only the arbitration clause, but also of all Quebec's arbitration-enabling legislation, must take into account the Model Law and related documents prepared by the United Nations.

Additionally, the Code of Civil Procedure provides that the courts cannot intervene in any question governed by the provision on arbitration, except where expressly provided, and cannot inquire into the merits of the dispute on any application for recognition and execution of an arbitral award. The courts may, however, grant provisional measures before or during arbitration proceedings.

The Quebec law further limits attacks on arbitral awards to very specific circumstances, such as a party's incapacity to enter into the arbitration agreement, or the award's exceeding the arbitrators' jurisdiction by dealing with a dispute not falling within the terms of the arbitration agreement. Error of law will not annul the arbitral award. Article 946.5 also provides that the court can refuse homologation or annul the award if it finds that the matter in dispute cannot be settled by arbitration in Quebec or that the award is contrary to public order.

Since all Canadian provinces have implemented the Model Law, awards from an international arbitration in one province of Canada will be enforceable in other provinces under their respective implementing statute.

The first curial decision to emerge based on the provisions of the Model Law came from Quebec in *Navigation Sonamar Inc. v. Algoma Steamships Ltd.*<sup>8</sup> In that case, the applicant sought to set aside an arbitral award, contending the award was invalid because of the absence of coherent reasons and because it was contrary to public policy. The court rejected the applicant's motion, upholding the arbitral award since the arbitrators' conclusions were not viewed as unreasonable, having covered all essential elements of the dispute, even though they were not drafted in legal terms.

In conjunction with these legislative developments, arbitration cen-

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<sup>8</sup> [1987] R.J.Q. 1346 (C.S.).

ters have been established in two Canadian provinces. In 1986, British Columbia opened its International Commercial Arbitration Center. The Quebec National and International Commercial Arbitration Center was inaugurated in 1988 in Quebec City, with offices in Montreal and Quebec City.

The existence of these commercial arbitration centers is also a tribute to the provincial governments' desire to encourage this form of dispute resolution and to attract arbitrations to their provinces. The Quebec Center, for one, also offers the possibility of conducting hearings and entire arbitrations in both French and English as a matter of course, and in other languages if necessary. In an international context, this is obviously an advantage. Given the recent amendments to Quebec's Code of Civil Procedure promoting and facilitating the use of arbitration, Quebec is one jurisdiction where international commercial arbitration is very likely to develop in the near future, with or without the help of the Arbitration Center.

Arbitration is governed by two sets of rules: the procedural rules regulating the arbitration process as a whole, and the law applicable to the merits of the dispute. Since every arbitration must be conducted at a given site, that jurisdiction must offer a legal system which recognizes the validity and legitimacy of arbitration proceedings. Parties wishing to resort to arbitration will therefore choose a country where the laws recognize the validity of the proceedings and where the courts are less likely to interfere with, invalidate, or slow down the process. With the adoption of the new statutes on arbitration, Canada, and especially Quebec, offer just such a place. In addition, with regard to the law applicable to the substance of the dispute, Quebec provides a forum able to deal with common law as well as civil law matters.

All in all, the recent evolution of Canadian internal legislation has put in place all the elements necessary to promote and favor ADR, particularly arbitration, in the Canada-United States context or even in the Canada-Mexico-United States context.

#### IV. THE FREE TRADE AGREEMENT

Dispute settlement mechanisms are more often becoming a feature of trade agreements, and are now used almost routinely in efforts to settle trade law disputes between countries. One of the most recent developments in this field is the new GATT provision regulating the modification of tariff schedules through arbitration. The new Article XXVIII, formally approved in April 1989, implements a mechanism to monitor disputes over the transposition of tariff schedules to the new Harmonized System of tariff classification, which both Canada and the United States have recently adopted.

At the North American level, several alternative dispute resolution mechanisms were established pursuant to the Canada-United States Free

Trade Agreement. The dispute resolution provisions dealing with trade disputes under the FTA consist of two basic components, each sub-divisible into various stages and parts. First, Chapter 18 applies to disputes involving the interpretation or application of FTA provisions and its consistency with a party's actual or proposed legislative or regulatory measures. To activate the mechanism, a party must, pursuant to Article 1803, notify the other party of any of its measures which might materially affect the operation of the FTA. This brings about informal talks, or consultations. If consultation fails to resolve the matter within thirty days, either party may request a meeting of the Canada-United States Trade Commission which, under Article 1805, has thirty days in which to attempt to achieve resolution. If this fails, the Commission has two choices. First, it can elect to refer the dispute to arbitration, described as binding in Article 1806(1). If a party fails to implement the arbitration finding, the other can suspend the application of equivalent benefits, that is to retaliate. Second, if the Commission does not send the dispute to arbitration, it must, upon the request of either party, name a panel to recommend a resolution of the dispute in the form of initial and final non-binding reports.

The arbitration provision has given rise to a well-publicized battle with respect to Canadian blended sugar exports to the United States. In this dispute, Canada and the United States appointed an arbitrator to examine a situation in which the United States reclassified sugar blends under a Harmonized System tariff item subject to an import quota more restrictive than had previously applied to sugar blends. The arbitrator ruled in favor of Canada, but the United States has not changed the classification, and the restrictive quota is still being applied. Canada has decided to postpone its rights to seek concessions against the United States and has put off its deadline to take retaliatory measures several times since the spring of 1990. This reflects a strong willingness to have the dispute resolved through arbitration and by consensus rather than resorting to retaliatory and adversarial measures which, in the end, would only serve to hamper trade between the two countries.

Two Chapter 18 Panels have been formed since the implementation of the FTA, one on Pacific salmon and herring from Canada, and the other on lobsters from Canada. The Salmon Panel produced a report on which Canada and the United States finally agreed. However, the dispute over the American legislation forbidding the sale or transportation into the United States of Canadian lobsters under a certain size gave rise to a split panel and then to extensive negotiations between the two governments, which are still pending.

The second dispute settlement mechanism under the FTA is also based on the principles of arbitration. Pursuant to Chapter 19 of the Agreement, binational panels are charged with reviewing each country's administrative authorities' final determinations of dumping, subsidization and consequential injury. Panels, composed of three panelists of one

nationality and two of the other, may uphold the final determination or remand it for action not inconsistent with the Panel's decision.

To Canadian and American business alike these panels offer speedy resolution of trade disputes (within a 315-day deadline) as well as independent binational treatment by trade law experts. This is meant to be faster not only than the traditional recourse to judicial review at the hands of the U.S. Court of International Trade or the Federal Court of Canada, but to create on each side of the border a growing awareness of the procedures and laws on the other side, as well as a greater expectation of even-handed treatment.

The experience since 1989 has shown these panels to be very popular. More than a dozen reviews have been requested by Canadian and American businesses, and the fear that these panels might split along national lines has not materialized. Most of the panel decisions challenging United States rulings have been unanimous. Another fear, expressed by some, that these panels would suffer from the panelists' lack of expertise in the law of at least one of the two countries and from their commitment to non-judicial pursuits, has also not materialized. On the contrary, these Chapter 19 Panels have been diligent, hard-working paragons of availability, and their decisions promise to be an asset to each country's jurisprudence.

These Binational Panels have offered a new approach to anti-dumping and countervailing duty disputes which have always been very complex, costly, and time-consuming. The panelists have not hesitated to plunge into in-depth analysis of the other country's laws and even to offer new, but no less valid, perspectives on U.S. and Canadian law.

The mechanisms implemented by the Free Trade Agreement are further examples of the development of ADR in the Canada-United States context. Since they provide non-adversarial, rapid, trade-minded resolution of public and private disputes, they can only favor the growth of trade between the two countries.

I predict that recourse to these proceedings will become more and more frequent and that the FTA's dispute settlement mechanisms will be seen by other countries as well worthy of imitation.

## V. CONCLUSION

The alternative dispute resolution mechanisms I have discussed are feeding and are fed on the Canada-United States trading context, at both the national and the binational levels. They respond to businessmen's dissatisfaction with the traditional court system as well as to the two countries' and their citizens' evident desire to keep disputes from being disruptive. In addition, they appear well adapted to the contemporary growth in international commercial relations.

One must remember, however, they are not a panacea. Alternative dispute resolution, and arbitration in particular, will fail when its proce-

ture becomes too complex, too cumbersome, or when lawyers seek to hinder rather than facilitate the arbitration proceedings. Alternative dispute resolution will not be attractive if it is surrounded by uncertainty. Furthermore, attractive though it may be made, ADR will forever remain an alternative, not a replacement, to the traditional mechanisms of adjudication.

The inevitable integration of our markets and the increase in trade calls for a dynamic response which will diminish conflicts and eliminate the wedges which drive businesses apart. This economic context dictates that alternative dispute resolution mechanisms will be on the agenda, and that businessmen and lawyers who do their job will come up with even more imaginative, even more efficient solutions. The recent evolution of Canadian domestic law and the implementation of the Free Trade Agreement suggest that Canada and the United States have done nearly all that is required to put the challenge into the private hands where it belongs.