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Canadian Acceptance of International Commercial Arbitration

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CANADIAN ACCEPTANCE OF INTERNATIONAL COMMERCIAL ARBITRATION*

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I. INTRODUCTION

A few years ago it would have been impossible to speak of Canadian "acceptance" of international commercial arbitration. Canada had not adhered to any international convention on arbitration, and Canadian legislation did not specifically regulate arbitration in commercial dealings or when it involved some non-national element. There was no federal enactment on the subject. Canadian provincial legislation, whether the civil law of Quebec or the common law of the rest of Canada, had not greatly evolved from the 19th century position expressed in legislation based upon the legal traditions of France and the United Kingdom of the same period. No more than a handful of judicial decisions had been rendered in Canadian courts involving the enforcement of foreign arbitral awards. There was little doctrinal writing on the topic. Institutional structures designed to assist in the implementation of arbitration agreements were no more than local organizations whose primary concern was domestic arbitration within local communities or specialized trade associations.[1]

Canada has recently gone through a remarkable transformation on all of these fronts. Since 1986 its position has evolved to the point where it is, indeed, appropriate to speak of a Canadian acceptance of international commercial arbitration. There have been dramatic developments in the legislative ordering of arbitration. New institutional facilities have been set up to accommodate the specific needs of those implicated in the organization of international arbitrations involving commercial interests. The topic, moreover, is one now claiming the fresh attention of members of the Canadian legal community. All of these developments are of interest to those generally concerned with the evolution of Canada's international trade law.

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1. A survey of the Canadian position on all these aspects of arbitration in the early 1970's is provided in Brierley, *International Trade Arbitration: The Canadian Perspective*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION 826-41 (1974). The present study traces the major developments occurring in Canada since this earlier assessment.

They may also be of particular interest to those who are exploring the legal implications for the private sector of the bilateral free trade agreement between Canada and the United States. While the renewal of the Canadian position on international commercial arbitration has not been directly linked to the movement in promotion of free trade, it is only natural to enquire whether these developments in the law of arbitration may assist in the resolution of disputes arising between the commercial interests in the private sector on both sides of the border that will receive new impetus if the Free Trade Agreement is implemented in both countries.

This study will therefore summarize the new legislative framework that has been put in place in Canada with respect to international commercial arbitration (Part II) and draw attention to the existence of newly formed institutional facilities designed to accommodate the organization of international arbitrations (Part III). Some concluding reflections are devoted to the specific considerations that are prompted by the possibility of using arbitration as a mode of dispute resolution within the context of Canada-U.S. trade in the private sector (Part IV).

II. CANADA'S NEW LEGISLATIVE FRAMEWORK

A. Sources of New Laws.

Canadian federal and provincial legislative authorities have found it appropriate, within the last three years, to enact progressive legislation on the subject of international commercial arbitration that has put an entirely new legislative framework in place throughout the whole country. This coordinated transformation has come about as a consequence of Canada's adherence to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the New York Convention)[2] and the further decision, in most jurisdictions, to enact, as a manner in which to implement that Convention, the substance of the 1985 Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (hereinafter the UNCITRAL Model Law).[3]

The topic of international commercial arbitration has thus acceded, in an almost instantaneous legal ordering, to an unprece-

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2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38-49 [hereinafter New York Convention]. Upon the deposit of Canada's instrument of accession on 12 May 1986 the Convention came into force in Canada on 10 August 1986 by proclamation. 1986 Can. Gaz. No. 17, Part II 3306, 3423. *See also* 1986-1987 CAN. DEP'T EXTERNAL AFFAIRS ANN. REP. 70, app. III at 91.

3. *Report of the United Nations Commission on International Trade Law*, 18th Session, 3-21 June 1985, Supplement No. 17 (A/40/17) of the Official Records of the Fortieth Session of the General Assembly, United Nations, New York, 1985.

dented specificity within the Canadian legal system. This development represents remarkable progress on the part of a country that has hitherto maintained a very low profile with respect to arbitration in general. This achievement is no less singular in that it has shown that the work of fully national legislative harmonization is possible within a federal system in which the different traditions of civil law (in Quebec) and common law (in other jurisdictions) coexist. It is, of course, the *international* and *commercial* faces of arbitration, as envisaged by the two sources mentioned, that has enabled this development to take place.

The New York Convention, to which other major western trading nations had already adhered, constitutes a minimum acknowledgement of the norms accepted in the international commercial community with regard to arbitration insofar as it sets forth the principle that a foreign arbitral award will not be the subject of untoward scrutiny in the country in which its enforcement is sought. The UNCITRAL Model Law, which on this last point duplicates the substance of the New York Convention, goes a step further because it offers a complete legislative *cadre* for an international commercial arbitration in all its respects. It proposes provisions on the enforceability of the agreement, the autonomy of the parties (or the arbitrators) in deciding upon the substantive and procedural rules applicable, the possible interventions of judicial authority and, of course, it allows for the necessary reservations arising from local concerns of public policy or public order. Designed primarily to serve as a legislative precedent for states wishing to implement the New York Convention, the UNCITRAL Model Law was also envisaged as a possible framework to be used to modernize existing legislation in relation to domestic or internal arbitration as well. The UNCITRAL Model Law was, in addition, of particular significance to Canada because it constitutes a consensus about arbitration among trading nations of the civil and common law traditions, traditions also represented within Canada. Its achievement has been to place arbitration above the peculiarities of those legal traditions by de-nationalizing its features and incorporating the norms perceived as essential by transnational trading interests. It recognizes, in other words, the "specificity" of international commercial arbitration, without precluding its possible adoption for domestic or internal arbitration law as well.

A review of the Canadian legislation in place, at the provincial and now also at the federal level, will indicate how these two important international instruments have been incorporated into the substance of Canadian law. The matter exhibits some complexity because not all Canadian jurisdictions have proceeded in the same manner.

B. Federal Implementation.

For many years it was seriously doubted that the federal parliament had any constitutional authority to enact legislation on the topic of arbitration. The federal government, to be sure, is the only authority in Canada competent to enter into an international convention and to declare it to have force of law for Canada as a whole. But the implementation of an international convention on a topic such as arbitration, involving the law of contract or procedure before the courts in a province, was thought to fall within the exclusive legislative authority of provincial legislatures and be ultra vires of federal power.[4] And this position has been taken to be correct even when the subject matter presented international or interprovincial dimensions. The fact that arbitration agreements and awards, a purely provincial head of legislative competence, might accede to national or international commercial importance has never been thought to justify federal action because such an invasion of provincial authority can only occur, under established doctrine, in circumstances characterized as involving an emergency.

The explanation for the long absence of a Canadian federal law on arbitration, comparable in scope to that found in the United States, lies therefore in the constitutional arrangements prevailing in Canada.[5] The implementation of the New York Convention thus required that the federal and provincial governments agree to move in concert. This was achieved in 1985-1986, when Canada adhered to the New York Convention. Its instrument of accession was subject to the declaration, authorized by the Convention, which applies the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered "commercial" under Canadian law. The United Nations Foreign Arbitral Awards Convention Act[6] gives internal expression to this undertaking by "approving" the Convention and declaring it to have force of law in Canada. It specifies that an application seeking the recognition and enforcement of a foreign arbitral award in Canada may be made to the Federal Court,[7] a court of national jurisdiction in federal matters, or to "any superior, district or county courts" within a province.[8] The provincial implementation that is necessary and concor-

4. The Canadian constitution confers exclusive legislative competence in relation to "Property and Civil Rights in the Province" and "The Administration of Justice in the Province" to the provinces. Constitution Act, 1867, 30-31 Vict. ch. 3, §§ 92:13, 92:14 (U.K.).

5. The Canadian federal power in relation to "The Regulation of Trade and Commerce" under section 91:2 of the Canadian constitution, *supra* note 4, has in fact developed along very different lines from what is known in the United States. *See* A. SMITH, THE COMMERCE POWER IN CANADA AND THE UNITED STATES (1963).

6. 1986 Can. Gaz. ch. 21.

7. *See* Federal Court Act, CAN. REV. STAT. ch. 10 (2d Supp. 1970).

8. United Nations Foreign Arbitral Awards Convention Act, 1986 Can. Gaz. ch.

dant with this federal legislation is examined below.

The federal authorities took this same occasion, however, as an opportunity to enact further federal legislation on arbitration, using the UNCITRAL Model Law, in relation to some heads of its own exclusive legislative authority under the Canadian constitution. As a federal legislative initiative this step is highly significant because it constitutes an excursion of the federal authority into a domain it has not hitherto occupied. This second measure, the Commercial Arbitration Act,[9] was enacted at the same time as the United Nations Foreign Arbitral Awards Convention Act. The Commercial Arbitration Act provides for a complete regime of arbitration in relation to disputes in which "at least one of the parties to the arbitration is a department or a Crown corporation" (that is to say a federal governmental department or a federal Crown corporation) or "in relation to maritime or admiralty matters" in which respect the Canadian federal parliament enjoys full authority.[10] The UNCITRAL Model Law, with minor terminological modifications, is incorporated within the Act as a "Commercial Arbitration Code" and, in the style observed by many of the provincial legislatures in the legislation examined below, is reproduced in an annexed schedule. In the interpretation of the Code, recourse to the *travaux preparatoires* of the UNCITRAL Model Law is expressly authorized by the Act.[11]

In other words, the UNCITRAL Model Law, which was in fact proposed as a precedent primarily for international arbitration, is adopted in Canada at the federal level as the law for both domestic *and* international arbitrations held in Canada in relation to the federal matters specified. The UNCITRAL Model Law, in its Canadian federal form, henceforth constitutes a part of federal internal and international commercial law.

C. Provincial Implementation.

The ten Canadian provinces and two federal territories (for the purpose of this analysis the territories may be assimilated to provinces) have proceeded to enact legislation that implements the New York Convention and, in all but three of them, to legislate also the substance of the UNCITRAL Model Law. The technique for doing so, however, has varied.

This body of provincial legislation may be divided into three groups. In the first and largest group—Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Manitoba, Alberta and the Northwest Territories—a single enactment, uniformly entitled

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21, § 6.

9. 1986 Can. Gaz. ch. 22.

10. *Id.* § 10.

11. *Id.* § 4.

the International Commercial Arbitration Act,[12] has been adopted as the vehicle for implementing both the New York Convention and the UNCITRAL Model Law. These instruments appear as annexed schedules in each local act. Again, in each case, the New York Convention applies only with respect to differences arising out of commercial legal relationships according to the law of the jurisdiction, and the UNCITRAL Model Law applies only to international commercial arbitration agreements. Other uniform features worth noting are that the Crown in the right of each jurisdiction is bound by the new legislation and that each act authorizes resort to the *travaux preparatoires* of the UNCITRAL Model Law as an aid in interpretation. In these seven jurisdictions the arbitration legislation already in place, based upon the U.K. Arbitration Act of 1889, continues to apply to arbitrations that cannot be characterized as international commercial arbitrations.[13] A duality of arbitration regimes therefore exists depending upon the characterization of the arbitration as "international" and "commercial" or otherwise.

In a second group—Ontario, Saskatchewan and the Yukon Territory—legislation, variously entitled,[14] has been enacted only in relation to the recognition and enforcement of foreign arbitral awards pursuant to the New York Convention. The Saskatchewan and Yukon enactments reproduce the New York Convention as a schedule, whereas the Ontario enactment contains the substance of the New York convention without referring to it by name. The same limitation to commercial relationships is made in all three jurisdictions of the second group as in the first group. The UNCITRAL Model Law has not, to date, been incorporated as an aspect of the internal regulation of arbitration.[15] Ontario, however, has made it known that it intends to repeal its legislation now limited to enforcing foreign awards in order to enact a more comprehensive measure implementing the substance of the UNCITRAL Model Law for international commercial arbitrations and within which the provisions on enforcement of foreign awards would be duplicated. This new

12. Ch. 45, 1988 Nfld. Stat. (Vol. 2); ch. 14, 1986 P.E.I. Acts; ch. 12, 1986 N.S. Stat.; ch. I-12.2, 1986 N.B. Acts; ch. 32, 1986-1987 Man. Stat.; ch. I-66.6, 1986 Alta. Stat.; ch. 6, 1986(1) N.W.T. Ord.

13. Judicature Act, NFLD. REV. STAT. ch. 187, Part VI (1970); Arbitration Act, P.E.I. REV. STAT. ch. A-14 (1974); Arbitration Act, N.S. REV. STAT. ch. 12 (1967); Arbitration Act, N.B. REV. STAT. ch. A-10 (1973); Arbitration Act, MAN. REV. STAT. ch. A-120 (1970); Arbitration Act, ALTA. REV. STAT. ch. A-43 (1980); Arbitration Ordinance, N.W.T. REV. ORD. ch. A-4 (1974).

14. Foreign Arbitral Awards Act, ch. 25, 1986 Ont. Stat.; The Enforcement of Foreign Arbitral Awards Act, ch. E-9.11, 1986 Sask. Stat.; Foreign Arbitral Awards Act, ch. 4, 1986 Yuk. Stat.

15. The existing legislation on arbitration therefore remains in place. Arbitration Act, ONT. REV. STAT. ch. 25 (1980); Arbitration Act, SASK. REV. STAT. ch. A-24 (1978); Arbitration Act, YUK. REV. ORD. ch. A-2 (1971).

measure is now pending.[16]

In the third and last group, the remaining provinces—British Columbia and Quebec—have proceeded in yet a different fashion. British Columbia has adopted three distinct acts: 1) the Foreign Arbitral Awards Act,[17] which implements the Convention in the manner described earlier; 2) the International Commercial Arbitration Act,[18] which implements, in language of its own, the substance of the Model Law for arbitrations that are characterized as international and commercial, but without authorizing expressly the use of the UNCITRAL Model Law as an aid in interpretation; and 3) the Commercial Arbitration Act,[19] which amounts to a reform of its pre-existing legislation on domestic arbitration in general. This last enactment can only be said to be indirectly inspired by the new vision of arbitration accepted in the Model Law.

Finally, in the case of Quebec, Canada's only jurisdiction in which the French civil law tradition applies, the subject of arbitration has been integrated into its Civil Code, where it appears for the first time as a regulated contract.[20] With respect to arbitration procedures, arbitrators and enforcement, traditional provisions on arbitration in the Code of Civil Procedure have been completely reformulated.[21] This manner of proceeding breaks the pattern established elsewhere in Canada, but observes Quebec's longstanding tradition of codification. The Quebec legislation, however, is distinctive for more than its formal ordering of the subject. It incorporates the substance of the UNCITRAL Model Law and the New York Convention in its own legislative style and, as to content, generalizes the provisions of both these instruments to embrace not only international commercial arbitrations, but also *all* types of consensual arbitration. In other words, the norms developed specifically for the international commercial context are fully accepted as well for purely domestic and non-commercial disputes. Furthermore, the

16. Bill 7(G), 34th Legis., 1st Sess., (1987-1988) (International Commercial Arbitration Act, 1987).

17. Ch. 74, 1985 B.C. Stat.

18. Ch. 14, 1985 B.C. Stat.

19. Ch. 3, 1986 B.C. Stat. (repeals Arbitration Act, B.C. REV. STAT. ch. 18 (1979)). The new Commercial Arbitration Act contains an extensive definition of the notion of "commercial agreement" (section 1) but the Act also applies to arbitration agreements other than commercial arbitration agreements (section 2). This body of legislation is examined in detail in UNCITRAL ARBITRATION MODEL IN CANADA (1987). The work consists of edited papers presented at a conference at the University of British Columbia in May 1986.

20. Ch. 73, 1986 Que. Stat. added articles 1926.1-1926.6 to the Civil Code of Lower Canada (as Quebec's Civil Code is still known technically). The significance of the integration of arbitration agreements into the Civil Code is discussed in Brierley, *Quebec's New (1986) Arbitration Law*, 13 CAN. BUS. L. J. 58 (1987-1988).

21. *See* ch. 73, 1986 Que. Stat. (replacing Book VII of the Code of Civil Procedure, QUE. REV. STAT. ch. C-25 (1977), with new articles 940-51.2).

provisions relating to the recognition and enforcement of awards rendered outside Quebec extend to arbitral awards rendered in other Canadian jurisdictions as well as to those rendered outside Canada.[22] This feature is not found in other Canadian provincial legislation.

Quebec, therefore, among all Canadian jurisdictions, has opted for the greatest degree of integration of the international norms represented by the UNCITRAL Model Law into the fabric of its internal law. It is therefore curious to observe that resort to the *travaux preparatoires* of the UNCITRAL Model Law is expressly permitted only in respect to matters involving interprovincial or international trade.[23] Finally, while the ability of the Crown to participate in and be bound by arbitration agreements in the right of Quebec is not expressly mentioned in these new codal provisions, the matter is covered elsewhere by general principle.

D. Summary.

The new legislative framework in Canada may be summarized as follows. All levels of Canadian legislative authority have accepted the substance of the New York Convention of 1958 and ten out of thirteen jurisdictions, including for the first time the federal parliament, have moved simultaneously to integrate the substance of the UNCITRAL Model Law of 1985. In its adaptation within Canada, that legislative precedent is limited to "international" and "commercial" arbitration (as these terms are to be understood in their respective enactments) within eight of those ten jurisdictions. In Quebec and federal legislation, however, the international model is adopted as well to serve the purposes of internal or international arbitrations—in Quebec as a matter of general principle even for non-commercial arbitration agreements and, at the federal level, with respect to commercial matters in which the government itself, or an agent of the Crown, is implicated and in relation to maritime or admiralty matters.

E. Reasons for Change.

This unprecedented and almost instantaneous re-ordering of the Canadian legislative framework on arbitration naturally prompts the observer to ask why it has come about. What coalescence of factors has occurred to change the face of Canadian law in so radical a manner, when the subject of arbitration was for so long a matter of apparent indifference and neglect on the part of Canadian legislators?

In seeking an explanation, it is important to note, once again, the

22. Code of Civil Procedure, art. 948-51.2 (codified at ch. 73, 1986 Que. Stat. art. 948-51.2).

23. *Id.* art. 940.6.

two principal thrusts of the legislative reform. The first, and probably the more important, is to render foreign arbitral awards enforceable in Canada upon terms that have been accepted by the more than seventy trading nations that have adhered to the New York Convention since it was opened for signature in 1958. Canadian interests carrying on business abroad which decide to include an arbitration agreement as the mode of settlement of disputes are thus on an equal footing with their trading partners whose countries have also adhered to the Convention. Canada finally realized that it is "good business law" to have the legislation in place so that Canadian trading interests are not disadvantaged in the international market place. While one might be hard put to produce concrete evidence to show that Canadian business in foreign countries has been prejudiced in this regard, such is the rationale that has traditionally been advanced as the justification for agreeing to the Convention, and this rationale makes equal sense for Canada's international traders.[24] In practical terms, as already suggested, Canada's adoption of the Convention may well prove to be the most important element of the reform package. While it was constitutionally possible, of course, for any Canadian legislative authority to accept the norms on arbitration that the Convention represents and to have done so without federal or concerted action by all such provincial authorities,[25] the federal decision provided the necessary focus to bring it about as a matter of general policy.

The second and more dramatic thrust of the reform movement, the adoption or adaptation of the UNCITRAL Model Law as it has been legislated in the majority of Canadian jurisdictions, is an attempt to render Canada a hospitable forum for international commercial arbitration—in other words, to make possible and even to draw *into* Canada itself the actual *practice* of arbitration in the realm for which the legislation reproducing the UNCITRAL Model Law is specifically designed.[26] It remains to be seen, however, whether the implantation of a modern law on international commercial arbitration will serve as an effective mode for stimulating its practice within Canada. Experience elsewhere suggests that more than modern and sympathetic legislation is needed to stimulate the actual practice of arbitration. This observation naturally leads

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24. See the remarks of the Honorable John Crosbie, Minister of Justice and Attorney General of Canada, moving the federal enactment on the enforcement of foreign arbitral awards (Bill C-107) in the Canadian House of Commons on 7 May 1986. 9 PARL. DEB., Can. H.C. 13060 (1986) (official report).

25. Quebec, in fact, had proposed this step as early as 1977. *See* Civil Code Revision Office, *Report on the Quebec Civil Code*, vol. I, *Draft Civil Code*, arts. 1206-1239 and *Commentaries* vol. II, t. I, at 820-25. These proposals were superseded by the more extensive Quebec enactment discussed in the text.

26. See *supra* note 24 for the citation to the remarks of the federal Minister of Justice and others.

therefore to the exploration of the second aspect of this survey—the possibility of an actual practice of international commercial arbitration in Canada and the institutional facilities in place to accommodate that practice.

III. Canada's Institutional Facilities for Arbitration

A. *Arbitration Centres and Their Role.*

There is no need to restate here the advantages of organized institutional structures put in place to assist in the implementation of arbitrations. The existence of such facilities in the United States, England, and France is well known; and the fact that a significant number of arbitrations are held in the arbitration centres of these countries is surely no mere coincidence. The design of an arbitration agreement, the availability of qualified arbitrators, an established set of procedures and practices and, where desired, even the use of physical quarters, are all of assistance in the implementation of the dispute resolution process to those who take advantage of them by way of an initial stipulation in their agreements. The institutionalization of arbitration through these centres, open to general trading interests, is itself a remarkable phenomenon of contemporary arbitration practice existing alongside the specialized trade or commodity associations offering arbitration to their members that, in many cases, may be more longstanding.

Arbitration facilities have also undergone a significant transformation in Canada due to the reform movement of 1986 described in Part II. Therefore, it is useful to review developments in this aspect of the practice of arbitration in Canada both before and after 1986.

B. *Institutional Facilities Prior to 1986.*

The first attempt in Canada to provide pre-organized arbitration machinery for disputing parties in the general commercial milieu, as opposed to those within a particular trade or commodity association, was also an effort to create an inter-institutional link at the international level. In 1943, the Canadian-American Commercial Arbitration Commission (CACAC) was founded pursuant to an agreement between the Canadian Chamber of Commerce (CCC) and the American Arbitration Association (AAA). The AAA was, of course, well established by that time; the CCC, on the other hand, had had no particular experience in the organization of arbitrations at either the domestic level or in international dealings. Providing organized arbitration facilities for disputing Canadian and American trading interests nonetheless appeared to be an important initiative within the framework of Canada-United States trading patterns.[27]

27. For the contemporary literature describing the initiative, see Brierley, *supra* note 1, at 831-32.

The CACAC was organized along lines necessary for the functioning of an inter-institutional agreement. It had two sections, one on the Canadian side at the CCC head office in Montreal and one on the American side at the headquarters of the AAA in New York City. Each section was called upon to maintain lists of qualified potential arbitrators from among whom the disputing parties might make a selection. The rules of the Commission, including an arbitration clause, were published and available generally.

As far as it is possible to ascertain actual arbitration practices, the CACAC appears never to have gained any real foothold and it became inoperative in the mid-1950's. It has now been long disbanded. The reasons for the failure may well have been legal in nature, at least on the Canadian side: the agreement to arbitrate future disputes was unenforceable under Quebec law at the time;[28] the procedure allowing for a "special case" in order to obtain a judicial determination of questions arising within the arbitration was available in common law Canada;[29] and in neither legal tradition was there any expeditious proceeding for enforcing the award, whether domestic or international.[30] The design of Canadian arbitration law was thus deficient when it proved necessary to invoke it. In short, the CACAC was ahead of its time, and its short existence does not appear to have stimulated any movement towards the reform of Canadian law. The use of consensual arbitration, whether in the domestic or international forum and even outside institutional facilities, was not widespread, no doubt for the same reasons.

Renewed efforts to put into place institutional facilities date from the early and mid-1970's. Two initiatives call for some comment. The first has sought to provide inter-institutional links with another part of the international trading community, and the second has sought to establish facilities for internal arbitrations. The Canadian Arbitration, Conciliation and Amiable Composition Centre, Inc., founded in 1972 with headquarters in Ottawa, serves as the Canadian section of the Inter-American Commercial Arbitration Commis-

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28. Prior to 1966, the undertaking to arbitrate future disputes was not enforceable in Quebec courts on the reasoning that the agreement was not specifically authorized by either the Civil Code or the Code of Civil Procedure; a reform of the latter Code in 1966 left the question in some ambiguity until the Supreme Court of Canada, in Zodiak International Productions, Inc. v. The Polish People's Republic, 1 S.C.R. 529 (Can., May 17, 1983), upheld such a contract. For a general discussion of Quebec law on this point, see Brierley, *Quebec Arbitration Law: A New Era Begins*, 40 ARB. J., 20 (Sept. 1985).

29. *See supra* notes 13 & 15 (Canadian common law provincial legislation).

30. The general tendency of Canadian courts was to subject the enforcement of a foreign arbitral award to the same controls that regulated the enforcement of foreign judgments. In Quebec, moreover, under the Code of Civil Procedure, an action on the award, rather than the more expeditious procedure of a motion, was required until a reform on this point in 1970.

sion (IACAC). The Centre's primary emphasis, to date, has been to forge links with institutional facilities in Central and South America. Its arbitration rules date from 1980 and it publishes a periodical newsletter, *Inter-American Arbitration.* The Canadian International Development Agency extends financial support to the Centre and the Commission. It is difficult, however, to assess the degree to which the Canadian section has had success in the actual organization of arbitrations for the trading interests operating within its chosen geographical sphere.

The other initiative, in which the lead was taken by an Ontario organization, has concentrated on developing internal or domestic commercial arbitration facilities. The Arbitrators Institute of Canada (AIC) was founded in Toronto, Ontario in 1973 and incorporated in 1974 as a non-profit, public service organization. In subsequent years it has stimulated the creation of comparable bodies in other Canadian regions and created links with those already established. In 1985-1986 the AIC was restructured, under the same name, as a confederation of provincial arbitration associations. These now exist in the Atlantic region, Quebec, Ontario, Saskatchewan, Alberta, and British Columbia.[31] The AIC has also established connections with the American Arbitration Association and the Chartered Institute of Arbitrators of the United Kingdom. The various sections of the AIC provide, with differing degrees of success, training programs for arbitrators. They serve as educational agents and offer for incorporation into contracts arbitration clauses and procedural rules consistent with their own provincial arbitration legislation. The Ontario organization has published the *Canadian Arbitration Journal* since 1976. To date, the principal effort of the AIC has been to stimulate the use of arbitration within the domestic rather than an international or inter-provincial context. An International Division was set up in 1987 in the light of the legal developments discussed in Part II.[32]

C. New Developments Since 1986.

The advent in 1986 of the new Canadian legislative framework has prompted the founding of two new Canadian organizations which have avowed aims to serve as forums for international commercial arbitrations. These organizations, with the aid of substantial government funding and publicity, have achieved a high profile in the Canadian legal community and have focused attention on the new legal

31. Atlantic Provinces Section, St. John, New Brunswick; Section du Quebec, Montreal, Quebec; Arbitrators' Institute of Canada (Ontario), Inc., Toronto, Ontario; Arbitration & Mediation Institute of Saskatchewan, Inc., Saskatoon, Saskatchewan; Alberta Arbitration and Mediation Society, Edmonton, Alberta; British Columbia Arbitrators' Institute, Vancouver, British Columbia.

32. 12 CAN. ARB. J. 7 (No. 1, 1987).

framework that arbitration now enjoys in Canada.

The first of these new organizations is the British Columbia International Commercial Arbitration Centre (BCICAC) which opened in May 1986 in Vancouver.[33] British Columbia was prominent in advocating the reform action that culminated in the legislative developments already described, and was the first jurisdiction in the world to adopt the UNCITRAL Model Law and the first in Canada to modernize its law on domestic arbitration. The BCICAC provides specialized administrative services that may be desirable in the conduct of an arbitration, whether domestic or international. It is endeavoring to situate itself as an arbitration centre with specific reference to the Pacific Rim. The BCICAC model arbitration clause and arbitration rules for international commercial arbitrations and conciliations are based upon the UNCITRAL models. The Centre publishes a periodical entitled *Arbitration Canada.*

In January 1987, the second arbitration centre was founded at the other end of the country, in Quebec City in the Province of Quebec, with the bilingual title "The Quebec National and International Commercial Arbitration Centre/Le Centre d'arbitrage commercial national et international du Quebec". Like its western counterpart, the Quebec Centre has established a list of arbitrators and drawn up arbitration clauses and procedures for possible adoption.[34] It has organized a series of conferences and study sessions involving prominent personalities in European, English, and American arbitration law in an attempt to stimulate interest in arbitration in Quebec at both the domestic and international levels.[35] The Centre's primary reference point appears to be directed at the European context.

D. The Future of International Arbitration in Canada.

It remains to be seen whether it is realistic to have two arbitration centres in Canada serving as forums for international commercial arbitrations.[36] There are many such centres elsewhere in the world

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33. BCICAC has published a briefing book, *International Commercial Arbitration, The Canadian Advantage,* containing the relevant British Columbia legislation and the Centre's rules of arbitration, with explanatory notes.

34. "Règlement général d'arbitrage commercial en matière commerciale" will soon be available in English. The Centre is also in the process of preparing a text of rules for the conduct of international commercial arbitrations.

35. The organizers of the Centre sponsored a conference on International Commercial Arbitration in Quebec City, Quebec, on 14-17 October 1985, published as UNIVERSITÉ LAVAL, FACULTÉ DE DROIT, PROCEEDINGS OF THE 1ST INTERNATIONAL COMMERCIAL ARBITRATION CONFERENCE/ACTES DU IER COLLOQUE SUR L'ARBITRAGE COMMERCIAL INTERNATIONAL (1986). Between May 1987 and January 1988 the Centre held five study sessions in Montreal and Quebec City devoted to various aspects of domestic and international arbitration entitled *Les Journées Jean Robert: Cours de perfectionnement en arbitrage.* The papers presented at the sessions are being compiled for publication in a single volume.

36. It has been suggested that a third arbitration centre be organized in Toronto,

that have had scant success in attracting arbitration clients. The volume of cases to be handled is limited even with respect to well established centres in New York, London and Paris, not to mention those centres now established in the Eastern Hemisphere, with which the Quebec and British Columbia centres may well be in competition. The Canadian centres have the advantage of existing within a legal framework that is openly hospitable. However, it will be some time before it is possible to conclude that the welcoming Canadian environment has overcome the established reputation of the European and American centres and Canada's previous absence from the international forum.

The dramatic transformation of the Canadian legal framework will, no doubt, catch the attention of "arbitration law watchers" familiar with the UNCITRAL Model Law who will be interested in its Canadian adaptation. However, at least at this moment in time, it appears unlikely that the level of achievement in attracting an international arbitration practice will equal or even approximate the level of success recorded in transforming the formal legal substance of Canadian law. The decision to resort to arbitration and to conduct it in a particular setting may depend upon other non-legal factors. It is too early to determine whether the Canadian centres now in place will offer the ingredients sought by disputing parties within the context of international trading.

In relation to this theme, it is now appropriate to explore the possible role of arbitration in Canada-United States trade relations within the private sector, upon which the Free Trade Agreement, and its arbitral techniques for resolving disputes between the two state parties, now focuses our attention. Canadian-American trade accounts for an important part of the international commercial relations of both countries and would appear to provide a natural environment for the use of arbitration for resolving disputes between Canadian and American trading interests.

IV. Arbitration in the Context of Canada-United States Business Disputes

A. Factors Relevant to this Context.

Arbitration as a mode of dispute resolution has received little attention over the years in the specific context of Canada-United States commercial activities. Few judicial decisions involving the arbitration of Canadian and American commercial disputes have been reported in Canadian sources. Historically, developments in American arbitration legislation have had no impact on the evolution of Canadian legislative attitudes.[37] As examined above, the attempt ap-

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Ontario.

37. The American experience in the wake of state and federal legislation as it

proximately forty-five years ago to provide a structure for the resolution of disputes through arbitration within the special context of Canadian and American transnational trade was a failure. Nor does the contemporary Canadian effort to provide an institutional framework for international commercial arbitrations specifically focus on Canadian-American disputes arising within the intimate commercial relations existing between the two business communities. One would think, given the volume of trade crossing the border, that arbitration would naturally flourish in this context. The evidence, at least on the Canadian side, appears to be otherwise. The traditional proposition that where international trade occurs arbitration takes root does not seem to be borne out in Canadian-American experience, at least according to evidence now available.

As lawyers, we know little about the patterns of dispute settlement in the context of Canada-United States trade and about the place arbitration, as one option among others, may enjoy. A successful arbitration, especially an ad hoc arbitration organized outside any institutional framework, leaves no trace that the investigator can detect in any systematic way. Nor is it to be ruled out that, for some commercial interests, arbitration may well be inappropriate or even irrelevant. The question no doubt turns in part upon the nature of the commercial or trading disputes themselves, which the law and commercial practice can accommodate in a variety of different ways. Considerable study has been devoted to the fact that a very large proportion of international transactions involving Canadian and American economic interests is carried out by multinational enterprises and, in Canada, by foreign owned subsidiaries.[38] The business relations of such companies are highly integrated and, in such a context, their dispute solving mechanisms are naturally "internalized" and therefore do not rely upon the form of arbitration envisaged here. The impact of free trade, apparently much favored by such entities, will likely have no repercussions in this big business sector with regard to the techniques for dispute resolution

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existed in the late 1920's was drawn to the attention of The Conference of Commissioners on the Uniformity of Legislation in Canada when it studied proposals submitted by the Canadian Chamber of Commerce in 1931 to promote more progressive legislation to encourage arbitration. The fact that the procedure of the "special case" might have discouraged the use of arbitration in those American jurisdictions retaining it and that arbitration was more widespread in those that had repealed it did not appear significant to the Canadian uniform law agency. This body, on the same occasion, failed to tackle the diversity of Canadian legislation as represented by the Quebec tradition. See Can. Bar Ass'n, 16 PROC. CONF. OF COMMISSIONERS ON UNIFORMITY OF LEGIS. IN CAN. (1931); Can. Bar Ass'n, 15 PROC. CONF. OF COMMISSIONERS ON UNIFORMITY OF LEGIS. IN CAN. (1930).

38. *Cf.* Rugman, *Why Business Supports Free Trade*, in FREE TRADE 95, 100 (1988); TRADE LIBERALIZATION AND INTERNATIONAL INVESTMENT 1A·10 (Discussion Paper No. 347 prepared for the Economic Council of Canada, Apr. 1988).

already existing between closely affiliated interests.

If these last reflections are sound, then arbitration, or techniques related to it, may well be more relevant to small and medium businesses trading across the border whose volume of economic activity will, in many domains, increase with free trade. The question would then appear to be whether arbitration is an *attractive* alternative within this sector. That matter, in turn, will involve an assessment of a complex of factors touching upon the confidence that the business interests of one country have in the courts of the other, and upon the confidence that potentially disputing parties have in the arbitration systems found on either side of the border and in the arbitrators who may be available to serve. If arbitration is provided for, then a further decision is necessary as to whether it is to take place in the United States or in Canada and, on this point, factors other than those already mentioned and related to business pressures may come into play.

As analyzed earlier, Canada has put into place an environment that is hospitable for this purpose, but it is not one that is yet buttressed by any solid experience in the field. Canadian lawyers, for example, with a few notable exceptions, have not, historically, appeared favorable to arbitrations or gained any reputation in international circles that would prompt thinking of them as appropriate arbitrators. Canadian business interests may, moreover, be subject to other pressures at the moment of contracting that favor arbitration in the United States rather than in Canada. In this respect, Canadian adherence to the New York Convention may prove to be the most important practical feature of the new Canadian legislation insofar as it now opens up the prospect that an arbitration award resulting from an arbitration held outside Canada and involving Canadian interests can be more easily enforced in Canada.

V. CONCLUSIONS

The future of international commercial arbitration practice in Canada, both in general and also with specific reference to Canada-United States trade, remains to be determined. Canadian legislators, as demonstrated, have sent a clear signal that such arbitrations are to be favoured within the Canadian legal system. But whether Canadian courts will follow suit is only a matter of speculation at the present time.[39] The Canadian legal community, for its part, has also evolved in its attitude to arbitration, even though its practical expe-

39. The first reported decision in Canada on the new federal Commercial Arbitration Code, Navigation Sonamar v. Algoma Steamships, 1987 R.J.Q. 1346 (Quebec), decided by the Quebec Superior Court, declined to set aside an arbitration award for lack of reasons or manifest legal error, and is a promising indication of favourable judicial attitudes, one that is in marked contrast to a significant body of previous judicial opinion in Quebec on various aspects of arbitration law.

rience in the field is not extensive.

These developments are all of interest to the observer. The real future of international commercial arbitration from the Canadian perspective, however, is more elusive because, in the final analysis, its use will probably turn upon a range of non-legal factors that are at work within the specific patterns of Canadian-American trading relations. The Canadian-American commercial connection, in this regard, offers an interesting case study for the continuing observation of how arbitration law and practice, and dispute resolution in general, truly function.