

WHY ARBITRATE?: ONTARIO'S RECENT EXPERIENCE WITH COMMERCIAL ARBITRATION[©]

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In 1988, Ontario adopted the *International Commercial Arbitration Act* and in January 1992 the *Arbitration Act, 1991* came into force for domestic arbitrations. These statutes and similar legislation in other provinces pushed Canadian arbitration regimes into the forefront of industrial nations. However, there has not been a significant increase in the number of commercial arbitrations being conducted in Ontario. This article suggests that Ontario is ideally placed to become an important centre for domestic and international arbitration. The author asserts that if commercial parties and their counsel were more familiar with the benefits of the arbitral process and with the approach of the Ontario courts to the new legislation, arbitration would become a preferred method of dispute resolution for many types of business disputes. The current enthusiasm for alternative dispute resolution may also provide an impetus for future growth in commercial arbitration.

En 1988, l'Ontario a adopté la *Loi sur l'arbitrage commerciale internationale* et en janvier, 1992, la *Loi de 1991 sur l'arbitrage* est devenue effective pour les arbitrages nationaux. Ces lois et d'autres législations semblables dans d'autres provinces ont propulsé le Canada au-devant des nations industrialisées quant à ses régimes d'arbitrages. Pourtant, il n'y a pas eu d'augmentation significative dans le nombre des arbitrages commerciaux qui ont été effectués dans la province. Cet article constate que l'Ontario est idéalement situé pour être un centre important pour les arbitrages nationaux et internationaux. L'auteur affirme que si les parties et leurs conseils étaient plus au courant des bénéfices du processus d'arbitrage et de l'approche des tribunaux ontariens quant à la nouvelle législation, l'arbitrage deviendrait une méthode préférable pour résoudre plusieurs sortes de disputes commerciales. L'enthousiasme actuelle pour la résolution alternative des disputes pourrait aussi donner un élan à une augmentation future dans l'arbitrage commercial.

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* The author would like to thank The Honourable Edward Saunders, Q.C., and Professor Christine Chinkin of the London School of Economics and Political Science for their helpful comments on earlier drafts of this article.

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I. INTRODUCTION

In 1985, Canadian legislators took notice of international commercial arbitration, and the seriously under-developed condition of their arbitration legislation. Before 1986, the federal government had passed no arbitration legislation, and the common law provinces had statutes based on English legislation dating from 1889. Further, the federal government had chosen not to accede to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,¹ which had been adopted by the United Nations Conference on

¹ 10 June 1958, 330 U.N.T.S. 38 [hereinafter "New York Convention"].

International Commercial Arbitration in 1958. In essence, Canada's Parliament had not seen a need, for more than twenty-five years, to adopt an international code for the recognition and enforcement of arbitral awards made in Canada and in other countries. This reflected a surprising lack of interest among Canadian commercial parties, trade organizations, and their counsel in the benefits of commercial arbitration.

Enticed by the opportunities available to Canadian business through the expanding Pacific Rim economies, British Columbia led Canadian legislators out of the darkness. In May of 1986 Canada acceded to the New York Convention, and Parliament subsequently passed the *United Nations Foreign Arbitral Awards Convention Act*, which incorporated the Convention into Canadian law. Each province followed suit and passed legislation adopting the New York Convention as part of provincial law.

Meanwhile, in June 1985, the United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on International Commercial Arbitration.³ The Model Law was then adopted by the federal government and all the provinces as the law that would govern any international arbitrations taking place within their respective jurisdictions. Several reform minded provinces, including Ontario, revised their domestic arbitration statutes to conform with the modern approach of the Model Law.

Despite the belated but insightful steps taken by federal and provincial legislators to ensure that Canada's domestic and international arbitration legislation was in the forefront of industrial nations, Canadian commercial parties and their legal advisers have been slow to embrace arbitration as a preferred method of dispute resolution.

With a focus on the new Ontario legislation and the associated case law, Part II of the article considers the Model Law and its purported benefits. Part III considers whether commercial arbitration offers parties any significant advantages over traditional litigation, especially in light of recent improvements in the Ontario judicial

² R.S.C. 1985 (2nd Supp.), c. 16.

³ *Report of the United Nations Commission on International Trade Law on the Eighteenth Session*, UN GAOR, 18th Sess., Supp. No. 17, UN Doc. A/40/17 (1985) 81 [hereinafter "Model Law"], adopted by resolution of the General Assembly, GA Res. 40/72, UN GAOR, 40th Sess., Supp. No. 53, UN Doc. A/40/935 (1985) 308.

system.⁴ In addition, in Part IV an analysis of the case law under the new Ontario legislation is undertaken to examine whether the Ontario courts have respected the intentions behind, and the promised benefits of, this new legislation. Is commercial arbitration in Ontario a secret too well kept? Can the province become an important centre for domestic and international arbitration? Part V of this article considers these questions and examines the factors which may influence the future growth of commercial arbitration in Ontario, including familiarity with the arbitral process, the activities of arbitration organizations, and the growing popularity of alternative dispute resolution.

II. THE NEW LEGISLATION AND THE MODEL LAW

At a time when the term “globalization” has become a watchword of modern society, it is remarkable that, as recently as 1982, the Canadian Department of Justice expressed the view that the Canadian business community had little interest in Canada’s accession to the New York Convention.⁵ British Columbia played a significant role in changing this attitude. In January 1985, the attorney general of British Columbia established a task force to examine options for improving the legal climate in British Columbia for international business dispute resolution. The task force, aided by UNCITRAL’s adoption of the Model Law in 1985, developed a provincial law governing the resolution of international commercial disputes. However, the task force and other Canadian proponents of arbitration also recognized that Canada would not be an attractive site for international dispute resolution until it acceded to the New York Convention. This was complicated by the fact that the subject matter of the Convention fell primarily within provincial jurisdiction.⁶ This problem was solved in 1986 by provincial undertakings to implement a Uniform Foreign Arbitral Awards Act adopted by the Uniform Law Conference of

⁴ For a discussion of the recent implementation of case management procedures and the establishment of the Commercial List to expedite specified commercial proceedings, see *infra* notes 21-22, 29, and accompanying text.

⁵ Law Reform Commission of British Columbia, *Report on Arbitration* (Vancouver: The Commission, 1982) at 58.

⁶ For a more detailed discussion of this process, see R.K. Paterson & B.J. Thompson, eds., *UNCITRAL Arbitration Model in Canada: Canadian International Commercial Arbitration Legislation* (Toronto: Carswell, 1987).

Canada.⁷ As a result, Canada became the first country to adopt legislation based on the UNCITRAL Model Law. The decisive and systematic implementation of the UNCITRAL regime throughout Canada has been described by one American observer as “a beacon to the US and the rest of the world.”⁸

A. *The Model Law*

Canada’s accession to the New York Convention and its adoption of the Model Law were heralded by some as major events. One Canadian arbitrator wrote:

Canada is poised to take its proper place on the stage of international commerce. Until now, lone among the developed trading nations, Canada has not been a signatory to the [New York Convention]. Our domestic laws have been unfriendly to international arbitration. Our businessmen and practitioners cool and inexperienced. We have been a peculiar No Man’s Land with enormous potential. The potential soon will be realized.⁹

From the perspective of an Ontario commercial lawyer, one might ask what has been accomplished after the passage of ten years. Since 1987, there has not been a remarkable increase in the number of commercial arbitrations conducted in Ontario.¹⁰ However, this may have more to do with the lack of familiarity of Ontario lawyers with the features of the Model Law than with any failings in the legislation or the arbitration process.

The central philosophy of the Model Law is one of party autonomy, the guiding principles of which can be summarized as follows: (1) parties should be free to design the arbitral process as they see fit, but the arbitral process should be “fair” to both parties; (2) parties who enter into valid arbitration agreements should be held to those agreements; (3) the arbitration tribunal should be neutral and as unbiased as possible, and should be empowered to determine its own

⁷ Uniform Law Conference of Canada, *Proceedings of the Sixty-Seventh Annual Meeting of the Uniform Law Conference of Canada* (Toronto: Uniform Law Conference of Canada, 1985) at 111.

⁸ I.I. Dore, *The UNCITRAL Framework for Arbitration in Contemporary Perspective* (London: Graham & Trotman, 1993) at 183.

⁹ E.C. Chiasson, “Canada: No Man’s Land No More” (1986) 3:2 J. Int’l Arb. 67 at 67.

¹⁰ The author contacted a number of Ontario arbitration organizations, including the Arbitration and Mediation Institute of Ontario (AMIO), the Private Court of Ontario, and ADR Chambers. Those that responded reported a modest increase in the number of domestic commercial arbitrations conducted in Ontario, while international arbitrations represented a small percentage of their respective case loads.

jurisdiction; (4) the arbitration should proceed in confidence without substantial intervention by the courts; and (5) the resulting award should be readily enforceable, subject to review only on the basis of a limited and specified list of fatal flaws in form or procedure.¹¹

Some of these principles will have more importance to parties engaged in international commercial disputes than to those responding to domestic disputes. For example, international commercial parties who are reluctant to submit to the jurisdiction of their opponent's courts will often favour minimal court intervention. In many cases, however, including those discussed in Part IV, below, domestic commercial parties will also recognize that these principles offer advantages to traditional litigation.

B. *International Commercial Arbitration Act*

Like most of the provinces that adopted the Model Law for international commercial arbitrations, Ontario made few deviations from the text of the Model Law when it enacted the *International Commercial Arbitration Act*¹² Section 2(1) of the *International Act* declares that the Model Law (appended as a schedule) is in force in Ontario. The balance of the *International Act* does not diverge significantly from the Model Law, with the following exceptions. First, consistent with the emphasis on alternative dispute resolution as a means of encouraging settlement, section 3 provides that an arbitral tribunal may, *with the agreement of the parties* use mediation, conciliation, or other procedures at any time during the arbitration, and the tribunal members are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation, or other procedure. Second, section 4 contains two novel provisions: subsection (1) provides that if an arbitrator is replaced or removed in accordance with the Model Law, any hearing prior to the removal shall start afresh; subsection (2) then provides that the parties may remove an arbitrator at any time prior to the final award, "regardless of how the arbitrator was appointed" This latter provision implies that the parties may even

¹¹ These central features and the primary motivations for their adoption are canvassed in greater detail in Uniform Law Conference of Canada, *Proceedings of the Seventy-Second Annual Meeting of the Uniform Law Conference of Canada* (Toronto: Uniform Law Conference of Canada, 1990) at 88 [hereinafter *Proceedings*]; and E.P. Mendes, "Canada: A New Forum to Develop the Cultural Psychology of International Commercial Arbitration" (1986) 3:3 J. Int'l Arb. 71.

¹² R.S.O. 1990, c. I-9 [hereinafter *International Act*].

remove an arbitrator appointed by the court, thereby strengthening party autonomy. Third, section 7 provides that the court, on application of the parties to two or more arbitration proceedings, may order the arbitration proceedings to be consolidated, heard at the same time or one immediately after another, or may stay one of the proceedings until the determination of another. Upon consolidation, if the parties cannot agree to the composition of the tribunal, the court may appoint such a tribunal. While this provision attenuates party autonomy and the principle that parties are free to select their own arbitrator, it does expand the potential application of arbitration to multi-party disputes. Finally, section 12 directs that the Crown is bound by the provisions of the *International Act*. These four exceptions, especially the consolidation power under section 7, extend the scope of potential arbitrations, and may provide parties with greater flexibility to design an appropriate arbitration process.

The *International Act* applies only to “international” and “commercial” arbitration agreements and awards. Under article 1(3) of the Model Law, an arbitration is “international” if the parties have their places of business in different countries; if one party has its place of business outside Canada; if a substantial part of the obligations of the commercial relationship is to be performed outside Canada; or if the subject matter of the dispute is most closely connected with a place outside Canada. The *International Act* however, unlike its provincial counterparts, does not permit the parties to unilaterally agree that the arbitration is international. Section 2(3) has deleted this provision from the Model Law, which has the unfortunate effect of denying Ontario-based parties an aspect of party autonomy—parties, for example, could have opted for the application of the *International Act* instead of the *Arbitration Act, 1991*¹³ which implies a greater degree of court control over arbitration. Although parties may contract out of all but six sections of the *Arbitration Act*¹⁴ the legislative paternalism implicit in section 2(3) is difficult to reconcile with the philosophy of party autonomy which seemingly forms the basis of both the *International Act* and the *Arbitration Act*.

The “commercial” requirement for the application of the Model Law is not defined in the Model Law. However, section 13 of the *International Act* provides that for the purpose of interpreting the Model Law, recourse may be had to UNCITRAL’s 1985 Report, which

¹³ S.O. 1991, c. 17, repealing *Arbitrations Act* R.S.O. 1990, c. A-24 [hereinafter *Arbitration Act*].

¹⁴ See *ibid.* s. 3.

recommends that a wide interpretation be given to the term “commercial,” and to the Analytical Commentary contained in the Report of the Secretary General to UNCITRAL.¹⁵

C. *Arbitration Act, 1991*

Before the adoption of the *Arbitration Act* Ontario law did not make a distinction between international and domestic arbitrations. While it was open to provincial legislators to adopt a variation of the Model Law for domestic arbitrations as well, the Ontario legislature was not prepared to implement a highly autonomous domestic arbitration regime with limited scope for judicial scrutiny. The rationale for the distinction appears to be that, while the *International Act* applies only to “international” and “commercial” arbitration agreements (usually entered into by reasonably sophisticated commercial parties), the *Arbitration Act* applies to all forms of domestic arbitration whether commercial or not—unless excluded by law, in which case the *International Act* applies. The broader scope of the *Arbitration Act* provided a basis for retaining a wider measure of court supervision of arbitral procedure and awards. The *Arbitration Act* followed the wording of the Uniform Arbitration Act adopted by the Uniform Law Conference of Canada in 1990,¹⁶ which described the organization and the principles of the Act as “recognizably those of the Model Law,” but concluded that there was a greater role for judicial scrutiny of domestic arbitral procedure and awards.¹⁷ Nevertheless, in keeping with the principle of party autonomy, the *Arbitration Act* permits the parties to a domestic arbitration agreement to contract out of most of the provisions of the statute.

Unlike the earlier statute, the *Arbitration Act* provides a code of rights and procedures in the arbitration process for the parties, the arbitration tribunal, and the courts.¹⁸ While the court has wider review

¹⁵ See J.B. Casey, *International and Domestic Commercial Arbitration* (Toronto: Carswell, 1997) at 2-7-2-8 for the definition of “commercial” under the British Columbia *International Commercial Arbitration Act* R.S.B.C. 1996, c. 233 [hereinafter *British Columbia International Act*] and how one Alberta court has approached the definition of “commercial.” The Ontario courts have interpreted “commercial” in *Carter v. McLaughlin* (1996), 27 O.R. (3d) 792 (Gen. Div.) [hereinafter *Carter*]; see text accompanying notes 63-64, *infra*.

¹⁶ See *Proceedings supra* note 11.

¹⁷ *Ibid.* at 88-89.

¹⁸ For a full review of the *Arbitration Act* see W.H. Hurlburt, “New Legislation for Domestic Arbitrations” (1993) 21 C.B.L.J. 1.

powers in the *Arbitration Act* than in the *International Act* section 6 of the *Arbitration Act* directs that no court shall intervene in matters governed by the *Act*, except to (1) assist the conducting of the arbitration; (2) ensure that the arbitration proceeds in accordance with the arbitration agreement; (3) prevent unequal or unfair treatment of the parties; or (4) enforce awards. Consistent with the philosophy of party autonomy, the *Arbitration Act* also provides in section 3 that the parties may agree to vary or exclude any provision of the *Act* except for the following: (a) under section 5(4) an agreement requiring that a matter be adjudicated by arbitration before it may be dealt with by a court (*Scott v. Avery* clause¹⁹) is deemed to have the same effect as an arbitration agreement; (b) section 19 requires the parties to be treated equally and fairly, with each party being given an opportunity to present a case and to respond to the other parties' cases; (c) section 39 gives the court discretionary power to extend the time within which the arbitral tribunal is required to make an award, even if the time has expired; (d) section 46 gives the court jurisdiction to set aside an award on nine specified grounds; (e) section 48 gives the court jurisdiction to declare the arbitration invalid on four specified grounds which find their origin in the New York Convention; and (f) section 50 gives a party that is entitled to enforce an award the right to make an application to the court to that effect. Thus, while it is not possible for Ontario parties to contractually opt for the application of the *International Act* commercial parties in Ontario can agree to oust most of the provisions of the *Arbitration Act* in order to design an arbitration process appropriate to their dispute.

III. WHY ARBITRATE?

The comparative advantages and disadvantages of arbitration as opposed to litigation have been canvassed in a number of sources.²⁰

¹⁹ Such clauses have long been classified as "*Scott v. Avery* clauses," following an early decision recognizing their enforceability: see *Scott v. Avery*, (1856) 5 H.L.C. 811, 10 E.R. 1121 (H.L.).

²⁰ See, for example, J.B. Casey, *International and Domestic Commercial Arbitration* (Toronto: Carswell, 1997) at 1-6.1-1-8; D. St. John Sutton, J. Kendall & J. Gill, *Russell on Arbitration* 21st ed. (London: Sweet & Maxwell, 1997) at 9-14 [hereinafter *Russell on Arbitration*]; G.B. Born, *International Commercial Arbitration in the United States: Commentary & Materials* (Deventer, Netherl.: Kluwer Law and Taxation, 1994) at 5-9; J.C. Carson, Q.C., "Dispute Resolution: Negotiation, Mediation, and Arbitration in Ontario" (1992) 11:3 *Advocates' Soc. J.* 10; Lord Wilberforce, "Resolving International Commercial Disputes: The Alternatives" in Paterson & Thompson, eds., *supra* note 6, 7; and A. Redfern & M. Hunter, with M. Smith, *Law and Practice of International Commercial Arbitration* 2d ed. (London: Sweet & Maxwell, 1991) at 22-26.

However, before analyzing how the courts of Ontario have applied the new legislation in commercial contexts, it is useful to consider the relative merits of arbitration against the Ontario court procedures as they currently exist.

A. *Selecting the Adjudicator*

Perhaps the most important advantage of arbitration over litigation for domestic commercial parties is the ability to choose your own judge in a way which is not usually possible in court proceedings. There is a growing number of well-qualified and specialized arbitrators within Ontario and internationally. Arbitrators can be selected for their special skill and expertise in specific types of commercial law, civil engineering, or some other relevant discipline. This should be a significant consideration for commercial parties, since few judges in Ontario will have spent a significant part of their legal or judicial careers engaged in resolving commercial law issues. This may be less of a consideration for those parties in the Toronto Region whose disputes are eligible to be adjudicated under the Commercial List,²¹ as the judges who routinely hear these matters frequently have a high degree of familiarity with commercial law issues.

B. *Continuity*

Aside from allowing the parties to select an appropriate adjudicator, arbitration provides greater continuity than litigation. The arbitrator or arbitration panel follows the case from beginning to end, whereas commercial parties may be required to educate several different judges or masters as a matter proceeds through the courts. This can be a particularly frustrating experience for commercial parties dealing with complex matters requiring frequent interlocutory proceedings. For example, judges will often have different approaches to the scope of discovery and the degree of disclosure required, while arbitration offers consistency in approach as an arbitration tribunal gets acquainted with the parties, their advisers, and the case as it develops. Again, this may

²¹ The Commercial List was established in 1991 for certain proceedings involving issues of commercial law: see The Honourable R. Roy McMurtry, Chief Justice of the Ontario Court, "Practice Directions—Commercial List—1995" (1995), 24 O.R. (3d) 455 [hereinafter *Practice Directions*]. The special procedures on the Commercial List tend to expedite hearings and encourage alternative forms of dispute resolution.

be less relevant for matters eligible for the Commercial List or selected for case management.²² However, the case management system suffers from a number of potential drawbacks, including the inflexible approach of court administrators to time-tabling, and frequent difficulties scheduling appointments with over-worked case management judges.

C. Confidentiality

Privacy of the dispute, the pleadings, the procedure, and the outcome can be a major advantage of arbitration for commercial parties, especially in an age when newspapers and journalists have become adept at scouring court files for tantalizing and confidential details on corporate litigants and their battles. The confidential nature of arbitration proceedings will also be important when a commercial defendant is reluctant to publicize a dispute or its outcome for fear of alerting other potential plaintiffs to a possible cause of action. However, confidentiality of the arbitration process can be endangered if the parties proceed to the courts for interim relief, enforcement, or on appeal.²³

D. Flexibility

The contrast here is between the fixed and sometimes burdensome *Rules of Civil Procedure* and the more flexible and adaptable approach of arbitration. Many commercial parties will prefer the freedom offered by arbitration to design a procedure for the conduct of the proceeding that is appropriate to the economics of the dispute and the time constraints on the parties. Where parties approach this task in a sensible and orderly manner, arbitration can result in the

²² Civil case management is currently in force in Ottawa and applies to 25 per cent of the cases commenced in the Toronto Region, but is designed ultimately to apply province-wide: see Ontario, *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, as am. by O. Reg 555/96, r. 77. At the commencement of an action, the plaintiff chooses either the fast or standard track, with associated timetables for completing each step in the proceeding: r. 77.06(5). There is a provision for the defendant to change the track: r. 77.07(2). Rule 77 confers broad powers on both case management judges and masters.

²³ For an example of how confidentiality was lost by the parties in a well-publicized series of cases involving a major Ontario franchise system, see R.B. Potter, "The Pizza Pizza Quartet: Four Pizzas with Extra ADR and Hold the Appeals!" Case Comment on *887574 Ontario Inc. v. Pizza Pizza Ltd.* (1996), 23 B.L.R. (2d) 277.

expeditious resolution of even the most complex commercial disputes.²⁴ Both the *International Act*²⁵ and the *Arbitration Act*²⁶ permit the parties to determine the procedure to be followed in the arbitration, and failing agreement between the parties, the arbitral tribunal may determine the procedure for them.²⁷

This aspect of party autonomy can be of great benefit to commercial parties who have had the foresight to agree on an appropriate procedure in their arbitration agreement at the outset of their commercial relationship. However, if the parties wait until their dispute arises to negotiate an arbitration procedure, it is not uncommon for conflict to develop concerning the pace of the proceedings, the degree of discovery required, applicable rules of evidence, submission of evidence in writing, and other related matters. The subsequent wrangling and ultimate resolution of these issues before the arbitral tribunal can be time-consuming and expensive.

E. *Speed*

While speed is often held out as a significant advantage of arbitration, the pace of arbitration compared to litigation varies enormously depending upon the type of dispute, the degree of cooperation between the parties, the determination of the adjudicator to proceed quickly, and a variety of other factors. For example, if a commercial dispute is eligible for resolution by way of application under the *Rules of Civil Procedure* litigation will frequently provide a faster and less expensive means of resolution than arbitration.²⁸ Similarly, if a matter is eligible to be heard on the Commercial List, it will proceed quickly in accordance with the case management provisions of the

²⁴ For a good example of the flexibility of arbitration in the American context, see S.D. Houck, "Complex Commercial Arbitration: Designing a Process to Suit the Case" (1988) 43:3 Arb. J. 3.

²⁵ *Supra* note 12, art. 19.

²⁶ *Supra* note 13, s. 3.

²⁷ See *ibid.* s. 20(1).

²⁸ *Rules of Civil Procedure supra* note 22, r. 14.05 establishes when a proceeding may be commenced by application, one heading of which is the determination of rights that depend on the interpretation of a contract: r. 14.05(3)(d). However, if the court finds that there are any material facts in dispute, a trial of an issue will usually be directed, with a consequent delay in obtaining a hearing date: r. 14.05(3)(h).

Practice Direction.²⁹ For these types of matters, an expedited pace will usually be followed regardless of the degree of cooperation between the parties.

In arbitration, an uncooperative party has numerous opportunities to delay: it can refuse to nominate an arbitrator; it can obstruct the nomination of a third arbitrator; and it can be difficult about scheduling appointments for procedural directions. Faced with these tactics, a determined judge rather than an arbitrator is frequently better able to ensure that the matter proceeds quickly. Nevertheless, for most commercial disputes that do not qualify for case management in some form, and in which the parties have an interest in quickly resolving the matter, arbitration can proceed at a much more accelerated pace than traditional litigation. In this regard, the principal reason for lengthier delays in the Ontario court system is the backlog of cases in most regions, resulting in a longer wait for a trial. Further, criminal matters take priority because of the constitutional protection available to the accused. The usual result is a twelve month wait on the civil trial list from when the matter is set down for trial to the pre-trial conference when a trial date is set. While it will sometimes be difficult to schedule a hearing date for a tribunal of busy arbitrators, a delay of twelve months for an arbitral hearing would be highly unusual.

F. Cost

Like speed, it is difficult to generalize about the costs of litigation compared to arbitration. While litigation offers a permanent, publicly-financed court system with judges and masters, trial and motion court rooms, libraries, record keeping, and administrators, arbitration systems with similar benefits must be paid for by the parties. Availability of these institutions is another consideration in Ontario. While there are well-established arbitration institutions internationally—the London Court of International Arbitration (LCIA) is over 100 years old, the International Chamber of Commerce (ICC) in Paris is over 70, and the American Arbitration Association (AAA) over 65—the availability of similar organizations in Ontario is comparatively recent.³⁰ Although parties may frequently avoid the cost of arbitration institutions through

²⁹ See *Practice Directions* supra note 21 at 463-64.

³⁰ The arbitration and dispute resolution organizations available in Ontario are discussed in Part V(B)(1), below.

ad hoc arbitration, they will nevertheless be required to incur the considerable fees and expenses of the arbitration tribunal.

G. *Enforceability*

This is an important consideration in the choice between arbitration and litigation. While the new legislation has expanded the powers of the arbitral tribunal to collect evidence and to provide interim relief, the arbitration tribunal must still depend for its full effectiveness upon the assistance of the courts. For example, while both the *International Act*³¹ and the *Arbitration Act*³² provide that the arbitral tribunal may make interim awards for the preservation of property, the arbitral tribunal would need the court's assistance to enforce an award whether by fine, imprisonment, the attachment of a bank account, or the seizure of assets.

Internationally, arbitration may offer some advantages over litigation concerning enforcement. Court judgments granted in one country are only enforceable in another country subject to treaty rights between the two countries. Canada's accession to the New York Convention, however, now provides a convenient and effective method of enforcing arbitral awards among the 120 countries that have acceded to the Convention.³³

H. *Multiple Parties*

One perceived disadvantage of the arbitral process lies in the fact that historically it was not possible to bring multi-party disputes together before the same arbitral tribunal except upon the consent of the parties. However, as noted above, the *International Act*³⁴ and the *Arbitration Act*³⁵ now provide that, on the application of parties to more than one arbitration proceeding, the court may order the proceedings to be consolidated, or conducted simultaneously or consecutively before an

³¹ *Supra* note 12, art. 17.

³² *Supra* note 13, ss. 18(1), 41.

³³ See "Multilateral International Conventions and Instruments" in E.E. Bergsten, ed., *International Commercial Arbitration* (Dobbs Ferry, N.Y.: Oceana, 1998) document I.6.1 at 4.

³⁴ *Supra* note 12, s. 7.

³⁵ *Supra* note 13, ss. 8(4), 8(5).

arbitral tribunal appointed by the court. Ontario is one of the few jurisdictions in the world which provides for such consolidation.³⁶

I. *International Disputes*

As noted above, the debate about whether to arbitrate or litigate a domestic commercial dispute will depend upon the relationship of the parties, the types of disputes likely to arise, and the circumstances of each particular case. When the dispute is international, however, the decision comes down firmly in favour of arbitration. The commercial plaintiff in an international dispute will often be obliged to consider litigation in the courts of the defendant's home country or the place of its principal assets. Few plaintiffs will look forward to the prospect of litigating in a foreign country, sometimes in a different language, employing the services of local counsel within an unfamiliar court system that may or may not be accustomed to international business transactions. If one of the parties to the contract is a state or governmental authority, this prospect will be even less attractive. In these contexts, international arbitration before a convenient and neutral tribunal selected by the parties presents a more acceptable alternative to litigation.

J. *Finality*

Arbitration generally offers commercial parties an award which is final and less subject to the delays and uncertainty inherent in a litigation appeal process. Article 34 of the Model Law provides the exclusive means by which a party can challenge an international arbitration award. Under the *International Act* an award may be set aside only if (1) either party was under some incapacity; (2) the arbitration agreement was invalid; (3) a party was not given proper notice of the arbitrator's appointment or was unable to present its case; (4) the award deals with a matter not within the scope of the arbitration agreement; (5) the tribunal was not composed in accordance with the agreement; (6) the subject matter was not capable of settlement by arbitration; or (7) the award is in conflict with Ontario's public policy.³⁷ These exceptions reflect the grounds for refusing recognition and

³⁶ See Redfern & Hunter, *supra* note 20 at 184-90.

³⁷ See *International Act* *supra* note 12, ss. 46(1)(6)-(9).

enforcement under the New York Convention.³⁸ Section 46 of the *Arbitration Act* slightly expands the mandatory review grounds for domestic arbitrations to include the following: (a) the applicant was not treated equally and fairly; (b) the procedures followed did not comply with the *Arbitration Act* (c) an arbitrator committed a corrupt or fraudulent act or there is a reasonable apprehension of bias; or (d) the award was obtained by fraud.³⁹

Section 45 of the *Arbitration Act* provides that if the arbitration agreement is silent on appeals on questions of law, a party may appeal an award on a question of law with leave of the court. However, subject to this section, neither a domestic nor an international award can be set aside on the basis of an error of law, or an error of mixed fact and law, unless the parties incorporate such appeal grounds into their arbitration agreement.

IV. ONTARIO'S EXPERIENCE WITH THE NEW LEGISLATION

Having reviewed the professed benefits of the new legislation and the relative merits of arbitration over litigation, the question of whether the courts in Ontario have followed the philosophy and guiding principles behind the Model Law and the new legislation then arises. Have the Ontario courts exhibited the same initial response to the new legislation as the courts in British Columbia, which has been described as "an atmosphere of judicial indifference or hostility"?⁴⁰ The following review of Ontario case law is not intended to be comprehensive, nor does it address decisions outside of the commercial law area. However, by canvassing reported and unreported decisions that demonstrate the approach of the Ontario courts under the *International Act* and the *Arbitration Act* it does enable commercial parties to determine whether Ontario is an attractive site for arbitration.

³⁸ See "New York Convention," *supra* note 1, art. V, s. 1. For a detailed review of the grounds for challenging an international arbitration award in article 34 of the Model Law, as compared with the grounds for refusing recognition and enforcement under the New York Convention, see H.M. Holtzmann & J.E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Deventer, Netherl.: Kluwer Law and Taxation, 1989) c. VII.

³⁹ See *Arbitration Act* *supra* note 13, ss. 46(1)(6)-(9)

⁴⁰ Casey, *supra* note 20 at 4-1.

A. Case Law Under the International Act

1. The willingness of the courts to intervene

The stark contrast between Ontario and British Columbia courts in their approach to the new legislation is demonstrated in two early decisions with remarkably similar facts. In *Boart Sweden AB v. NYA Stromnes AB*⁴¹ the Ontario High Court of Justice considered the alleged wrongful termination by a Swedish party of a distributorship arrangement with Swedish and Canadian companies. The relevant agreement provided for arbitration in Sweden, although some of the plaintiffs' claims were clearly outside the ambit of the arbitration agreement. The Swedish and Canadian plaintiffs commenced an action in Ontario claiming, *inter alia*, breach of contract, conspiracy, inducing breach of contract, and unlawful interference in economic relations. The defendants moved to stay the action and refer the matter to arbitration. The plaintiffs opposed the motion on various grounds: the Ontario action involved parties who were not parties to the arbitration agreement; Swedish law did not recognize the economic torts claimed in the action; and the public policy against inconsistent verdicts and multiplicity of proceedings. The stay was granted. Campbell J. determined that refusing the stay would violate "the very strong public policy of this jurisdiction that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract."⁴²

This ringing endorsement of one of the fundamental principles of party autonomy was followed by a comment on the significant change brought about in the law of Ontario by the new legislation:

[Refusing the stay] would also fail to give effect to the change in the law of international arbitration which, with the advent of art. 8 of the Model Law and the removal of the earlier wide ambit of discretion, gives the Courts a clear direction to defer to the arbitrators even more than under the previous law of international arbitration.⁴³

In relation to the claims not subject to the arbitration clause, the court adopted a practical approach and stayed the Ontario proceedings until a specified date by which time it was forecast that the Swedish arbitration would be complete. This responded to a concern that the defendant

⁴¹ (1988), 41 B.L.R. 295 (Ont. H.C.J.) [hereinafter *Boart Sweden*].

⁴² *Ibid.* at 303.

⁴³ *Ibid.*

might use the Swedish arbitration proceedings as a means of delaying the prosecution of the plaintiffs' other claims.

The approach of the Ontario court in *Boart Sweden* differs fundamentally from that of the Supreme Court of British Columbia in *ODC Exhibit Systems Ltd. v. Lee*,⁴⁴ which also involved the commencement of an action in Canada for a variety of claims related to the termination of a distributorship arrangement between a Swedish and a Canadian company.⁴⁵ In *ODC Exhibit Systems* the Supreme Court of British Columbia denied an application for a stay of court proceedings without making any reference to the policy change underlying the new British Columbia *International Commercial Arbitration Act*.⁴⁶ Judge Mackoff found that the original sales agency agreement (which contained an arbitration clause) had been superseded by a conciliation agreement which also contained an arbitration clause. However, he held that an allegation that the conciliation agreement was entered into fraudulently could not be arbitrated. In doing so, the court rejected an argument by the defendant that the new legislation mandated the court to stay legal proceedings in certain circumstances—the very argument that the Ontario High Court of Justice fastened upon in granting the stay in *Boart Sweden*.

Two years after the decision in *Boart Sweden*, an Ontario court tackled the issue of whether the court or the arbitrator should determine the scope of the arbitration agreement, and in particular, whether the arbitrator was empowered to interpret the relevant agreement. In *Rio Algom Ltd. v. Sammi Steel Co.*,⁴⁷ the defendant contracted in Canada and New York to buy the plaintiff's steel manufacturing business, with any disputes over the balance sheet and related adjustments to the purchase price to be referred to arbitration. When a dispute arose, the defendant referred the matter to arbitration. The plaintiff responded by commencing an action and seeking a stay of the arbitration or, in the alternative, a trial of the issues of contract interpretation which it claimed could only be determined by the court. The judge at first instance accepted the plaintiff's argument and directed the trial of the issues of contract interpretation. On a motion for leave to appeal, Henry J. concluded there was good reason to doubt the correctness of

⁴⁴ (1988), 41 B.L.R. 286 (B.C.S.C.) [hereinafter *ODC Exhibit System*].

⁴⁵ For a more detailed comparison and analysis of *Boart Sweden* and *ODC Exhibit Systems* see A. Varma, "Annotation" (1988), 41 B.L.R. 297.

⁴⁶ R.S.B.C. 1996, c. 233 [hereinafter *British Columbia International Act*].

⁴⁷ (1991), 47 C.P.C. (2d) 251 (Ont. Ct. (Gen. Div.)).

the lower court decision, and he granted leave to appeal. He noted that the Model Law allows the arbitrator to determine his or her own jurisdiction and scope of authority. The role of the court in such a case “appears to be confined to determining whether the arbitration clause is null and void, inoperative or incapable of being performed (Art. 8)—if not it is mandatory to send the parties to arbitration.”⁴⁸ Judge Henry concluded his decision by noting that the purpose and spirit of the *International Act* was to make commercial arbitration law in Ontario consistent with the law of other trading countries “so as to enhance and encourage international commerce in Ontario and the resolution of disputes by rules of international commercial arbitration”⁴⁹

*Onex Corp. v. Ball Corp.*⁵⁰ is another decision illustrating the reluctance of Ontario courts to intervene in international commercial arbitration. The parties had entered into a sophisticated joint venture agreement for the operation of a packaging business in Canada. The agreement called for final settlement of disputes by way of arbitration in Chicago under the International Chamber of Commerce (ICC) Rules, with the law of Ontario being applied. The plaintiff claimed that there was a drafting error in the provisions of the agreement, and commenced an action in Ontario for rectification. The defendant moved to stay the action in favour of arbitration.

Judge Blair held that while the arbitrator had no inherent power to rectify the parties’ agreement, that power could be conferred upon the arbitral tribunal by agreement. He then examined the language of the arbitration clause compared to other arbitration agreements that the courts have held were broad enough to encompass rectification. Commenting on the clear shift in Ontario legal policy towards encouraging parties to submit differences to “consensual dispute mechanisms outside of the regular court system,” Blair J. indicated that courts should not try to put too fine a distinction on nuances between words such as “under,” “in relation to,” or “in connection with” the contract when interpreting the scope of arbitration clauses. He went on to say:

⁴⁸ *Ibid.* at 256.

⁴⁹ *Ibid.* at 257. See also *Canada Packers Inc. v. Terra Nova Tankers Inc.* (1992), 11 O.R. (3d) 382 (Gen. Div.), which confirms that a claim sounding in tort does not exclude arbitration; and *Mind Star Toys Inc. v. Samsung Co.* (1992), 9 O.R. (3d) 374 (Gen. Div.), which confirms that an allegation that a contract has been repudiated by fundamental breach does not terminate the obligation to arbitrate.

⁵⁰ (1994), 12 B.L.R. (2d) 151 (Ont. Ct. (Gen. Div.)) [hereinafter *Onex Corp.*].

At the very least, where the language of an arbitration clause is capable of bearing two interpretations, and on one of those interpretations fairly provides for arbitration, the courts should lean towards honouring that option, given the recent developments in the law in this regard to which I have earlier referred.⁵¹

This statement provides both a refreshing approach to the conflicting authorities on defining the scope of an arbitration clause,⁵² and a strong endorsement of party autonomy.

In 1994, the Ontario Court of Appeal added its voice to the judicial chorus in favour of minimal court interference in international commercial arbitration. In *Automatic Systems Inc. v. Bracknell Corp.*,⁵³ the plaintiff, a Missouri corporation, agreed to manufacture and install a conveyor system for Chrysler Canada in Ontario. The contract contained no arbitration clause. The plaintiff subcontracted the electrical work to the defendant Ontario company in an agreement designating Missouri as the governing jurisdiction, and providing for arbitration in Kansas City under the AAA Rules. When a dispute arose under the subcontract, the defendant commenced an action under the Ontario *Construction Lien Act*⁵⁴ which conferred lien rights upon the subcontractor. The plaintiff then brought an application under the *International Act* for a stay of the action. In refusing to grant the stay, the lower court referred to a section in the *International Act* which rendered void any agreement for the supply of services or materials that attempted to exclude the operation of the *CLA*. It also noted that the *CLA* specifically recognized domestic arbitrations for *CLA* claims, but made no specific mention of the *International Act*. The court rejected this analysis and stayed the action, holding that the lien rights issue had been resolved by posting a letter of credit with the court. More importantly, the court held that as a matter of principle, there was no reason to draw any distinction between domestic, international, and inter-provincial arbitration:

Having regard to international comity, and to the strong commitment made by the legislature of this province to the policy of international commercial arbitration through the adoption of the ICAA [*International Act*] and the *Model Law*, it should, in my respectful view, require very clear language indeed to preclude it. No such language appears in the *CLA* or in any other statute referred to the court. At most, the failure to amend the *CLA* so that reference is made to the *Arbitration Act, 1991* and to the

⁵¹ *Ibid.* at 160.

⁵² See *Russell on Arbitration* *supra* note 20 at 56-67.

⁵³ (1994), 18 O.R. (3d) 257 (C.A.), rev'g (1993), 110 D.L.R. (4th) 390 (Ont. Ct. (Gen. Div.)) [hereinafter *Automatic System*].

⁵⁴ R.S.O. 1990, c. C-30 [hereinafter *CLA*].

[*International Act*], instead of to the *Arbitrations Act* may raise some doubt as to precisely what was intended. Having regard to the commitment of the province to the *Model Law*, that doubt must be resolved in favour of support for the application of the *Model Law* and not otherwise.⁵⁵

The Ontario Divisional Court has also advocated a liberal approach to international commercial arbitration and judicial deference to arbitration agreements. In *ABN Amro Bank Canada v. Krupp MaK Maschinenbau GmbH*,⁵⁶ the plaintiff had agreed to provide funding for the overhaul of a Canadian coast guard ship on condition that equity funding be provided. After the venture failed, the plaintiff bank commenced an action alleging that the defendant and a Canadian businessman had conspired to give the appearance of an equity injection that did not occur. After serving its statement of defence and counterclaim, the defendant moved unsuccessfully to have the action stayed in favour of arbitration under the *International Act*. The motions court judge held that the motion was not timely, the plaintiff was not a party to the arbitration agreement, and the fraud allegation was not appropriate for arbitration. The court reversed this decision, holding that it was too technical to require a party to apply for arbitration before pleading when its pleading was consistent with a concurrent request for referral to arbitration. It also held that the motion court was not an appropriate forum for deciding whether the agreement was void for fraud, and that the plaintiff, in seeking to enforce assigned rights, must do so subject to the arbitration clause in the agreement.

2. Enforcement of foreign arbitral awards

In addition to the case law concerning the willingness of the courts to intervene in international commercial arbitration, there have been a number of decisions under the *International Act* dealing with the enforcement of foreign arbitral awards. Under articles 35 and 36 of the *Model Law*, recognition or enforcement of an arbitral award is to be refused only on specified procedural grounds. The question, then, was whether the Ontario courts were prepared to interpret the enforcement provisions of the *International Act* within these limitations.

One of the enumerated grounds for refusing enforcement in Article 36 is “public policy of the province.” In one of the first decisions

⁵⁵ *Automatic Systems* supra note 53 at 266 [emphasis in original].

⁵⁶ (1996), 135 D.L.R. (4th) 130 (Ont. Div. Ct.), rev'g (1994), 21 O.R. (3d) 511 (Gen. Div.).

on enforcement, *Schreter v. Gasmac Inc.*,⁵⁷ Feldman J. held that courts should not, under the guise of “public policy,” reopen the merits of an arbitral award on legal issues involving foreign law where there has been no procedural misconduct. *Schreter* involved an application for enforcement of an arbitration award from the state of Georgia. In allowing the application, Feldman J. rejected the respondent’s submissions that the arbitrator’s failure to give reasons in limiting the respondent’s right to seek judicial review constituted a denial of natural justice, and that enforcement of the award would be contrary to public policy because it included an acceleration of future damages.⁵⁸

The ability to challenge the enforcement of foreign arbitral awards on the grounds of public policy has been further limited by the 1993 decision in *Arcata Graphics Buffalo Ltd. v. Movie (Magazine) Corp.*⁵⁹ In that case, the respondent opposed enforcement on various grounds, including an argument that the award included interest calculated in accordance with the agreement on a monthly basis rather than stipulating an annual rate as required under the federal *Interest Act*.⁶⁰ Justice Eberle rejected this argument and relied upon the decision of the Ontario Court of Appeal in *Boardwalk Regency Corp. v. Maalouf*,⁶¹ in which the court held that in order to refuse enforcement of a foreign judgment, it must find that enforcement would not only be contrary to Ontario statute law, but would violate conceptions of essential justice and morality. Justice Eberle applied a similar test for the enforcement of a foreign arbitral award and granted the application.

In *Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd.*,⁶² the applicant sought to enforce a Japanese arbitration award in relation to unpaid royalties and a technical assistance fee. The respondent did not appear at the arbitration but opposed enforcement on the basis that there had been a fundamental breach of the licensing agreement between the parties. The Ontario court had no difficulty in rejecting the respondent’s argument. While a fundamental breach may have called into question the validity of the

⁵⁷ (1992), 7 O.R. (3d) 608 (Gen. Div.) [hereinafter *Schreter*].

⁵⁸ See *Murmansk Trawl Fleet v. Bimman Realty Inc.* (19 December 1994), Toronto RE 3845/94 (Ont. Ct. (Gen. Div.)) for similar reasoning in relation to the enforcement of a New York arbitration award.

⁵⁹ (12 March 1993), Toronto RE 2351/93 (Ont. Ct. (Gen. Div.)).

⁶⁰ R.S.C. 1985, c. I-18.

⁶¹ (1992), 6 O.R. (3d) 737 (C.A.).

⁶² (1992), 7 O.R. (3d) 779 (Gen. Div.), aff’d (1995), 22 O.R. (3d) 576 (C.A.).

arbitration agreement, the court held that this issue ought to have been brought before the arbitrator in Japan, who had jurisdiction to hear arguments regarding the validity of the agreement.

Finally, in *Carter*,⁶³ the respondent opposed enforcement of a Minnesota arbitral award on the basis that the dispute between the parties was not “commercial,” and therefore the *International Act* did not apply. The Ontario court held that the sale of a residential house, when conducted in a business-like manner with the assistance of professional realtors, was a “commercial” transaction under the *Act*.⁶⁴

B. Case Law Under the Arbitration Act

The case law under the *International Act* demonstrates that the Ontario courts have adopted a remarkably consistent approach to the interpretation of the statute which strongly supports the philosophy of party autonomy and the guiding principles underlying the Model Law. This section reviews the somewhat less consistent approach of the courts to the *Arbitration Act*. Since the new legislation came into force on 1 January 1992, most reported and unreported decisions that consider the *Arbitration Act* have fallen under the following headings: stay motions, appeals on questions of law, and review of arbitral awards.

1. Stay motions

One of the first cases decided under the *Arbitration Act* *Scotia Realty Ltd. v. Olympia & York SP Corp.*⁶⁵ dealt with a stay motion in the context of a dispute between two major commercial parties concerning the amount of participation rent due under an office lease. In granting the stay, the court rejected the argument that arbitration was inappropriate because the dispute involved questions of law related to the interpretation of documents:

Since the application in effect seeks to pre-empt an arbitration for the 1990 year which would hereafter be conducted under the *Arbitration Act, 1991* it is useful to note that s. 7(1) of that Act provides that litigation in respect of a matter subject to an arbitration agreement “shall” be stayed and enumerates in s. 7(2) five very narrow grounds of exception none of which would apply in the instant case. Section 8(2) provides that the

⁶³ *Supra* note 15.

⁶⁴ *Ibid.* at 798.

⁶⁵ (1992), 9 O.R. (3d) 414 (Gen. Div.) [hereinafter *Scotia Realty*].

arbitrator may determine questions of law. This enactment gives effect to the view of Laskin J. in *Deuterium* that there should be no return to the jealous guarding of the court's jurisdiction against encroachment by arbitration.⁶⁶

Scotia Realty's endorsement of limited court intervention in domestic arbitration is also reflected in *Ontario Hydro v. Denison Mines Ltd.*⁶⁷ In that case, Denison Mines sought to stay an action commenced by Ontario Hydro in favour of arbitration. Ontario Hydro argued that the dispute, which concerned a sophisticated pricing formula for the supply of uranium, was inappropriate for arbitration because of its claim for rectification of the relevant agreement. In rejecting this argument, Blair J. described the *Arbitration Act* as a "legislative directive in favour of arbitration over litigation"⁶⁸ and observed that "the new Act provides a forceful statement from the Legislature signalling a shift in policy and attitude towards the resolution of disputes in civil matters through consensual dispute resolution mechanisms."⁶⁹

The judicial tendency to limit court intervention and to allow the arbitral tribunal to determine its own jurisdiction is also apparent in the decisions to grant stay motions against allegations of unconscionability under the main contract,⁷⁰ where substantial questions of law were in issue,⁷¹ and where one of the parties launched a conspiracy action during the course of arbitration.⁷²

While the approach of the Ontario courts in these early decisions demonstrates a strong support for the philosophy of party autonomy underlying the new legislation, a somewhat disturbing trend has arisen in part from the statements of Blair J., sitting as a judge on the Commercial List, in *Deluce Holdings Inc. v. Air Canada*.⁷³ This case considered the interplay of the *Arbitration Act* with the oppression remedy provisions of the *Canada Business Corporations Act*.⁷⁴ In *Deluce Holdings*, the parties had entered into a shareholders agreement relating to the acquisition of

⁶⁶ *Ibid.* at 422, citing *Deuterium of Canada Ltd. v. Burns & Roe Inc.*, [1975] 2 S.C.R. 124.

⁶⁷ (3 June 1992), Toronto B54/92 (Ont. Ct. (Gen. Div.)).

⁶⁸ *Ibid.* at 7.

⁶⁹ *Ibid.* at 8.

⁷⁰ See *Dimarino v. United Imaging Inc.* (19 November 1992), Ottawa 67182/92, 66442/92 (Ont. Ct. (Gen. Div.)).

⁷¹ See *Fitz-Andrews v. Meisner* (21 January 1993), Brampton A1599/92 (Ont. Ct. (Gen. Div.)).

⁷² See *Bakorp Management Ltd. v. Pepsi-Cola Canada Ltd.* (31 March 1994), Toronto B467/93 (Ont. Ct. (Gen. Div.)).

⁷³ (1992), 12 O.R. (3d) 131 (Gen. Div.) [hereinafter *Deluce Holding*].

⁷⁴ R.S.C. 1985, c. C-44, s. 241 [hereinafter *CBCA*].

shares in two regional airlines. The agreement provided that upon the termination of employment of a principal of the minority shareholder, the controlling shareholder could acquire the minority shareholder's shares in a holding company at a price to be agreed between the parties. Failing agreement, any dispute with respect to the fair market value of the shares was to be referred to arbitration. In 1991, the controlling shareholder decided to try to acquire a 100 per cent interest in the two regional airlines and it asked the principal of the minority shareholder to resign. When he refused to do so, the controlling shareholder caused the directors to terminate the principal's employment, although there were no complaints about his performance. The controlling shareholder then initiated arbitration proceedings and the minority shareholder responded by commencing an action under the oppression remedy provisions of the *BCA*. When presented with stay motions from each side, Blair J. made a preliminary finding of "oppressive" conduct but noted the shift in policy in the new legislation "towards the resolution of arbitrable disputes outside of court proceedings."⁷⁵ He then rejected arguments from each side regarding the application of section 7 of the *Arbitration Act* and focused instead upon the following italicized passage: "7(1) If a party to an arbitration agreement commences a proceeding *in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.*"⁷⁶

Judge Blair held that the real subject matter of the dispute was not the fair market value of the shares but one which "strikes at the very underpinning of the contractual mechanism itself."⁷⁷ In staying the arbitration proceedings, he stated that "[t]he question is whether that oppression is such that it destroys the very underpinning of the arbitration structure, thus taking the subject of the dispute out of the 'matters to be submitted to arbitration under the agreement.'"⁷⁸

While it is acknowledged that the arbitration clause in *Deluce Holdings* was not wide enough to allow the arbitrators to determine whether there was oppression and to fashion an appropriate remedy, the danger in this approach lies in the court usurping the arbitration panel's authority to rule on its own jurisdiction.

⁷⁵ *Deluce Holdings* *supra* note 73 at 148.

⁷⁶ *Ibid.* at 149 [emphasis added].

⁷⁷ *Ibid.* at 150.

⁷⁸ *Ibid.* at 149.

Unfortunately, the reasoning in *Deluce Holdings* has been interpreted by other courts as an invitation to narrowly construe the ambit of arbitration clauses and to find rather too easily that the conduct under consideration “destroys the very underpinning of the arbitration structure.” For example, in *Jaffasweet Juices Ltd.v. Michael J. Firestone & Associates*⁷⁹ the parties had agreed to submit to arbitration “any and all claims or disputes arising out of the business relationship between them.”⁸⁰ After the commencement of the arbitration, the plaintiff brought an action alleging that the defendant, in ostensibly pursuing an interim order of the arbitrator, had deliberately breached its fiduciary obligation to the plaintiff by interfering with the plaintiff’s contractual relations with a third party. The court dismissed the stay motion, holding that the arbitration agreement did not encompass conduct which “one party considers to be a subsequent assault on the integrity of the very relationship.”⁸¹ Similarly, in *Ontario Federation of Labour v. Ontario (Minister of Economic Development, Trade & Tourism)*⁸² an agreement purporting to renew a previous program between the province and a labour federation provided for arbitration of any dispute arising in connection with the agreement. The agreement was entered into shortly before a change of provincial government, and the new government cancelled the program before the renewal was to have come into effect. The labour federation brought an application seeking the appointment of an arbitrator. The government sought a declaration by cross-application that the arbitration agreement did not apply to the dispute. Citing the reasons of the court in *Deluce Holdings*⁸³ the court held, *inter alia*, that the agreement did not apply to the dispute and that the government had the authority to cancel the program. The arbitration clauses in both of these cases, however, were wide enough to encompass the disputes under consideration. Further, in keeping with the philosophy of party autonomy, the courts ought to be mindful of the reasoning in *Automatic Systems*⁸⁴ and *Onex Corp*⁸⁵ recommending a liberal interpretation of arbitration clauses towards providing coverage of the subject dispute.

⁷⁹ (1996), 45 C.P.C. (3d) 350 (Ont. Ct. (Gen. Div.)).

⁸⁰ *Ibid.* at 351.

⁸¹ *Ibid.* at 353.

⁸² (1996), 31 O.R. (3d) 302 (Gen. Div.).

⁸³ *Supra* note 73 at 149.

⁸⁴ *Supra* note 53.

⁸⁵ *Supra* note 50.

Regretfully, there are also a number of cases in which stay motions were refused and arbitration clauses narrowly interpreted, in part because the parties had drafted inappropriate or awkwardly worded arbitration clauses. In *TIT2 Ltd. Partnership v. Canada*,⁸⁶ the parties entered into contracts relating to the privatization of terminals at Lester B. Pearson International Airport. The contracts contained arbitration clauses requiring disputes to be submitted to arbitration except where they involved a question of law.⁸⁷ In refusing a stay, Borins J. held that the resolution of the disputes raised by the pleadings would involve questions of mixed fact and law which were not caught by the arbitration clause. Similarly, in *Benner and Associates Ltd. v. Northern Lights Distribution Inc.*,⁸⁸ the parties had entered into a dealership agreement which stipulated that a dispute concerning the dealer's breach of the agreement would be submitted to a single arbitrator, jointly appointed. Following several letters from the defendant complaining of alleged breaches of the dealership agreement, the plaintiff dealer commenced an action alleging breaches of the agreement by the defendant. The stay motion was refused.

Finally, in *Ontario v. Abilities Frontier Co-operative Homes Inc.*⁸⁹ Sharpe J. dealt with another dispute arising from the cancellation of an existing program by the new provincial government. He held that the dispute about whether the province was contractually bound to honour the co-operative and non-profit housing commitments of the previous government should not be arbitrated. He found that the arbitration clause which referred to disputes about the interpretation of the agreement, or about actions taken under the agreement, was strongly suggestive of a limited purpose—especially when, in a preamble to the clause, the parties acknowledged that differences of view could arise in the development and construction of a non-profit housing project. These cases demonstrate that commercial parties, when drafting an arbitration agreement, should carefully consider whether any restrictions on the subject matter of the arbitration, or any limitations on the arbitrator's jurisdiction, are either necessary or appropriate.

⁸⁶ (1994), 19 B.L.R. (2d) 72 (Ont. Ct. (Gen. Div.)).

⁸⁷ See *ibid.* at 77.

⁸⁸ (1995), 22 B.L.R. (2d) 79 (Ont. Ct. (Gen. Div.)).

⁸⁹ (1996), 5 C.P.C. (4th) 81 (Ont. Ct. (Gen. Div.)).

2. Appeals on questions of law

As stated above, the parties to an arbitration agreement may agree to exclude appeals. Problems arise, however, when the arbitration agreement is unclear about whether such an exclusion has been made. The Ontario Superior Court of Justice is evenly split on the question of whether parties that describe their arbitration as “final and binding” intend to exclude a right of appeal.⁹⁰ Until the Ontario Court of Appeal resolves this issue, commercial parties wishing to exclude the right of appeal should carefully specify this intention in their arbitration agreements.

If the arbitration agreement does not deal with appeals on questions of law, the appeal may proceed under section 45 of the *Arbitration Act* only with leave, where the court is satisfied that (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and (b) the determination of the question of law at issue will significantly affect the rights of the parties.⁹¹

Much has been written about the judicial origins of this two step test and how it should be applied.⁹² To date, few Ontario cases have interpreted section 45. However, in *Labourer's International Union*⁹³ the court held that there must be good reason to doubt the correctness of an arbitration decision before leave will be granted. Hopefully, subsequent decisions will consider whether the more purposeful approach of the English and British Columbia courts should be followed in Ontario in determining whether or not to grant leave to appeal.⁹⁴

Where leave is refused, the *Arbitration Act* does not grant any further right of appeal. In *Hillmond Investments Ltd. v. Canadian*

⁹⁰ There are two decisions in support of each position: *Bramalea Ltd. v. T. Eaton Co.* (17 January 1994), Toronto RE 2845/93 and *Superior Propane Inc. v. Valley Propane (Ottawa) Ltd.* (15 February 1993), Ottawa 69331/92 hold that these words exclude a right of appeal, while *Metropolitan Separate School Board v. Daniels Lakeshore Corp.*, [1993] O.J. No. 2375 (C.A.) (QL) and *Labourer's International Union of North America, Local 183. Carpenters and Allied Workers Local 2714* (February 1994), Toronto RE 2733/93 (Ont. Ct. (Gen. Div.)) [hereinafter *Labourer's International Union*] hold the opposite.

⁹¹ See *Arbitration Act* *supra* note 13, s. 45(1).

⁹² See, for example, J.J. Chapman, “Judicial Scrutiny of Domestic Commercial Arbitral Awards” (1995) 74 Can. Bar Rev. 401 at 412-20; and Casey, *supra* note 20 at 9-4-9-9.

⁹³ *Supra* note 90.

⁹⁴ Brian Casey recommends an approach to this question which is consistent with the English courts, and also respects a guiding principle of the Model Law and the new legislation in favour of limited judicial scrutiny of arbitral awards: see Casey, *supra* note 20 at 9-6-9-8.

*Imperial Bank of Commerce*⁹⁵ the Ontario Court of Appeal held that allowing an appeal from a refusal to grant leave would defeat the legislative impediment in section 45 to appeals as of right. This reasoning is consistent with principles of limited court intervention and finality in arbitration proceedings.

Parties can provide in their arbitration agreement for appeals on questions of law, fact, or mixed fact and law.⁹⁶ In such circumstances, the parties have contracted for court supervision and should expect the courts to treat the arbitration award in the same manner that an appellate court would treat a trial judgment.⁹⁷ Two Ontario decisions have held that where the parties have contracted for such rights of appeal, the proper standard of judicial review is a normal standard of “correctness.”⁹⁸

3. Review of arbitral awards

Section 46 of the *Arbitration Act* provides the court with power to set aside an arbitral award on nine specified grounds, which are largely jurisdictional in nature. To be consistent with the philosophy of party autonomy, one would expect the scope of review under this section to be relatively narrow in order to prevent these review provisions from being employed as an alternative to the appeal provisions in section 45. With one exception,⁹⁹ the cases under section 46 have largely followed this approach.

In *Environmental Export International of Canada Inc. v. Success International Inc.*,¹⁰⁰ a Canadian company sold used tire manufacturing equipment to a New York corporation for resale to China. The sophisticated commercial contract between the parties provided for arbitration of all disputes with the award being final and “not subject to any appeal.” The vendor of the equipment applied under section 46 to

⁹⁵ (1996), 29 O.R. (3d) 612 (C.A.).

⁹⁶ See *Arbitration Act* *supra* note 13, ss. 45(2)-(3).

⁹⁷ For an especially helpful discussion of this point, see Chapman, *supra* note 92 at 422.

⁹⁸ See *887574 Ontario Inc. v. Pizza Pizza Ltd.* (1995), 23 B.L.R. (2d) 259 at 267 (Ont. Ct. (Gen. Div.)) [Commercial List]; followed in *Petro-Lon Canada Ltd. v. Petrolon Distribution Inc.* (1995), 19 B.L.R. (2d) 123 at 135 (Ont. Ct. (Gen. Div.)).

⁹⁹ See *Vav Holdings Ltd. v. 720153 Ontario Ltd.* (28 March 1996), RE 5922/95 (Ont. Ct. (Gen. Div.)) [hereinafter *Vav Holdings*]. For a fuller discussion of this case, see *infra* notes 104-106 and accompanying text.

¹⁰⁰ (22 February 1995), 2143/94, RE 4796/94 (Ont. Ct. (Gen. Div.)).

set aside the arbitrator's award and to remove the arbitrator for perceived bias. In dismissing the application, MacPherson J. held that it would be wrong to invent a remedy of setting aside an arbitral award on procedural points. In reaching this conclusion, MacPherson J. endorsed the following statement of Steyn J. from the English decision in *K/S A/S Bill Biakh and K/S A/S Bill Bialiv. Hyundai Corporation*

In the interests of expedition and finality of arbitration proceedings, it is of the first importance that judicial intrusion in the arbitral process should be kept to a minimum. A judicial power to correct during the course of the reference procedural rulings of an arbitrator which are within his jurisdiction is unknown in advanced arbitration systems, ... and the creation of such a power by judicial precedent in this case would constitute a most serious reproach to the ability of our system of arbitration to serve the needs of users of the arbitral process.¹⁰¹

A strict standard of review for jurisdictional issues was also adopted by the court in *Mungov. Saverino*,¹⁰² where share valuation was the subject of an arbitration award. In dismissing an application to set aside the award, Campbell J. held that the applicant had failed to show that the arbitrator "clearly" exceeded his jurisdiction. He went on to comment on the merits of the arbitration process:

The great merit of arbitrations is that they should be, compared to courts, comparatively quick, cheap, and final. There is a trade-off between perfection on the one hand and speed, economy, and finality on the other hand. If you go to arbitration, you can get quick and final justice and you can get on with your life. If you go to court, you can get exquisitely slow and expensive justice and you can spend the rest of your life enduring it and paying for it.

For a disappointed arbitral litigant, jurisdiction and natural justice are good pickings. Jurisdiction and natural justice invoke the primordial instinct of courts to second guess other tribunals and thus defeat the greatest benefit of arbitration, its finality.¹⁰³

Unfortunately, Campbell J.'s colourful comments in favour of limited court intervention in the review of arbitral awards have not been heeded by all judges in Ontario. In *Vav Holdings*¹⁰⁴ the court was asked to set aside an arbitral award which had established a rental value for a commercial property. The court concluded that the arbitrator proceeded on a wrong principle of law in fixing the rental value on an "as is" basis, despite evidence that the applicant had failed to present sufficient information to allow the arbitrator to even determine the value on an "as was" basis. The court then set aside the award on the basis

¹⁰¹ [1988] 1 Lloyd's L.R. 187 at 189 (Q.B.).

¹⁰² (15 October 1995), RE 178/95 (Ont. Ct. (Gen. Div.)).

¹⁰³ *Ibid.* at para. 78-79.

¹⁰⁴ *Supra* note 99.

that it was “patently unreasonable.”¹⁰⁵ This is clearly a wrong interpretation of section 46, as it appears to imply that there remains in Ontario a common law right to review for errors of law on the face of the record. It cannot reasonably be argued that such a common law right of review continues to exist in Ontario in the face of section 6 of the *Arbitration Act* which provides that “no court shall intervene” except for certain specified matters. As one commentator has aptly stated, “[t]o resurrect the ghost of ‘error of law on the face of the record’ would undermine the thrust of the legislation.”¹⁰⁶ Indeed, reasoning such as that demonstrated in *Vav Holdings* threatens one of the central benefits of arbitration, that of finality.

V. FACTORS INFLUENCING THE FUTURE OF COMMERCIAL ARBITRATION

In view of the relative merits of arbitration over litigation and the apparent willingness of the Ontario courts to respect the philosophy of party autonomy underlying the new legislation, this section considers whether we should expect to see a significant increase in the number of commercial arbitrations, both international and domestic, being conducted in the province, and the factors that will influence possible growth.

A. Ontario’s Attractiveness as a Site For International Arbitration

While an informal survey of the arbitral organizations in Ontario indicates that there are few international arbitrations being conducted in the province,¹⁰⁷ there are a number of reasons to consider Ontario as a site for international arbitration. First, Ontario courts have shown a consistent and principled approach to the interpretation of the *International Act*. Second, there are early indications that the Supreme Court of Canada will adopt a similar approach to the interpretation of Canada’s new arbitration statutes.¹⁰⁸ Third, as set out below, there is an

¹⁰⁵ *Ibid.* at para. 22.

¹⁰⁶ Chapman, *supra* note 92 at 425.

¹⁰⁷ See *supra* note 10.

¹⁰⁸ In *Burlington Northern Railroad Co. v. Canadian National Railway Co.*, [1997] 1 S.C.R. 5, the Supreme Court overturned a confusing decision of the British Columbia Court of Appeal, thereby endorsing two of the central principles of party autonomy.

increasing number of well-qualified arbitrators within Canada, and particularly in Ontario. Fourth, Canada's legal system has an enviable international reputation and is less threatening to many businesses than the United States' legal system.¹⁰⁹ Fifth, Ontario represents a neutral venue for many types of international business disputes.¹¹⁰ Finally, it is considerably less expensive to conduct commercial arbitrations in Ontario (Toronto in particular) than in many other international centres, including London, England, and New York.¹¹¹

Given these circumstances, Ontario has the potential to become a more significant player in international arbitration. However, there are many countries and several established arbitration institutes competing to attract international arbitration work.¹¹² Within Canada, Ontario faces competition from the Quebec National and International Commercial Arbitration Centre in Quebec City and the British Columbia International Commercial Arbitration Centre in Vancouver. For Ontario to become recognized as a centre for international arbitration, its arbitration organizations, together with the Law Society of Upper Canada and the Canadian Bar Association, will have to coordinate their efforts to promote Ontario as an attractive site. Following the example of *other* recently established arbitration centres,¹¹³ the provincial government could also play an important coordinating role in this process.

¹⁰⁹ In contrast to the United States, the Canadian legal system does not provide the constitutional right to a jury trial, and punitive damages are comparatively limited.

¹¹⁰ See Mendes, *supra* note 11.

¹¹¹ The author's inquiries with counsel in England and New York indicate that the costs of arbitrators and the legal costs of counsel are significantly lower (by more than 50 per cent) than the comparable costs in Toronto.

¹¹² The following statistics show, among the more significant arbitration centres, the number of new requests for arbitration in 1992: AAA (252); Vancouver (40); Helsinki (43); Hong Kong (185); ICC (337); Oslo (3); Stockholm (63); Vienna (70); and LCIA (72): see J.G. Wetter, "The Internationalisation of International Arbitration: Looking Ahead to the Next Ten Years" in M. Hunter, A. Marriott & V.V. Veeder, eds., *The Internationalisation of International Arbitration: The LCIA Centenary Conference* (London: Graham & Trotman, 1995), 85 at 95, 100. There has also been significant growth in the number of international cases being conducted by the China International Economic and Trade Arbitration Commission: see C. Shum, "International Economic and Trade Arbitration in China" (1990) *J. Bus. L.* 274.

¹¹³ For a description of the establishment of the Australian Centre for International Commercial Arbitration, see C. Croft, "International Commercial Arbitration: Developments in the State of Victoria, Australia" in Paterson & Thompson, eds., *supra* note 6, 35 at 44.

B. Familiarity With the Arbitral Process

In certain jurisdictions and in some fields of business activity, especially in the international sphere, arbitration has for many years been the preferred method of dispute resolution.¹¹⁴ Commercial lawyers who practise in these areas routinely advise their clients to include arbitration clauses which provide for institutional or *ad hoc* arbitration with well-known rules of procedure. In contrast, arbitration has traditionally been viewed by many Ontario lawyers as expensive, ineffective, and easily avoided—under the old legislation it often was.¹¹⁵ As a result, commercial lawyers in Ontario have little familiarity with the arbitral process, and they have been understandably reluctant to recommend that arbitration clauses be included in commercial agreements.

Arbitration will grow slowly in Ontario until this situation changes. While some commercial litigators will be able to convince their clients to negotiate an arbitration agreement when a dispute arises, the best time for commercial parties to consider the relative merits of arbitration is when their business relationship is first reduced to writing. Once a dispute arises, few parties have the foresight or the goodwill required to negotiate an arbitration agreement. In addition, once the fight is underway, one party will frequently prefer the tactical advantage provided by the delays built into litigation and the appeal process. The following section reviews the practical considerations that commercial parties must confront in deciding to proceed to arbitration, and the resources available in Ontario to deal with these issues.

1. Institutional versus *ad hoc* arbitration

Commercial parties have a number of arbitration institutions to choose from when conducting an arbitration in Ontario. The best known of the international institutions, including the ICC, the LCIA and the AAA, will all provide arbitrators to conduct arbitrations in Ontario either in accordance with their internal rules of procedure, or the UNCITRAL

¹¹⁴ In England, for example, a large number of construction, commodities, and shipping disputes are arbitrated, and contracts in these fields usually contain arbitration clauses: see J. Flood & A. Caiger, "Lawyers and Arbitration: The Juridification of Construction Disputes" (1993) 56 Mod. L. Rev. 412.

¹¹⁵ For a description of some of the deficiencies in the pre-1991 arbitration regime, see Chapman, *supra* note 92 at 403-04.

Arbitration Rules.¹¹⁶ However, arbitration before these institutions tends to be expensive, especially when the amounts in issue are large and the administrative fees of the institution are calculated primarily on a claim value basis. In addition, there is a certain inflexibility and time delay in administering an arbitration through the bureaucratic mechanisms of the larger institutions.

Within Ontario, there are now several arbitration organizations that provide administrative services, including assistance in selecting a suitable tribunal, fixing arbitrators' fees, overseeing the payment of arbitral expenses, coordinating the exchange of materials, and scheduling meetings and hearings. The fees of these organizations are considerably more modest than those of the international institutions. The Arbitration and Mediation Institute of Ontario (AMIO) is a non-profit organization established in 1974 that is affiliated with the AAA and the Chartered Institute of Arbitrators in the United Kingdom. AMIO provides suggested arbitration clauses and has its own rules of procedure for the conduct of arbitrations, although parties may formulate their own set of rules. The Private Court of Ontario, established in the mid-1980s, also provides draft arbitration clauses and conducts arbitrations under its own rules (modelled on the Ontario *Rules of Civil Procedure*), which parties are free to vary. For construction disputes, the Toronto Construction Association provides its members with a low-cost, expedited arbitration procedure and a sample arbitration agreement. Finally, most Ontario lawyers will have noticed the remarkable growth since 1991 in the ADR Chambers, a national alternative dispute resolution group comprised of retired judges and senior counsel who conduct arbitrations and consensual appeals. ADR Chambers is in the process of drafting its own rules of procedure.

Compared to institutional arbitration, the distinct advantages of *ad hoc* arbitration are the potentially lower cost and the parties' ability to shape the arbitral process to meet their requirements and the facts of the particular dispute. These advantages become more apparent if the parties are sufficiently cooperative to design an arbitral process once the dispute arises. For international arbitrations, the parties should consider using (or modifying) the UNCITRAL Arbitration Rules which were

¹¹⁶ These rules were adopted by resolution of the United Nations General Assembly, GA Res. 31/98, UN GAOR, 31st Sess., Supp. No. 39, UN Doc. A/31/390 (1976) 182. For a summary of these rules, see Redfern & Hunter, *supra* note 20 at 479. For a comparative analysis of the arbitration rules of the AAA, ICC, LCIA, and UNCITRAL, see M. Huleatt-James & N. Gould, *International Commercial Arbitration: A Handbook* 2d ed. (London: LLP, 1999).

designed for use in *ad hoc* arbitrations.¹¹⁷ These Rules can also be used in domestic arbitrations, although in most circumstances the provisions of the *Arbitration Act* dealing with the conduct of the arbitration¹¹⁸ provide a reasonable procedural outline which can be modified by the parties and, if necessary, with the assistance of the arbitrator.

2. The appropriate arbitration clause

The case law relating to stay motions under the *Arbitration Act* and the unfortunate tendency of some courts to narrowly interpret the ambit of arbitration clauses, demonstrate the importance of clearly defining which disputes between parties should be referred to arbitration. This applies whether the parties opt for institutional or *ad hoc* arbitration. In either case, the parties must consider whether all or only certain disputes between the parties, or under the relevant contract, should be arbitrated. To ensure that the arbitration proceeds with a minimum of judicial interference, clauses should not contain any ambiguities that permit the other side to challenge the scope or meaning of the arbitration clause. As noted above, most arbitration organizations provide sample arbitration clauses and there are numerous guides to drafting an appropriate arbitration clause.¹¹⁹

C. Growth of ADR

Alternative dispute resolution (ADR) has captured the imagination of Canadian politicians, judges, and legal academics. More recently, lawyers and their clients are being won over to the advantages of early dispute settlement. In Ontario, a new rule provides for mandatory mediation of all civil, non-family, case managed actions in

¹¹⁷ For a detailed review of the rules, see I.I. Dore, *Arbitration and Conciliation Under the UNCITRAL Rules: A Textual Analysis* (Boston: Kluwer Law and Taxation, 1986). For an examination of how the rules performed before the Iran-U.S. Claims Tribunal, see S.A. Baker & M.D. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (Deventer, Netherl.: Kluwer Law and Taxation, 1992).

¹¹⁸ *Supra* note 13, ss. 20-30.

¹¹⁹ For examples of international arbitration clauses, see S.R. Bond, "How to Draft an Arbitration Clause" (1989) 6:2 J. Int. Arb. 65; for domestic arbitration clauses, see J.B. Casey, "Drafting an Arbitration Clause" in *Arbitration Clauses in Commercial Contracts: What Business Lawyers Need to Know* (Toronto: Canadian Bar Association-Ontario, 1993) [hereinafter *What Business Lawyers Need to Know*].

Ottawa. The rule is also partially implemented in Toronto, where currently 25 per cent of civil, non-family cases are subject to case management; ultimately the rule will apply province-wide.¹²⁰ For various reasons, the growing popularity of ADR may promote the willingness of commercial parties to look to arbitration as the preferred method of adjudication. First, for those parties who litigate but fail to resolve the dispute through mandatory mediation, arbitration can present a quicker and less expensive means of resolving outstanding issues than a return to the court system.¹²¹ Second, some business parties wishing to have their dispute adjudicated will opt for arbitration over a court process that compels them to engage in mediation. Finally, as commercial parties become more accustomed to alternative methods of resolving disputes, they may become more creative in designing appropriate and innovative arbitral procedures. For example, in the United States, commercial parties have adopted alternative forms of binding arbitration such as “Baseball” or “Final Offer” arbitration, in which each party submits a proposed monetary award to the arbitrator who, at the conclusion of the hearing, selects one award without modification. “Bounded” or “High-Low” arbitration is another alternative in which the parties agree privately that the arbitrator’s final award will be adjusted to a bounded range. Each of these alternatives provides greater party control over the arbitral award and limits the risk of an extreme award.¹²²

VI. CONCLUSION

For commercial parties, Ontario represents an attractive site for arbitration. With few exceptions, the Ontario courts have shown a willingness to interpret the *International Act* and the *Arbitration Act* in a manner consistent with the philosophy of party autonomy and the guiding principles of the Model Law. This provides business parties with an opportunity to tailor an arbitral process that suits the needs of the parties and the circumstances of the case.

¹²⁰ See Ontario, *Memorandum of the Rules Secretariat—Consultation on Mandatory Mediation* (Toronto: Law Society of Upper Canada, 1997); and Ontario, *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, as am. by O. Reg 453/98, r. 24.1.

¹²¹ For an interesting description of how a failed mediation turned into an arbitration, see Potter, *supra* note 23 at 283.

¹²² For other arbitration models, both binding and non-binding, see Center for Public Resources, “ABCs of ADR: A Dispute Resolution Glossary” (1992) 10 *Alternatives to High Cost Litig.* 115 at 115.

As noted above, there will be cases in which litigation can provide a satisfactory and less expensive resolution of disputes than arbitration when, for example, an issue of law is in dispute and the matter qualifies for treatment as an application,¹²³ or for matters which qualify for resolution under the Commercial List in the Toronto Region.¹²⁴ However, at the outset of a commercial relationship, parties will not know whether any subsequent disputes will qualify for such treatment. As a result, the negotiation of an arbitration agreement at the outset of their relationship provides commercial parties with an opportunity to fashion a dispute resolution process that is appropriate for their anticipated requirements.

Based on the above analysis, arbitration in Ontario should be strongly considered as a preferred method of dispute resolution in a large variety of business contexts, including the following:¹²⁵

(1) *International Business Arrangements* Arbitration will almost always represent a more acceptable alternative to litigation for the resolution of disputes in international business agreements, particularly as both parties are usually reluctant to submit to the other's courts. In addition, arbitral awards from Ontario are widely enforceable under the New York Convention.

(2) *Licensing, Distribution, Supply, or Franchise Agreements* Disputes relating to licensing, distribution, supply, or franchise agreements frequently involve issues such as marketing, pricing, and the quality of products and services. These are all matters in which the confidentiality of the arbitral process presents a significant advantage over traditional litigation. More importantly, these are often ongoing business arrangements in which quick and inexpensive dispute resolution is more conducive to a lasting, commercial relationship than a public court battle that is witnessed by competitors and other distributors or franchisees.

(3) *Partnership, Joint Venture, or Shareholder Agreements* In such agreements, disputes between the parties often require an assessment of one party's conduct or contribution, or a valuation of one party's interest in the venture. These disputes may relate to proprietary information, new technology, trade secrets, or to sensitive financial information. Arbitration provides a private forum where the parties are able to select

¹²³ See *supra* note 28.

¹²⁴ See *Practice Directions* *supra* note 21.

¹²⁵ For a helpful article on the types of commercial agreements that lend themselves to arbitration, see K.T. Louie, "When to Consider Including an Arbitration Clause in a Commercial Contract" in *What Business Lawyers Need to Know* *supra* note 119.

an arbitrator who has the necessary expertise to resolve these disputes without disclosing confidential data.

(4) *Technology or Process Agreements* When parties acquire technology or sophisticated process equipment, disputes can arise during installation or after start-up. In either case, significant damages can accrue as the parties seek a resolution of the dispute. Arbitration can provide a quick adjudication of the dispute before an arbitrator with the necessary technical expertise to efficiently resolve the issue.

(5) *Employment Contracts* Both the employer and the employee will frequently prefer the private arbitration of employment disputes to protracted litigation under the *Rules of Civil Procedure*. Wrongful dismissal litigation can be expensive and time-consuming for both sides. An abbreviated discovery and an expedited hearing before an arbitrator familiar with employment law will often be preferable to years of litigation and the risk of an aberrant court award.

(6) *Agreements to Buy or Sell Business* These agreements often generate disputes over post-closing adjustments, inventory quality, representations and warranties, and adequacy of financial disclosure and reporting. The litigation of these disputes can be acrimonious and time-consuming, but the resolution frequently turns on technical points or on accounting practices or procedures. Arbitration allows the parties to privately resolve these disputes before an arbitral tribunal selected for its familiarity with the issues in dispute.

(7) *Other Commercial Agreements* In addition to the above examples, arbitration should be the preferred method of dispute resolution in any commercial dispute in which both parties are cooperative and desire a quick resolution. This can occur when the parties have attempted some form of ADR or simple negotiation but have determined that adjudication of some or all of the disagreements between them is necessary. In such circumstances, arbitration can be faster, more economical, and the result less uncertain than litigation, if the parties adopt measures to save time and money and minimize risk. For example, the parties can agree to abbreviate oral discoveries, to submit evidence in writing, to impose time limits on oral presentations and cross-examinations, or to place bounds on the arbitral award. However, to take full advantage of these potential benefits of arbitration, legal counsel must be alert to possible time, cost-saving, and risk-reduction measures, and creative in designing an appropriate arbitration process.

Ontario's legislators and courts have paved the way towards a significant expansion in commercial arbitration. If lawyers and their clients become more familiar with the arbitral process and its advantages

over conventional litigation, and if arbitration and legal organizations (and the government) promote the province as a site for international arbitration, the years ahead may see Ontario emerge as a leading centre for domestic and international commercial arbitration.