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The Resolution of Transnational Commercial Disputes: A Perspective from North America

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THE RESOLUTION OF TRANSNATIONAL COMMERCIAL DISPUTES: A PERSPECTIVE FROM NORTH AMERICA

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I. INTRODUCTION

The resolution of international ("transnational") commercial disputes requires careful appraisal of the underlying business transactions from which a given dispute arises. Particular attention must be paid to several attendant problems — political, economic, jurisprudential, and cultural — that are seldom encountered in the resolution of domestic commercial disputes. Business executives, if properly counseled, will consider at some length the implications of those problems

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before negotiating a transnational agreement. Indeed, it is not enough to understand the implications of these problems in legal and pragmatic terms; the negotiating process itself should reflect that understanding. Accordingly, an important component of such an agreement should be a dispute resolution clause that reflects the parties' explicit intention to anticipate future disputes and resolve them in a manner conducive to preserving the business relationship.[1]

Over the years, the resolution of transnational disputes has been addressed almost exclusively by a small number of so-called "international law firms" which are well versed in the intricacies of international litigation and arbitration. Until recently, litigation and arbitration represented the only resolution techniques. The last decade however has witnessed an expansion of the available techniques, which manifests growing business confidence in the practice of resolving disputes through the use of voluntary, non-binding processes such as negotiation, mediation, conciliation, and the minitrial.

Adversarial adjudicative techniques, such as arbitration and litigation, remain important; but executive management has begun to inquire into the efficacy of those techniques, in light of growing experience in the resolution of domestic disputes. Reflecting experience overseas, United States business interests continue to expand dramatically their use of domestic dispute resolution techniques (ADR). This expansion has several critical implications for the resolution of international business disputes. First, business relies far less upon courts and lawyers. Second, business executives are increasingly determined to manage and control the dispute resolution process. Third, there is a growing reliance upon negotiation, mediation, and conciliation dispute resolution techniques, in lieu of traditional litigation and even arbitration. And finally, there is greater awareness of the need to include an appropriate dispute resolution clause in the underlying commercial agreement.

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1. George W. Coombe, Jr., *Anatomy of a Business Dispute: Successful ADR Analysis by the Office of General Counsel*, 45 ARB. J. 3, 10 (1990).

These trends raise the question whether domestic dispute resolution principles can be applied to transnational business. The answer — an emphatic "yes" — can be found by examining the nature of the underlying transnational transaction, the evolving international political and economic changes, and, perhaps most importantly, the expectations of the parties who are involved in such transnational business opportunities. A consideration of these factors will prove helpful in evaluating transnational dispute resolution mechanisms and making predictions regarding their future.[2]

II. GLOBAL ECONOMIC CHANGE

Profound political, social, and cultural changes accompany the expansion of free society and the ongoing transition from socialism to capitalism. These changes are visible in many places: in the European Union (e.g. implementation of the Europe 1992 program and the advent of a common European currency); on the North America continent (e.g. the North American Free Trade Agreement); in the Asian-Pacific Region (e.g. the Asia Pacific Economic Cooperation Forum); and in Eastern Europe (e.g. the Central European Free Trade Area and association with the EU). Developments in the resolution of transnational business disputes relate closely to such changes. Thus, expanding political freedom motivates international, regional, and national support for trade and investment, and in time, business dispute mechanisms expand and gain legislative and regulatory recognition. One can reasonably anticipate that national civil justice systems will respond appropriately and sympathetically, and thereby encourage the process.[3]

The evolving nature and complexity of transnational business transactions correspond to this changing global environment. Today, the complexity of transnational commercial transactions reflects a willingness of parties to create and

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2. George W. Coombe, Jr., *International Dispute Resolution*, CALIFORNIA ADR PRACTICE GUIDE 17-1, 17-2 (1997).

3. *See* Rt. Hon. Lord Goff of Chievely & Arthur L. Marriott, Address at the Chartered Institute of Arbitration at its 75th Anniversary Conference, London, England (Oct. 1990) (unpublished paper, copy on file with author).

sustain a long-term comprehensive endeavor in the expectation of mutual economic benefit. These contemporary endeavors are far more complex than the simple and discrete undertakings identified with the business world that existed prior to the 1957 Treaty of Rome. Commercial disputes arising out of these earlier transactions tended to be resolved within specialized industries (e.g. international shipping and insurance) or through institutional or ad hoc international commercial arbitration. In short, the straightforward nature of the underlying transactions permitted a convenient framework for dispute resolution by settlement, arbitration, or litigation. These techniques relate well to discrete business transactions, where disputes yielded win-lose, yes-no answers to precisely framed issues.

Today, in contrast, transnational business disputes typically arise within the context of complex, long-term, and often multi-party relationships. Typical examples of such relationships include: joint ventures between two or more transnational entities to establish research and development (R&D), marketing, or manufacturing facilities in a third country; joint ventures between private investors and state-owned enterprises for large-scale industrial and agribusiness developments in developing countries; co-financing projects involving the World Bank, the International Finance Corporation, private investors, state and parastatal enterprises; and participation agreements involving development and exploitation of natural resources.[4]

Parties to such complex, relation-based transactions must contemplate the likelihood that any dispute that arises will bear a direct relationship to the complexity and duration of their mutual undertakings. Given these circumstances, the need for decent resolution of transnational business disputes has never been more important. Several recent multilateral, regional, and national developments pertaining to trade and

4. For an early analysis of the changing nature of international business disputes, *see* Carter, Matching Technique to Need in the Resolution of International Business Disputes, Address at the Center for Public Resources International Task Force Workshop (April 1982) (unpublished paper, copy on file with author).

investment and the resolution of transnational commercial disputes reflect growing recognition of that importance.[5]

III. RECENT DEVELOPMENTS

This section provides an overview of significant developments pertaining to transnational dispute resolution in various regions of the world. Some developments in certain regions will be analyzed in greater depth in the sections that follow.

A. NORTH AMERICAN DEVELOPMENTS

The North American Free Trade Agreement (NAFTA)[6] provides for direct arbitration between a foreign investor and a member state. NAFTA provides that an investor may submit a dispute to international arbitration pursuant to the rules of either the International Centre for the Settlement of Investment Disputes (ICSID), or of the United Nations Commission on International Trade Law (UNCITRAL).[7] Further, NAFTA expressly promotes international commercial arbitration: "Each party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area."[8]

NAFTA has encouraged the development of new arbitration and mediation centers to address private transborder disputes. The Commercial Arbitration and Mediation Centre for the Americas (CAMCA) was created to facilitate the resolution of private transborder disputes within the North American free trade area. CAMCA was formed by the efforts of its constituent members: the American Arbitration Association (AAA), the British Columbia Commercial Arbitration Centre, the Mexico City National Chamber of Commerce, and the

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5. Dankmeyer, Long Term Contracts and Change, Address at the International Symposium on Pacific Basin Dispute Resolution (May 1987) (unpublished paper, copy on file with author).

6. North America Free Trade Agreement, 32 I.L.M. 605, 698 (entered into force Jan. 1, 1994), *reprinted in* HOLBEIN & MUSCH, NORTH AMERICA FREE TRADE AGREEMENTS (1994), Treaties Binder 1, Booklet 3 [hereinafter NAFTA AGREEMENT].

7. NAFTA AGREEMENT, art. 1120.

8. NAFTA AGREEMENT, art. 2022, sec. 1.

Quebec National and International Commercial Arbitration Centre. CAMCA is jointly administered by each of these leading dispute resolution centers in the three NAFTA countries. CAMCA provides arbitration and mediation services under a uniform set of rules published in the three languages of the NAFTA countries. Furthermore, CAMCA has established a multi-national roster of arbitrators and mediators, and has created a neutral mechanism to fix the situs of arbitration or mediation proceedings in the absence of party agreement.[9]

B. CENTRAL AND EASTERN EUROPE

Arbitration and arbitration institutions in the former member countries of the Council for Mutual Economic Assistance (CMEA) have been enhanced. For example, Bulgaria, the Czech Republic, Hungary, the Russian Federation, and Ukraine have recently adopted legislation based on the UNCITRAL Model Law.[10] In addition, arbitral centers throughout Eastern Europe are being strengthened, with the assistance of the International Chamber of Commerce (ICC). These efforts to enhance legislation and develop arbitral centers reflect an increasing emphasis in transition economies upon international commercial arbitration as a means to encourage trade and investment.

C. LATIN AMERICAN DEVELOPMENTS

The use of mediation and arbitration has expanded throughout Latin America.[11] Mexico recently enacted an arbitration statute largely based on the UNCITRAL Model Law. In Argentina, a discernable trend in favor of the use of arbitral clauses has been noted, particularly in the field of international contracts. This trend is apparent in Brazil as well, where new legislation has repealed former statutory regulation

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9. *See* The American Society of International Law, Commercial Arbitration and Mediation Center for the Americas (CAMCA): Mediation and Arbitration Rules, *reprinted in* 35 I.L.M. 1541 (1996).

10. For the National Reports on several former CMEA countries, *see* ROBERT VAN DEN BERG, YEARBOOK OF COMMERCIAL ARBITRATION (1997).

11. For National Reports on Mexico, Argentina, and Brazil, *see* VAN DEN BERG, *supra* note 10.

unfavorable to arbitration. Another trend noted in Latin America is the proliferating activities of bar associations, chambers of commerce, and arbitration centers in matters relating to international commercial arbitration. These entities disseminate information regarding the virtues of commercial arbitration. In addition, several of the arbitration centers — which also act as National Sections for the Inter-American Commercial Arbitration Commission (IACAC) — promote symposia, seminars, and simulated arbitration in order to encourage its use for international purposes.

D. ASIAN DEVELOPMENTS

Throughout Asia, strong emphasis has been placed upon the conciliation technique, and upon the historical, social, and cultural derivatives pertaining to its use. Indeed, avoidance of confrontational, adversarial, and adjudicatory dispute resolution appears almost an end in itself at many Asian arbitration centers.[12]

The tendency to resolve international commercial disputes by conciliation (or mediation) and arbitration has gained momentum throughout Asia.[13] An informal survey of several Asian and Pacific Rim dispute resolution institutions and conciliation and arbitration provides support for this assertion. The survey results pinpoint a variety of concrete developments. First, a number of countries — such as India, Singapore (with minor modifications) and Vietnam — have adopted new commercial arbitration legislation based upon the UNCITRAL Model Arbitration Law. These new laws encourage the use of international commercial conciliation and arbitration, by affording greater party autonomy and permitting less judicial intrusion in international than in domestic arbitrations. Second, conciliator and arbitrator panels with appropriate experience and expertise are being created and expanded.

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12. *See* George W. Coombe, Jr., A Survey of Pacific Rim Arbitration and Dispute Resolution Centers (1994) (unpublished paper, copy on file with author).

13. For National Reports pertaining to the countries of East Asia and the Pacific Rim, including legislation applicable to international commercial arbitration and rules of their respective conciliation and arbitration centers, *see* VAN DEN BERG, *supra* note 10.

Third, centers for dispute resolution, conciliation and arbitration have been expanded and strengthened in the Asian Pacific. In addition, several of these centers have adopted new rules modeled on the UNCITRAL Arbitration Rules. Finally, cooperation agreements have emerged that are designed to facilitate the transnational dispute resolution process between and among the several centers.

In the People's Republic of China, comprehensive arbitration legislation that shows the influence of the UNCITRAL Model Law, and amendments to the Chinese International Economic and Trade Arbitration Commission (CIETAC) Rules, demonstrate that country's intention to make China an acceptable venue for international commercial arbitration. China has joined the ICC in Paris, and will organize a new national arbitration body, the China Arbitration Association, that will be a non-governmental entity established to supervise the Chinese arbitration commissions. In fact, more than 1000 new arbitration cases are instituted annually in Hong Kong and China together, which is more than the aggregate of international cases instituted annually under the aegis of the ICC, the LCLA, and the AAA. CIETAC now is the arbitral institution that handles the greatest number of international arbitrations in the world.

For its part, Japan has established a "blue ribbon" commission to review its arbitration laws and the rules of the Japan Commercial Arbitration Center (JCAA). The commission's recommendations are expected to enhance opportunities for international arbitral proceedings sited in Japan.

E. INTERNATIONAL CENTRE ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

The role of the International Centre for the Settlement of Investment Disputes (ICSID), an autonomous international organization that has close links to the World Bank, continues to grow, not least due to the trend discussed above in connection with NAFTA. The number of adherents to the Convention on the Settlement of Investment Disputes has increased substantially. As of 1998, one hundred and forty-four states have signed the Convention, and one hundred and

twenty-nine states have attained the status of a Contracting State.[14]

F. WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) DEVELOPMENTS

The World Intellectual Property Organization (WIPO) has created an Arbitration Center in Geneva, and has developed specialized mediation and arbitration rules to address intellectual property issues, i.e. the WIPO Mediation and Arbitration Rules.[15] The basic premise behind the creation of the WIPO Center is the special nature of intellectual property as a subject matter. The WIPO Rules reflect the belief that dispute resolution alternatives to litigation, such as mediation and arbitration, offer particularly suitable means of accommodating the specific characteristics of intellectual property disputes. The WIPO Rules represent the latest and best-informed example of desirable, international practice. At the same time, the WIPO Center provides quality case management and assures ongoing identification of experienced and highly qualified international mediators and arbitrators who can address the complexities and challenges of transnational intellectual property disputes.

G. FURTHER CHANGES IN LEGISLATION AND CASE LAW

Further changes in legislation and case law significantly affect transnational dispute resolution. For example, public policy limitations on the use of arbitration as a method for settling transnational commercial disputes have been narrowed. Several nations have significantly expanded the range of arbitrable matters by legislation, thereby enhancing the enforcement and recognition of arbitral awards obtained under the application of the New York Convention on the Recognition

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14. ICSID ANNUAL REPORT 17-19 (1998). For further information on the International Centre for Settlement of Investment Disputes, *see* ICSID BIBLIOGRAPHY (Washington, D.C.) (published annually). The most up-to-date information is available at <http://www.worldbank.org/html/extdr/icsid.html>.

15. *See generally* David Caron, Evaluating the New WIPO Arbitration Rules for Intellectual Property Disputes, Address at the Eleventh Annual Joint Colloquium and Seminar on International Arbitration (Oct. 1994) (unpublished paper, copy on file with author).

and Enforcement of Foreign Arbitral Awards. Liberal notions of arbitrability support international business, whereas the imposition of strict limits on the nature of claims that can be arbitrated elevates the primacy of public policy over party autonomy. Major change in the direction of liberalizing restrictions on arbitrability can be discerned, for example, in Eastern European countries that are establishing market economies and have entered the mainstream of international trade. But such liberalization is also apparent in the United States, where the U.S. Supreme Court has shown considerable readiness to grant more liberal treatment to international arbitration agreements.[16]

H. PROLIFERATION OF ADR TRAINING AND EDUCATION

Mediator and arbitrator training and education have proliferated throughout the world. The dramatic expansion of transnational trade and investment has increased the need for qualified neutrals that can address commercial disputes that arise from those activities. A primary source for such neutrals will be experienced domestic arbitrators who have been introduced to international rules and procedures by instructional programs conducted by leading international arbitral centers and institutions, such as the ICC, the LCIA, the AAA, and the Chartered Institute of Arbitrators. Law schools also play an important role in these developments, particularly in the United States and Canada, since they have initiated curricular offerings in international dispute resolution with clinical emphasis upon mediation and arbitration.

IV. THE NAFTA PRECEDENT

During the negotiations underlying NAFTA, the parties were sensitive to the need to build on the successful precedent of the Canada-U.S. Free Trade Agreement (CUSTA).[17] NAFTA negotiators also had to bear in mind the important

16. *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 115 S.Ct. 2322, 132 L.Ed. 2d 462 (1995).

17. Canada-U.S. Free Trade Agreement, 27 I.L.M. 281 (entered into force Jan. 1, 1988).

developments occurring simultaneously in Geneva in the framework of the Uruguay Round, which ultimately resulted in adoption of the Agreement Establishing the World Trade Organization (WTO Agreement) and an understanding on Rules and Procedures governing the Settlement of Disputes (DSU).

The negotiating parties also sought to enhance further the perception that the CUSTA's novel dispute settlement mechanisms had largely accomplished their goal of settling disputes in a fair and effective manner, by eliminating political biases from the process, and reinforcing the rule of law in international trade. Indeed, the dispute settlement mechanisms adopted in the CUSTA were critical to the very existence of the Agreement and thus, to the continued employment of that mechanism in the NAFTA.

Canada and the United States, by introducing the concept of independent binational review of antidumping and countervailing duty determinations of their respective trade agencies, had created a procedural mechanism by which to resolve trade disputes between the two countries. This mechanism was designed to remain in force until the later resolution of substantive issues made it no longer necessary. From the U.S. perspective, the mechanism preserved existing antidumping and countervailing duty laws and established a form of review that applied the same standards of judicial review as applied by national courts. Moreover, it required Canada to submit to panel review certain types of agency decisions that theretofore had not been subject to appeal in Canada. From the Canadian perspective, Canadian exporters obtained assurances of a speedy review of U.S. agency determinations and avoided review by the U.S. Court of International Trade and the U.S. Court of Appeals, which courts the Canadians perceived to be overly deferential to U.S. agency negotiations.[18]

In retrospect, it is not surprising that Canada and the U.S., which share both their common law (and to a lesser extent,

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18. Arlene Wilson, *The Canada-U.S. Free Trade Agreement: Lessons for the NAFTA*, CONGRESSIONAL RESEARCH SERVICE 93-153E (Feb. 1993).

civil law) legal traditions, should find common ground in addressing the resolution of trade disputes. Their success in this regard was encouraged, further, by the absence of significant cross-cultural misunderstanding and the creation in each nation (through legislation and decisional authority) of favorable dispute resolution environments responsive to commercial expectations. A subsisting question, addressed in the following section, is how those traditions and values can accommodate different legal traditions and cultural and societal values.[19]

V. THE ASIAN INFLUENCE

Despite recent economic problems in the region, more foreign investment has been committed more rapidly to Asia and the Pacific during the past ten years than in any decade in world history. As a result of those capital flows, two billion people — two and a half times as many as those living in the industrialized west — are bringing themselves into modernity in the space of a single generation.[20]

Due to the commercial importance of Asia to the United States and Canada, it is not surprising that Asian traditions influence U.S. and Canadian thinking. One such tradition — conciliation of commercial disputes — is already firmly established throughout North America as a useful augmentation to arbitration. Business executives and their counsel have come to appreciate, through direct negotiating experience with their Asian counterparts, that Asian values emphasizing preservation of the business relationship and maintenance of party credibility and trust are the very heart of responsible commercial dispute resolution.

Stimulated by a growing recognition of the counter-productive features of formal adjudicatory procedures for resolving disputes, such as litigation and arbitration, many members of

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19. For a cross-cultural comparison of the legal traditions of Japan and the United States, *see e.g.*, George W. Coombe, Jr., *The Resolution of Intellectual Property Disputes Involving East Asian Parties,* 19 HASTINGS INT'L & COMP. L. REV. 707, 717 (1996).

20. *See* George W. Coombe, Jr., Address at The Eleventh Annual Joint Colloquium and Seminar on International Arbitration (Oct. 1994) (unpublished paper, copy on file with author).

the legal profession in the U.S. and in Canada have begun to search for better ways to resolve legal disputes. The objectives which have motivated the search for alternative procedures mirror the list of problems identified as inherent in the conventional adjudicatory procedures: the desire for party participation; the need to resolve the dispute without terminating the underlying business relationship or destroying the confidence upon which it is based; the need to focus the parties' attention on the main issues in the dispute and to minimize the diversions of time and energy to procedural and other ancillary issues; and the encouragement of free dialogue.[21]

In light of the foregoing considerations, and to take advantage of the non-binding negotiations procedures favored throughout Asia, those procedures can be structured within the framework of arbitral procedures. Indeed, the arbitral framework affords the parties great flexibility which will permit them to define the scope and mechanics of the proceeding so as to accomplish the main objectives of the alternative procedures and still lead to a final adjudication in the event that a negotiated settlement is not reached.

Thus, it is possible to design arbitration agreements under which the demand for arbitration would automatically trigger preliminary non-binding procedures, prior to the appointment of arbitrators. If properly structured, such provisions not only insulate such procedures from judicial interference, but also enable the party invoking the alternative procedure to obtain the assistance of a court to compel a recalcitrant opponent to pursue the alternative procedure as an integral part of the arbitration. At present, use of the arbitral framework offers the most promising approach for the application of alternative non-binding, negotiation procedures to transnational business disputes. As a result, we shall continue to look to the values and traditions of Asia and its growing influence upon transnational business and upon the decent resolution of transnational business disputes.

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21. Coombe, *supra* note 19, at 707-708.