

**LITIGATION RISK AND THE MIXED
PANACEA OF ARBITRATION
FOR THE SMALL BUSINESS EXPORTER***

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* Text for remarks by Scott Fairley at the Ontario Bar Association Programme: “Advising the Small Business Exporter”, Toronto, 30 May 2005.

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Introduction

A relatively small Canadian business exporter of micro-brewery systems (“E”), situated in Western Canada, and a customer located in the southeastern United States (“C”) enter into a typical international sales contract for machinery and services to install it and ensure its operational effectiveness. E sources a substantial portion of its business abroad, much of it in the United States, and has prudently inserted a “choice of law” clause into its standard form contract language. The laws of the province in which E is located will govern the contract and the parties thereto will attorn to the courts of that jurisdiction. E delivers the machinery to C in the southeastern United States. Alas, C is unhappy because, notwithstanding E’s best efforts, the machinery fails to perform in accordance with the contract terms until some time has passed and much of the machinery has been replaced. In the result, C sues E for breach of contract in its home jurisdiction, not in E’s home jurisdiction as specified in the contract. E does not attorn. C obtains a default judgment under the laws of its home jurisdiction and an award of treble damages, pursuant to the local legislation, plus punitive damages and attorney’s fees. Predictably, C takes this decision to the courts of E’s home jurisdiction to enforce its judgment where E’s assets are available to satisfy it. The enforcing court, having satisfied itself that “a real and substantial connection” existed between the matter in dispute and the originating court, does not permit E to defend on the merits. C succeeds at first instance. E’s appeal is subsequently dismissed, the appeals court holding that enforcement of both punitive and treble damages by way of a default judgment in a foreign jurisdiction is not *per se* contrary to Canadian public policy. C is elated; C resides in North Carolina. E is mortified; E resides in British Columbia.

Our purpose today is to highlight the increased litigation risk for small business exporters exposed to foreign legal proceedings, especially high civil jury awards from U.S. jurisdictions. We then discuss the advantages and disadvantages of arbitration as an alternative to public courts in disputes between buyers and sellers across international borders. In particular, we devote attention to how arbitration can protect an exporter and its customer from the costs and inequities of local and foreign enforcement regimes. We also address the alternatives of institutional and *ad hoc* arbitration with which advising counsel and small business exporters themselves may already be familiar.

I. A NEW CANADIAN CONFLICT OF LAWS DOCTRINE

The recognition and enforcement of foreign judgments in Canada is premised on international comity as a broadly accepted notion among civilized nations. In *Morguard v. DeSavoye*¹, the Supreme Court of Canada moved to embrace a comity-based approach to recognition and enforcement:

[Comity is] the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.²

Morguard was first and foremost an inter-provincial case *within* Canada involving the requested enforcement of an Alberta judgment in British Columbia. It established a constitutional principle of “full faith and credit” as between Canadian courts, which is another point to keep in mind. Nevertheless, the greater significance of *Morguard* has been in its recognition of comity as an operational legal doctrine – with its attendant impact on Canadian litigants, particularly defendants – in relation to the enforcement of foreign judgments. Justice La Forest, writing for the Court, emphasized the volume of cross-border commerce and the need “to facilitate the flow of wealth, skills and people across [increasingly irrelevant] state lines.” In a globalized economy, he concluded, Canada cannot afford to treat its trading partners as if they are not part of the same transcontinental market. He then set out a simple two-stage test that required a foreign litigant who had obtained a judgment abroad to show only that:

1. the adjudicating court of first instance had properly exercised jurisdiction under its own rules; and
2. the existence of a “real and substantial connection” between the adjudication and the subject-matter of the dispute based on various connecting factors, proven to the satisfaction of the Canadian court petitioned to enforce the foreign judgment.

For the enforcing court, a “real and substantial connection” with the originating jurisdiction is established through various connecting factors that may include a connection between the subject-matter of the action and the territory where the action is brought,³ between the damages suffered and the jurisdiction,⁴ or between the defendant and the forum.⁵

Once the two-stage test is met, *Morguard* forecloses any re-opening of the case on its merits. Defendants may raise certain impeachment defences, which include natural justice, public policy, and fraud. Nevertheless, post-*Morguard* jurisprudence reveals how

¹ [1990] 3 S.C.R. 1077 [hereinafter *Morguard*].

² *Ibid.* at 1096, citing *Hilton v. Cuyot*, 159 U.S. 113 (1895).

³ *Morguard, supra*, note 1 at 1104.

⁴ *Ibid.* at 1106

⁵ *Ibid.*

relatively narrow these defences are in application. The enforcing court measures a foreign judgment against its own standards of natural justice, but does not impose requirements of conformity with its own procedural rules. The public policy defence must establish that the foreign law, on which the judgment is founded, is on its face, not in its application, offensive to the fundamental morality of the Canadian legal system.⁶ Courts have stated that the doctrine of public policy should be applied sparingly and with caution.⁷ Finally, a “fraud” that was adjudicated upon in the foreign court cannot be re-litigated unless newly discovered and material evidence has become available.⁸

Despite the fact that *Morguard* dealt with the inter-provincial recognition and enforcement of judgments, lower courts across Canada – in the minds of some - began to slavishly and uncritically apply its relatively elastic and imprecise judge-made rule to judgments rendered in foreign jurisdictions. Judges were quite willing to recognize judgments where a “real and substantial connection” to the foreign jurisdiction was present, often without even addressing whether it was appropriate to extend the notions of comity and full faith and credit beyond the recognition of judgments from sister provinces. This resulted in some alarming decisions, the unfairness of which is best exemplified in our opening scenario involving a local vendor and foreign purchaser.⁹ That scenario is taken from *Old North State Brewing*¹⁰, a decision of the British Columbia Court of Appeal that illuminates a troublesome version of comity from the perspective of Canadian defendants who are sued abroad in civil matters. At the operational level of recognizing and enforcing foreign judicial decrees, the *Morguard* test has become a somewhat crude and sometimes harsh rule of law that has tilted the playing field rather precipitously in favour of foreign plaintiffs armed with foreign judicial decrees.

Many commentators viewed the subsequent case of *Beals v. Saldanha*¹¹ as an opportunity for the Supreme Court of Canada to put a stop to this dangerous outgrowth.¹²

⁶ See *infra* note 11 at paras. 71-72.

⁷ *Boardwalk Regency Corp. v. Maalouf* (1992), 6 O.R. (3d) 737 (C.A.), at 743 (per Carthy J.A.), citing with approval, *Canadian Acceptance Corp. v. Matte* (1957), 22 W.W.R. 97 (Sask. C.A.) and *Block Brothers Realty Ltd. v. Mollard* (1981), 27 B.C.L.R. 17 (C.A.).

⁸ J.G. Castel & J. Walker, *Canadian Conflicts of Law*, 5th ed. (Toronto: Butterworths, 2002) at p. 14-26.

⁹ See H.S. Fairley, “In Search of a Level Playing Field: The Hague Project on Jurisdiction and the Recognition and Enforcement of Foreign Judgments” in C. Carmody, ed., *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (Baltimore: Am. Soc. Int’l Law, 2003) 57 at 61, citing the following decisions: *United States v. Ivey et al.* (1995), 26 O.R. (3d) 533 (Gen. Div.); affirmed, (1996), O.R. (3d) 370 (C.A.); leave to appeal to S.C.C. dismissed [1996] S.C.C.A. No. 582.; *Moses v. Shore Boat Builders Ltd.* (1003), 106 D.L.R. (4th) 654 (B.C.C.A.) (enforcing an Alaska judgment), appeal dis’d, 24 C.P.C. (3d) 294 (S.C.C.); *Clarke v. Lo Bianco* (1991), 84 D.L.R. (4th) 244 (B.C.S.C.) (enforcing a California judgment); *Minkler & Kirschbaum v. Sheppard* (1991), 60 B.C.L.R. (2d) 360 (S.C.) (enforcing an Arizona judgment). For a critical commentary on the impact of *Morguard* and its progeny see: H. Scott Fairley, “Enforcement of Foreign Judgments by Canadian Courts: A New Age of Uncertainty” (1996) 2 Int’l Law. 1.

¹⁰ *Old North State Brewing Co. v. Newlands Services Inc.* (1998), 58 B.C.L.R. (3d) 144 (C.A.).

¹¹ *Beals v. Saldanha*, [2003] 3 S.C.R. 416.

¹² J. Talpis and J. Goodman, “A Comity of Errors”, *Law Times* (20 January 2003). The authors suggest that the concept of comity ought to be replaced by modern rules for recognition of foreign judgments and that the public policy defence be widened to allow courts to refuse enforcement of judgments viewed as manifestly unreasonable. See also J. Walker, “*Beals v. Saldanha*: Striking the Comity Balance Anew” (2002) 5 Cdn. Int’l. Law. 28.

Nevertheless, the Supreme Court of Canada recently affirmed in *Beals* that foreign judgments are to be recognized and enforced — as a matter of international comity — in a manner consistent with judgments rendered within the Canadian federation which, further to the Court’s earlier decision in *Morguard*, are recognized and enforced on constitutional grounds as a matter of “full faith and credit.”¹³ Incidentally, *Beals*, like *Old North State Brewing*, involved the recognition and enforcement of an exorbitant damages award granted by an American court. Canadian businesses marketing into the United States are now exposed to the possibility of civil jury awards far greater than original judgments typically issuing from Canadian courts.

The Supreme Court appears to have declared an “open season” on Canadian assets for foreign litigants who can establish jurisdiction to sue abroad at first instance. There is an increased willingness on the part of Canadian courts to enforce damages awards that no Canadian court would ever grant *de novo*. This risk suggests that the small business exporter should try to avoid conventional litigation altogether as a system for settling commercial disputes.

The traditional alternative is to negotiate and establish arbitration as the desired – and compulsory - dispute resolution mechanism.

II. ARBITRATION: A MYRIAD OF CHOICES AND MIXED BLESSINGS

The term “arbitration” refers to a process that provides for the resolution of disputes between parties essentially through a private court with specified rules, both of the parties’ own choosing. There are many different forms of arbitration and, subject to certain express provisions in the *International Commercial Arbitration Act*,¹⁴ parties are free to agree upon how the process will work. For example, the parties might agree that there will be no discovery process and that all evidence shall be tendered in written form. Alternatively, it is common for parties to agree that arbitration shall be conducted as if it were an Ontario proceeding subject to the same rules and procedures provided for under Ontario’s *Rules of Civil Procedure*. If the parties do not provide for a process, but simply provide that any dispute shall be submitted to a single arbitrator, then the arbitrator will have the discretion to decide what procedures and process will be followed, but will be subject to the constraints of natural justice. Therefore, the parties can better ensure they will be on equal footing, if and when a dispute arises, by considering and identifying some key issues in their arbitration clause, including:

¹³ *Supra* note 11 at paras. 163-166; *Supra* note 1 at 1104.

¹⁴ R.S.O. 1990, c. I.9. One should note that the scope of application of this legislation is governed by the UNCITRAL Model Law for International Commercial Arbitration, which is included as a schedule to the legislation. Article 1 of the Model Law states that an arbitration is “international” if the parties to the arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country; or one of the following places is situated outside the State in which the parties have their places of business: the place of arbitration pursuant to the arbitration agreement or the place with which the subject matter of the dispute is most connected.

- (a) The scope of the arbitration clause and the disputes it will cover;
- (b) The selection of arbitrators, including the selection process, the number of arbitrators, and their required qualifications;
- (c) The choice of law, substantive and procedural;¹⁵
- (d) The location of the arbitration, both the country and specific city;¹⁶
- (e) The language of the arbitration;
- (f) The rules for the arbitration, if not an institutional format.

A. Advantages & Disadvantages

When considering whether to adopt arbitration, the small business exporter would want to consider its advantages and disadvantages. As mentioned above, one advantage would be the exporter's ability to protect itself from the Canadian regime for recognition and enforcement of foreign judgments. The exporter also would want to consider whether all disputes or only certain types should be submitted to arbitration. The former approach avoids any risk that a secondary dispute will arise about whether the primary dispute is subject to arbitration. Where the parties agree that all disputes are subject to arbitration, courts generally will enforce the agreement and will not allow a party to attempt to avoid arbitration, even where it may argue that the agreement containing the arbitration clause is void. Further, where the parties have a variety of disputes, only some of which are subject to arbitration, there is a risk that the courts will find that all disputes should be litigated in a single forum, which can result in procedural motions that delay the process and increase costs.

There are a variety of potential advantages in using arbitration. We will discuss the following:

- (1) Expertise of the Arbitrator
- (2) Speed & Flexibility
- (3) Efficiency & Cost-Reduction
- (4) Privacy
- (5) Limiting Appeals
- (6) Local & Foreign Enforcement Regimes

¹⁵ If a selection is not made in this regard, the national law of the place of arbitration applies. Despite parties' choice of law, different laws may regulate various aspects of the arbitration, including the capacity to enter into the agreement, the performance of the agreement, the existence and proceedings of the arbitral tribunal, the substantive issues in dispute, and recognition and enforcement of the arbitral award;

¹⁶ For the purpose of enforcing the arbitral award, it is important to find out whether the country is a signatory to an international convention such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, United Nations Treaty Series (1959) Vol. 330, p.38, No. 4739. The parties also should consider the reputation of that country's courts, its local facilities, communications and transportation systems, and its national political stability and geographic location)

1. Expertise of the Arbitrator

One valuable benefit of arbitration is the quality of the person who will hear the matter in dispute and render a decision. With an arbitration agreement, the parties can agree in advance who will hear the dispute or they can have a process for agreeing on who will be the arbitrator. This means that the parties can select an individual with relevant knowledge and experience.

When disputes are submitted to public courts, the litigants do not know who ultimately will be assigned to hear their case. The judge may have little experience resolving those sorts of disputes that are unique to the industry within which the exporter operates. Moreover, a judge's failure to recognize the special characteristics of the exporter's business or industry, or to appreciate the finer issues that arise in that industry, may make the results of litigation much less predictable.

2. Speed & Flexibility

Arbitration enables the small business exporter and its customer to design dispute-resolution procedures to meet their specific needs. For example, one can envision an arbitration provision that creates two different sets of procedures. The first provides a "fast track" for conflicts that can be resolved quickly. The second set applies to more complicated disputes but still may include time limits and limits to the amount of discovery in order to streamline the process. If the parties include a mediation process as part of this, it might be possible to push matters to resolution even more quickly. Arbitration, in contrast to litigation, can add greater procedural certainty in the dispute resolution process.

Arbitration proceedings are much faster than the courts, although they can take over a year to complete in complex commercial matters. In contrast, complex commercial matters in the public courts often take 3 to 5 years to get to trial.

3. Efficiency & Cost Reduction

Arbitration can be a more cost-efficient method of resolving disputes. Public courts have established a number of procedural stages that, while "necessary", often increase costs without conferring a corresponding benefit on either party. The procedural flexibility of arbitration, especially if the parties choose an *ad hoc* rather than institutional approach, provides focus on the end-goal: resolution. Through cooperation and creativity, the parties can eliminate those steps or requirements that would otherwise inflate costs unnecessarily.

In arbitration, interlocutory proceedings and discovery prior to the hearing usually are more limited, in number and scope, and can be dealt with much more efficiently, resulting in substantial savings. Further, the management of arbitration files, in contrast to litigation matters, has a less onerous administrative burden. Finally, arbitration is typically less conducive to procedural game-playing. In a public court proceeding, the trial judge and the judge or judges who hear motions are usually not the same person. In arbitration, the parties must be sensitive to the fact that the arbitrator who will hear the "trial" of the dispute, also hears any interlocutory disputes. Therefore, a party that takes

unreasonable positions at the interlocutory stage runs the risk of prejudicing how the arbitrator looks at that party's overall case. Moreover, procedural games have little impact on an arbitration proceeding in any event. The parties can obtain a hearing date and the procedural issues can be resolved within a week or two. In contrast, if a litigant refuses to produce evidence or answer certain questions and effectively forces the other to bring a motion compelling production or answers, the litigation process is delayed by months.

4. Privacy

Parties who have agreed to arbitrate can elect to have the entire matter either treated confidentially or fully disclosed to the public. Privacy is an important value as disclosure of a company's strategic or technological initiatives may have adverse effects on competitive advantage.¹⁷

5. Limiting Appeals

As with all other procedural elements, the parties can restrict or eliminate rights of appeal. They also can elect to have a private appeal panel rather than an appeal to a public court. Again, considerations of efficiency, flexibility, and adjudicators' expertise will factor in the decision to have a private versus public appeal mechanism.

6. Local & Foreign Enforcement Regimes

This last category is particularly relevant to parties in transnational commercial relationships. The small business exporter should assess its level of comfort with the foreign legal system of its customer, including that system's laws, substantive justice and procedural fairness, and costs for litigants, before electing to enforce its legal rights through a foreign court system rather than an arbitration agreement. In some jurisdictions, for example, burdens of proof may be unduly onerous, while in others awards for damages may be exorbitant. Court systems in some developing nations are hampered by significant corruption and it is not uncommon for court pleadings to vanish just before trial, causing delays, unjust costs, unfairness, and financial loss.¹⁸ Thus, whole-hearted attempts to settle a transnational business dispute in a foreign court system may devolve into an exhausting, costly, and fruitless exercise.

Further, if a dispute has arisen and, through a court proceeding in Canada, the exporter succeeds in obtaining a judgment against the customer, it may be difficult, if not impossible, to enforce this judgment in the foreign jurisdiction where the customer or its assets are situated. Enforcement success or failure thus depends on the attributes of the

¹⁷ L. Kaarid, "(Non)Confidentiality of International Commercial Arbitration" [2004, unpublished, on file with the authors]. Kaarid notes that confidentiality of arbitral proceedings should not be taken for granted and that parties must ensure adequate protection of privacy considerations through careful drafting of the arbitration agreement.

¹⁸ R. Marentette, "Arbitration is a Cost-Effective Way to Resolve Overseas Trade Disputes" *The Lawyers Weekly* (2 April 1993) (QL).

foreign jurisdiction's recognition and enforcement regime. For example, in the United States, state law governs the recognition and enforcement of judgments in U.S. federal courts,¹⁹ resulting in a complex mix of state court decisions, federal court decisions interpreting or projecting state law, and statutes. Despite an apparently uniform rule in the *Restatement (Third) of Foreign Relations Law*²⁰ and the *Uniform Foreign Money-Judgments Recognition Act*,²¹ some version of which has been adopted by over 30 states, it is not possible to discuss U.S. judgments recognition law in generalities without constant reference to individual and sometimes isolated exceptions.²² With the possibility of over fifty separate and different rules,²³ enforcement of a judgment in the United States can be a daunting and uncertain process.

A dispute also may arise in which the Canadian exporter's customer commences an action against the exporter in a foreign jurisdiction. Canada's regime for recognition and enforcement of foreign judgments makes it difficult for the exporter to simply ignore a foreign proceeding in hopes that a judgment against it could never be enforced at home. The rationale of Canada's comity-based approach to recognition and enforcement lies in the idea that Canada is both constitutionally distinct from other countries and, at the same time, no different from the rest of the nations it encounters in trade.²⁴ Yet, as *Old North State Brewing* revealed, underestimating national differences - between, say, how two nations' legal systems measure damages - can lead to harsh results.

The internationalization of commercial arbitration has made enforcing one's contractual rights at first instance and enforcing one's "judgment" much less complicated than doing so through a local or foreign court proceeding. A number of conventions and other statutory instruments have played a prominent role in this internationalization, providing important guidelines and guaranteeing certain rights in arbitration proceedings. For example, the New York Convention of 1958, introduced by the United Nations in 1958, is the largest international convention of its kind, having over 125 signatories, including Canada.²⁵ Signatory states agree to recognize and enforce agreements in writing to submit issues to arbitration, and to enforce arbitral awards based upon those agreements. The New York Convention also significantly limits the grounds on which the recognition and enforcement of an arbitral award may be refused or challenged.

Besides international conventions, there are other instruments that have played a prominent role in the internationalization of the commercial arbitration process, prominent among them, the 1985 UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), which seeks to harmonize national arbitration laws and provide an international standard with solutions acceptable to parties from different states and legal systems.²⁶ The text of the Model Law provides a very complete precedent of

¹⁹ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

²⁰ American Law Institute, *Restatement of the Law* [,] *The Foreign Relations Law of the United States* (2 vols., 1987).

²¹ *Uniform Foreign Money-Judgments Recognition Act* §5(a)(1) (A.L.I. 1962).

²² R.A. Brand, "Foreign Judgments in U.S. Courts" (1996) 2:1 Cdn Int'l Lawyer 10 at 13.

²³ *Ibid.*

²⁴ E. Morgan, "The Crying of Rule 49" (2004) 54 U.T.L.J. 45 at 71.

²⁵ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, United Nations Treaty Series (1959) Vol. 330, p.38, No. 4739 (hereinafter, the "New York Convention").

²⁶ U.N. Comm'n on Int'l Trade Law, UNCITRAL Model Law on International Commercial Arbitration, June 21, 1985, U.N. Doc. A/40/17, Annex I, U.N. Sales No. E.95.V.18 (1995).

how an arbitration process should be conducted and has served as the basis for many countries' arbitration legislation. It has also been integrated, in an "as is" or amended format, into various domestic legal systems' including those of some Canadian provinces. In turn, national and local arbitration laws, such as Canada's federal *Commercial Arbitration Act*²⁷ and Ontario's *International Commercial Arbitration Act*,²⁸ have become another important component of the complex – and now far more certain - system that has developed over the years in support of international commercial arbitration.

B. Institutional or Ad Hoc?

Parties using arbitration have a choice between designating an institution to administer it or proceeding *ad hoc* outside an institutional framework. Institutional arbitration is conducted under the auspices of an arbitral organization that has its own rules for how the arbitration will be conducted. There are a myriad of arbitral organizations throughout the world but most international commercial arbitration proceedings are done through only a few leading arbitral organizations, such as the International Chamber of Commerce in Paris, the American Arbitration Association in New York, and the London Court of International Arbitration in London, England. The services that these institutions offer include: supervising the process; finding a *prima facie* agreement to arbitrate; deciding on the number of arbitrators; appointing the arbitrators; deciding challenges against arbitrators; ensuring that the arbitration is in accordance with the institution's rules; determining the place of arbitration; fixing and extending time limits; determining the fees and expenses of the arbitrators; and scrutinizing arbitral awards. If the parties agree to arbitrate on an *ad hoc* basis, they must adopt rules of procedure that have been drawn up by one of the non-commercial international organizations such as UNCITRAL or specifically drawn up by the parties, the arbitral tribunal, or some combination of both.

Each format, institutional and *ad hoc*, has its own advantages and disadvantages, which should be weighed carefully when the parties are negotiating their contract. Institutional arbitration ensures resources and guaranteed standards of professionalism, competence, and administration. Through its automatic incorporation of a book of rules, it also ensures a high degree of procedural integrity. In turn, the parties have certainty and confidence of an enforceable decision. Although institutional arbitration requires payment of a fee to the administering institution, the functions performed by the institution can be critical in ensuring that the arbitration proceeds to a final award with a minimum of disruption and without the need for recourse to the local courts.

In comparison, *ad hoc* arbitration can be less costly provided there is a sufficient degree of co-operation between the parties during both the drafting of the arbitration clause and the conduct of the arbitration. It offers greater flexibility and, through cooperation and creativity, the parties can agree to an extensively more detailed arbitration clause, better-suited to their relationship and circumstances, that addresses, for example, the identity, location, and relationship of the parties, the nature and size of possible disputes, and the desired outcome of resolution. Moreover, the parties can agree to set time limits that are less strict than those of the institutions. They also can adopt

²⁷ R.S., 1985, c. 17.

²⁸ R.S.O. 1990, c. I.9

certain institutional rules without actually agreeing to arbitrate through that particular institution.

The parties' decision to proceed on an institutional or *ad hoc* basis may be influenced by the type or nature of future disputes they face, the kind of tribunal they would need to deal with those disputes, the particular procedures that will work best for them based on considerations of time, efficiency, and special characteristics of the industry within which they do business, and the extent to which they will co-operate in conduct of the arbitration.

III. CONCLUDING OBSERVATIONS

International borders provide little, if any, insulation from litigation risk in international commercial disputes. Because of recently developed standards for the recognition and enforcement of foreign judgments by Canadian courts, this is particularly true for Canadian companies doing business abroad. This does not mean, however, that when disputes do arise, courts should always be avoided regardless of cost. Arbitration is a very useful but mixed panacea.

One must recognize that, despite its many advantages, arbitration entails risk where parties have agreed to arbitrate but have failed to provide any or sufficient details as to the process. Moreover, ideal arbitration provisions may be very difficult to negotiate at arm's length where bargaining positions may be less than equal between the parties. In these instances, there is risk that the parties will abuse the process, creating problems and causing unnecessary delays. Arbitration, in turn, becomes costly - perhaps more costly than litigation - because the parties are unable benefit from the savings that are otherwise built into the arbitration process.

At the very base of an international commercial arbitration proceeding is the parties' express agreement to submit to arbitration. The arbitration clause should not be a last-minute detail of a contract negotiation process and the parties should not place an almost blind faith in existing precedents. It is imperative that an arbitration clause be drafted carefully so that it will meet the needs of the parties involved and will be tailored to the requirements of the contract in question. Therefore, during contract negotiations, the parties must work together to develop a sound arbitral arrangement and to understand the possible ramifications of that arrangement. Regardless of what international conventions or legal instruments may apply to an international commercial arbitration, parties must bear in mind that the parameters of the process are set out at the very beginning when first drafting an arbitration clause - the point at which cooperation begins and the point from which it must survive. In some circumstances, with some customers from some places, such cooperation may be virtually impossible to sustain. In those situations, it may be better for the parties to start off in a public court for they will end up there anyway.